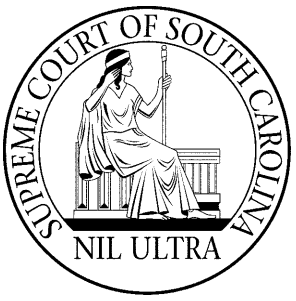

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
January 23, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

27148 – Adoptive Couple v. Baby Girl	Granted 1/4/2013
27157 - RFT Management v. Tinsley and Adams	Pending
27177 - M. Lee Jennings v. Holly Broome	Pending
2012-212913 - State v. Robert Holland Koon	Denied 1/14/2013

PETITIONS FOR REHEARING

27202 - State v. Danny Cortez Brown	Pending
27206 - In the Matter of Ernest William Cromartie, II	Pending

EXTENSION TO FILE PETITION FOR REHEARING

27208 - Dunes West Golf Club v. Town of Mt. Pleasant	Granted until 2/8/2013
2012-MO-055 - Sheep Island v. Bar-Pen Inv.	Granted until 1/18/2013

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5060-State v. Larry B. Brayboy	Pending
5062-Duke Energy Carolina v. SCDHEC	Pending
5065-Curiel v. Hampton County EMS	Pending
5066-Rhett v. Gray	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending
2012-UP-475-Shah v. Palmetto Health Alliance	Denied 01/18/13
2012-UP-520-Johnson v. Mew	Pending
2012-UP-569-Hudson v. Caregivers	Denied 01/18/13
2012-UP-571-Sarah Jo Gaylord v. Jules Gaylord	Denied 01/07/13
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Denied 12/18/12
2012-UP-609-Coghlan v. Coghlan	Pending
2012-UP-614 - Charles Griggs v. Ashleytowne Development	Pending
2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al.	Pending
2012-UP-626-Maurice Morant v. SCDC	Pending
2012-UP-627-Mack v. American Spiral Weld	Pending
2012-UP-632-State v. Stevie Lamont Aiken	Pending
2012-UP-647-State v. Danny Ryant	Pending
2012-UP-651-State v. Ben Robert Stewart	Pending
2012-UP-654-State v. Marion Stewart	Pending

2012-UP-658-Palmetto Citizens Fed. Credit Union v. Johnson Pending

2012-UP-663-Carlton Cantrell v. Aiken Cty. Pending

2012-UP-668-Thacker v. Aaron's Sales & Leasing Pending

2012-UP-670-Burgess v. Burgess Pending

2012-UP-674-SCDSS v. Devin B, Brian G., and Sue G. Pending

2012-UP-675-State v. Deqing Chen Pending

2012-UP-678-State v. Darrin D. Holston Pending

2012-UP-679-Dianne B. Sprott v. Brookdale Senior Living et al. Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4819-Columbia/CSA v. SC Medical Pending

4832-Crystal Pines v. Phillips Pending

4833-State v. L. Phillips Pending

4851-Davis v. KB Home of S.C. Pending

4857-Stevens Aviation v. DynCorp Intern. Pending

4859-State v. B. Garris Pending

4862-5 Star v. Ford Motor Company Pending

4863-White Oak v. Lexington Insurance Pending

4865-Shatto v. McLeod Regional Medical Pending

4867-State v. Jonathan Hill	Pending
4872-State v. Kenneth Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Stephen Wise v. Richard Wise	Pending
4880-Gordon v. Busbee	Pending
4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4890-Potter v. Spartanburg School	Pending
4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4897-David Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending

4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending

4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5044-State v. Gene Howard Vinson	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v, Alex Lee, Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending

2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-343-State v. Eric Dantzler	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Harris	Pending
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-463-State v. Rebekah Rogers	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending
2011-UP-475-State v. James Austin	Pending

2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. Michael D. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending

2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending

2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-371-State v. Thomas Smart	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-559-NAFH National Bank v. Israel Romero	Pending

2012-UP-577-State v. Marcus Addison Pending

2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Miama Kromah, Petitioner.

Appellate Case No. 2009-140328

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 27212
Heard September 20, 2012 – Filed January 23, 2013

AFFIRMED IN RESULT

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia;

and Solicitor Daniel E. Johnson, of Columbia, for Respondent.

JUSTICE BEATTY: Miama Kromah ("Kromah") was convicted of (1) infliction of great bodily injury upon a child, and (2) unlawful neglect of a child. Kromah appealed, arguing the trial court abused its discretion in permitting two of the State's witnesses to testify about actions they took after hearsay conversations they had with the three-year-old victim ("Child"), who did not testify at trial. The Court of Appeals affirmed, finding the issue was not preserved for review. *State v. Kromah*, Op. No. 2009-UP-322 (S.C. Ct. App. filed June 15, 2009). This Court granted Kromah's petition for a writ of certiorari. We affirm in result.

I. FACTS

The victim in this case is Kromah's stepson, who was born on February 23, 2002 in Philadelphia. The Child initially lived with his biological mother. Child Protective Services eventually removed the Child from her care, and he lived with a foster family in Minnesota for most of his first three years.

Kromah married the Child's biological father, Musa Kromah, in March 2005. Three months later in June 2005, the Child, then three years old, came to Columbia to live with Kromah and her husband. In August 2005, just two months thereafter, the incident occurred for which Kromah was indicted for infliction of great bodily injury to, and unlawful neglect of, a child.

At trial, the evidence indicated Kromah brought the Child to the Lexington Medical Center, where he was examined in the triage area at around 2:23 a.m. on August 16, 2005. The Child was wearing a pull-up diaper and was crying. The Child had a cut on his scrotum, and his right testicle was hanging outside of the scrotum and was bloody. An emergency room nurse testified that Kromah told her that the Child's scrotum had just "busted open or tore open," and that Kromah initially appeared very calm despite the severity of the wound.

Dr. Sean O'Meara testified that he examined the Child in the emergency room around 2:35 a.m. on August 16, 2005. In addition to the above injury, he also noticed dried blood on the Child's mouth. Kromah told him that she thought

the Child's scrotum appeared enlarged when she was giving him a bath, so she had applied pressure to it using a towel and then noticed the Child starting bleeding on the right side. Dr. O'Meara stated that, due to the severity of the wound, he decided the Child needed surgery by a pediatric urologist, so he transferred the Child by ambulance to Palmetto Health Richland Hospital.

Dr. Erin Fields-Harris, a pediatric physician at Richland Hospital, who was qualified as an expert in pediatrics, examined the Child around 6:00 a.m. on August 16, 2005. She stated Kromah told her that, other than the pressure with the washcloth, there was no other trauma to the Child. However, the doctor noticed the genital injury consisted of a four to five centimeter, V-shaped laceration exposing the right testicle. In addition, she noticed bruising on the Child's face and an abrasion in the middle of his forehead. The Child also had lacerations on his upper and lower lip, and a red, swollen area along the abdomen near the inguinal crease where the torso meets the thigh, which she opined indicated a recent injury.

She stated when she asked the Child how the injury occurred, the Child "started to mouth something," but Kromah, who had been watching, interrupted the Child by coming over and asking him if he was okay and the Child never answered. She noticed this was the only time Kromah came over to the Child. Dr. Fields-Harris stated that, after observing the clean linear lines of the injury, she believed it was not consistent with Kromah's statements that she had only applied a washcloth to the area before the Child started bleeding. She told Kromah that there "appeared to be some traumatic injury to the patient" that was intentional and asked Kromah if she knew what caused it, but Kromah was not very responsive and just said "[t]hat she did not know."

Dr. Jennifer Amrol, a physician in the Children's Hospital at Palmetto Health Richland, testified that, in her expert opinion, the injury to the Child was the result of "non-accidental trauma or child abuse." She testified the injury was not accidental because the cut was "a very clean cut, [a] very straight line across the scrotum." She explained that if the Child was injured by accident, the wound would have had a ragged edge or tear.

Dr. Jeffery Thomas Ehreth, a pediatric urologist at Richland Hospital, testified that he performs about 850 surgeries a year and has extensive experience in cuts and lacerations. He was qualified as an expert in pediatric urology, and he is one of only two pediatric urologists in South Carolina.

Dr. Ehreth testified the Child had a four-centimeter laceration transversing the scrotum, and he performed the surgery to repair it the same day he examined the Child on August 16, 2005. The Child did have some fluid around the testicle, "a small hydrocele, but it was very small, certainly not pathological or a problem." Dr. Ehreth testified the Child's wound "looked like a scalpel incision," as it went through the skin and the underlying muscle area. He said there was no evidence of a stellate form and rough edges as would be present in an ordinary injury. Rather, Dr. Ehreth stated in his expert opinion that the wound had to be caused by a sharp instrument, such as a "scalpel, razor blade, steak knife, something very sharp." He noted the cut went across the grooves in the skin, so if it had been caused by pressure along a weak point in the skin, it would have occurred along the grooves, not *across* them. He opined that bleeding from the injury would be immediate and significant, and the pain would be severe.

Dr. Anne Abel, Medical Director of the Violent Intervention and Prevention Program in the Department of Pediatrics at the Medical University of South Carolina, testified that she was called in to consult on the case with Richland Hospital. Dr. Abel examined the Child around 7:30 p.m. on August 16th, after his surgery. She said his upper lip was pretty swollen and he had an injury inside his lip. She also noticed abrasions on his face and "a rather large bruise" about 4½ inches by 3½ inches on the lower right abdominal area, near his hip. The abdominal area was tender and swollen.

She did not remove his bandages after surgery, but she viewed pictures taken before the surgery and noticed the Child had a V-shaped wound with "very, very clean" edges that was several centimeters long. She stated the lip injury appeared to be caused, in her expert opinion, by blunt force trauma against the face, possibly a blow to the face with a hand or fist. She stated the injury to the mouth was not consistent with the Child biting his own lip. She opined that the abdominal area does not injure easily, so the bruising there was probably from a blow or "heavy pressure from a hand or a foot holding the belly down in a very forceful manner."

Dr. Abel concluded the Child's injuries were the result of physical abuse and not accidental. She found the clean, linear cut and the "V" shape of the wound were significant because they indicated the wound was caused by "physical trauma with a sharp linear object" such as "a sharp knife, a sharp object, a scalpel like a surgeon uses, a razor, a box cutter, [or] something very sharp." She noted the laceration was "a grave bodily injury, which required surgical repair," as the cut went through all layers of the scrotal sack. Dr. Abel testified that, even if pressure

had been applied to the area, the Child's scrotum would not "explode," and she had never heard of such a theory of injury. Moreover, even if this happened, or if the area were manually torn, it would have multiple openings with ragged edges, not a clean linear cut. She concluded the wounds were not consistent with the version of events that Kromah had reported to medical personnel.

An investigator with the Richland County Sheriff's Office, Roy Livingston, testified that Kromah had given a statement acknowledging that she was the only person at home with the Child when he was injured, but she denied cutting him.

Kromah reiterated at trial the version of events she had previously given at both hospitals and to law enforcement and denied that she had intentionally injured the Child. Kromah testified that she got off work from the Brian Center, where she worked as a nursing assistant, at 11 p.m. on August 15, 2005 and she picked up the Child from her sister's house and took him to her home on St. Andrews Road, about ten minutes away. The sister had been watching the Child for her. She noticed no blood on the Child at any time prior to taking him home and he slept on the way home.

As Kromah got ready to give him a bath, she noticed the Child's scrotum was swollen, and the Child made a face and said he "hurt." She placed him in the tub and then tried to put pressure on the area with a warm washcloth. When she removed the cloth, she then noticed blood in the bathtub. She placed a pull-up diaper on the Child, then replaced it with a second one due to continued bleeding and took him to Lexington Memorial Hospital.

Kromah denied that she had cut the Child and stated she had no explanation as to what caused his testicle to be hanging outside of the scrotum. She maintained he was biting his lip on his way to the hospital, so that's when the injury to his lip occurred, and she stated she did not notice the abdominal bruising, just the swelling. She insisted that the only thing she had done was to apply pressure with the washcloth to the area that was already swollen and she had not pressed down on the Child with a razor or other sharp object.

The Child did not testify. Although DSS had taken the Child into emergency protective custody after the injury, DSS returned the Child to the father, Kromah's husband, in January 2006. Shortly before the trial began in June 2006, Kromah's husband sent the Child to live with the Child's grandmother in Liberia,

which is where Kromah and her husband were born. Kromah and her husband were still together at the time of trial.

A jury convicted Kromah of inflicting great bodily injury upon, and unlawful neglect of, a child. Kromah was sentenced to concurrent prison terms of eighteen years and ten years, respectively.

Thereafter, Kromah filed a motion for a new trial or for reconsideration of her sentences. A hearing was held on the motion on December 19, 2007. At the hearing, Kromah admitted that she had lied at trial when she said she did not know how the Child's injuries occurred. Kromah now maintained that she had caused the injury, but that it was an accident.

Kromah testified the Child did not want a bath and she was "agitated" because he was not cooperating, so she had "handled him roughly." Kromah stated she accidentally scratched him with her long acrylic fingernails when she was washing him, as the nails had sharp edges. She initially stated that she did not know what could have caused the bruising on his abdomen, but later acknowledged that she "probably" did apply sufficient force to cause the bruising on his stomach.

Kromah also presented the Child as a witness, who testified that Kromah hurt him when she was bathing him, but he did not see anything in her hand when the injury occurred and she did not hold him down. He was asked if he had bit his own lip because he hurt and because he was mad, to which he answered "yes." The trial court denied the motion for a new trial or a reduced sentence.

Kromah appealed, asserting the trial court erred in permitting two of the State's witnesses to testify about actions they took based on hearsay statements made by the Child, who was incompetent to testify at trial. The Court of Appeals affirmed, finding the issue unpreserved. *State v. Kromah*, Op. No. 2009-UP-322 (S.C. Ct. App. filed June 15, 2009). This Court granted Kromah's petition for a writ of certiorari.[1]

---

[1] Other issues ruled upon by the Court of Appeals on which certiorari was denied are not before us.

II. STANDARD OF REVIEW

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

III. LAW/ANALYSIS

On appeal, Kromah challenges the admission of testimony by two State's witnesses, Heather Smith, a forensic interviewer, and Roy Livingston, an investigator. The State contends the Court of Appeals properly found Kromah's issue is not preserved for appeal. It further contends the trial court did not err in admitting the testimony, in any event, and even if there was error, it was harmless beyond a reasonable doubt. We find the issue was preserved and address the merits of the appeal in the interest of judicial economy. We hold there was no error in the admission of Livingston's testimony, and that any error in the admission of Smith's testimony was harmless beyond a reasonable doubt.

A. Error Preservation

Kromah first contends the Court of Appeals erred in finding her issue was not preserved for review.

At the beginning of the trial, Kromah moved that the State's witnesses be prohibited from testifying about any statements made by the Child to them. Kromah asserted the Child was unavailable to testify because he had been removed from the country, and before the Child's hearsay statements could be introduced through other witnesses, the Child must have been deemed a competent witness. Kromah stated she believed the Child probably was not competent based on his responses during a videotaped interview with the Assessment and Resource Center

("ARC").[2] During the ensuing colloquy, the trial court noted that, under Rule 601, SCRE, children are presumed to be competent unless it is shown otherwise. The trial court stated some of the proposed testimony was not hearsay and that it would reserve its ruling at that time as to potential hearsay issues.

Just prior to Smith taking the stand, the trial court viewed the one-hour videotape of the Child being interviewed by Smith. The trial court ultimately agreed with Kromah that the Child's statements to her could not be repeated at trial and advised the State, "You can't go into statements that were made." The court stated it would take up other objections as they came up, but Kromah asked if they could hear what Smith would say now. Smith then testified in camera that she had interviewed the Child for about an hour, that investigator Livingston was there for part of the interview, and that based on the interview as well as other information and data available, her finding was compelling for child abuse. The trial court stated it "will permit that." Kromah again objected, and the trial court overruled the objection and reiterated that Smith would be limited to what had been gone over in camera.

Smith, a forensic evaluator and child therapist with ARC who was qualified without objection as an expert forensic interviewer of children, then testified before the jury as follows:

> Q And once you -- and **you can't say what was said** or wasn't said during that evaluation, but once the evaluation was complete and you got sufficient information, were you able to **make an assessment as to whether or not this was founded for child abuse?**
> A Yes, I did.
> Q And what was your conclusion, based on your evaluation of the child?
> A Based on the interview that I conducted, as well as information provided by law enforcement and the child protective services worker, **I made a decision that the child had given compelling -- a compelling finding.**

---

[2] The interview was with Heather Smith, a forensic interviewer and child therapist with ARC, and was taken on August 25, 2005. ARC is a non-profit child abuse evaluation and treatment center in Richland County administered under the auspices of the South Carolina Department of Mental Health in collaboration with the USC School of Medicine Department of Pediatrics and Palmetto Health Children's Hospital. (SCDMH website, http://www.state.sc.us/dmh/arc.index.htm)

[Kromah]: Objection.
The Court: Overruled.
[Kromah]: Your Honor, may we approach? I apologize.
The Court: All right. Come up.
(Whereupon, a bench conference was held in the presence, but not within the hearing, of the jury.)
The Court: **The objection is sustained as to the form of that question**. Please rephrase your question, solicitor.
[State]: Thank you, sir.
Q Ms. Smith, **your finding was compelling for child abuse or physical abuse**?
A For child physical abuse, yes.
A **And without saying what was said during the interview or anything else**, did you pass that information along to law enforcement officers including Investigator Livingston and other law enforcement agencies?
A Yes, yes, I did.

(Emphasis added.)

Livingston, an investigator in the Special Victims Unit of the Richland County Sheriff's Department, testified later in the trial. Livingston testified that he spoke extensively to Kromah and the Child's father, as well as to Kromah's sister, treating physicians, the responding officer, and a social worker. He stated that he had also spoken to the Child when he was in intensive care after his surgery:

Q **And you can't say what [the Child] said, but what were you asking him about. Do not say what he said.**
A I was asking what happened to him and who did it.
Q Was the child -- you can't say what he said, but was he able to communicate with you?
A Yes, he was.
. . . .
Q And he related -- was he able to relate information to you?
A Yes, he did.
Q And **based on your investigation at that point**, the next day did you arrest Miama Kromah?
A Yes, I did.

[Kromah]: Objection, Your Honor. That is an improper question based on that information. **We've already discussed this.** May we approach the bench?

The Court: Yes, sir. Come up.

(Whereupon a bench conference was held in the presence, but not within the hearing, of the jury.)

The Court: All right. The objection is overruled. You may continue, Solicitor.

Q Based on your investigation, what did you do the next day, Investigator Livingston?

A I placed Ms. Kromah under arrest.

(Emphasis added.)

The Court of Appeals held that, "[w]ith regards to Heather Smith's testimony, the objection did not specifically pertain to her reliance on the victim's statements, but rather addressed the form of the State's question." *Kromah*, slip op. at 1-2. The court further stated, "Similarly, the objection lodged during Investigator Roy Livingston's direct-examination did not address any alleged hearsay statement." *Id.* at 2.

As to Smith's testimony, we find the objection is preserved based on Kromah's objection immediately prior to Smith's testimony. The objection during the testimony was to the form of the question, and the objection was sustained, so Kromah received the relief she requested in that particular regard. However, the trial court's statement prior to her testimony that he would allow her to testify as she did during the in camera exchange constituted a final ruling that preserved the hearsay issue for appeal since Smith's testimony immediately followed this ruling with no intervening testimony.

"Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced." *State v. Wiles*, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). "There is an exception to this general rule when a ruling on the motion *in limine* is made 'immediately prior to the introduction of the evidence in question.'" *Id.* (quoting *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)). "This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection." *Id.* at 156-57, 679 S.E.2d at 175; *see also State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App.

1995) (noting where there is no evidence between the motion and the testimony, there is no basis for the trial court to change its ruling, so the decision is a final one).

As to Livingston, we also find the objection is preserved. Although the full grounds for the exception were not articulated on the record at the time of the objection, as would have been advisable to avoid a question in this regard, it nevertheless appears from the transcript and the context of the proceedings that Kromah's reference to the parties' earlier discussion sufficiently apprised the trial court of the nature of the objection. The trial court immediately appeared to understand the objection as a renewal of the previous hearsay argument advanced against the State's witnesses. *See State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011) (holding defense counsel's challenge to the evidence was presented with sufficient specificity to inform the circuit court of the point being urged as objectionable); Rule 103(a)(1), SCRE (stating for alleged errors in evidentiary rulings to be preserved, "a timely objection or motion to strike" must appear in the record "stating the specific ground of objection, *if the specific ground was not apparent from the context*" (emphasis added)).

B. Admissibility of Testimony of Two State's Witnesses

Having found the issue preserved, we find it appropriate, in the interest of judicial economy, to consider the merits of Kromah's appeal instead of delaying the proceedings with a remand to the Court of Appeals.

Kromah argues the trial court abused its discretion by permitting State's witnesses Smith and Livingston to testify regarding the actions they took as a result of hearsay statements made by the three-year-old Child, who would have been incompetent to testify.[3]

Kromah asserts, "In this case, Smith was permitted to testify that following her conversation with the [C]hild, she turned the information over to law enforcement. Additionally, Livingston was permitted to testify that following his conversation with the [C]hild, he arrested petitioner the next day. Livingston's testimony was all the more damaging because he testified that he did not consider

[3] To the extent Kromah additionally argues on appeal to this Court that the disputed testimony unfairly impugned her character, this argument was not preserved for appeal as it was not raised to and ruled upon by the trial court.

petitioner a suspect when he interviewed her the morning that he also interviewed the [C]hild."

Kromah essentially contends the trial court ruled the Child was not competent as a witness (based on the videotaped interview with the Child), so the Child's statements were inadmissible hearsay. Kromah then asserts the evidence offered by Smith and Livingston was unreliable and inadmissible because they relied upon their conversations with the Child in making their respective assessments (of child abuse and to arrest Kromah), citing *South Carolina Department of Social Services v. Doe*, 292 S.C. 211, 219-20, 355 S.E.2d 543, 548 (Ct. App. 1987) (holding, in a case rejecting the use of a child's out-of-court statements in a prosecution for alleged sexual abuse, that "[t]he admission of hearsay under an exception to the rule presupposes the declarant is possessed of the qualifications of a witness in regard to competency, personal knowledge, and the like," and that "the declarant's competency is a precondition to the admission of his hearsay statements on grounds of unavailability").

(1) Investigator Livingston

The trial court basically agreed with Kromah's initial objections at trial and ruled the State's witnesses could not repeat what the Child had actually said to them since the Child was not there to testify. In reviewing Livingston's testimony, we disagree with Kromah that the disputed portion of his testimony constituted inadmissible hearsay.

The South Carolina Rules of Evidence define hearsay as follows:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 801(c), SCRE. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." *Id.* Rule 801(a). The Hearsay Rule provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Livingston testified in detail about his investigative process and the numerous individuals he spoke to, including the Child, and that he made his

decision to arrest Kromah based on *all* of this information. Livingston did not directly relate to the jury any statements made by the Child, and the defense had the opportunity to cross-examine Livingston extensively. Even as posed by Kromah in her issue on appeal, she challenges the testimony of the State's witnesses as to what *actions they took* in response to information they received from the Child. However, Livingston never revealed any of the Child's statements in the presence of the jury.

Moreover, even if Livingston's testimony were considered some form of *indirect* hearsay, we find the trial court did not abuse its discretion. Livingston's testimony referencing his interview of the Child, excerpted above, was only one part of the information he recited in his investigative process leading up to his conclusion that there was sufficient evidence to arrest Kromah, and we find his testimony in this regard was proper as he did not repeat what the Child said to him. *Cf. State v Weaver*, 361 S.C. 73, 86-87, 602 S.E.2d 786, 792-93 (Ct. App. 2004) (holding officer's testimony as to what his investigation revealed and his conclusion that all of the evidence led to the defendant was proper where he did not repeat any statements actually made to him by individuals at the scene).

In addition, as mentioned at trial, Livingston's statement about the Child would appear viable as an excited utterance. The Child was interviewed while still under the influence of the traumatic events, as he was in intensive care after having had surgery for his injury when Livingston spoke to him. *Cf. State v. Sims*, 348 S.C. 16, 558 S.E.2d 518 (2002) (finding where a six-year-old suddenly stopped testifying that the trial court did not err in allowing a police officer to testify that the child had indicated who was in the apartment on the night his mother was fatally attacked and that it was the defendant; the testimony was admissible as an excited utterance under Rule 803(2), SCRE, even though some twelve hours had passed since the attack, as time is just one factor to consider, along with the declarant's demeanor and age, and the severity of the startling event, and even statements in response to an officer's questioning can be an excited utterance because the statements still have spontaneity, especially for a child, for whom stress can last longer than for an adult; the Court stated it is the totality of the circumstances that must be considered in this analysis). Similarly, under the totality of the circumstances, including the continuing stress of the incident, the Child's demeanor, and the traumatic nature of the event, we find the trial court did not abuse its discretion in allowing the disputed testimony here.

(2) Forensic Interviewer Smith[4]

In contrast, we find Smith's testimony more problematical to the extent that she testified as to a "compelling finding" of physical child abuse.

Smith is a forensic interviewer of children. "[A] forensic interviewer is a person specially trained to talk to children when there is a suspicion of abuse or neglect." *In re K.K.C.*, 728 N.W.2d 225, at *2 (Iowa Ct. App. 2006). The job of the interviewer is not to provide therapy, but to collect facts. *State v. Borden*, 986 So. 2d 158, 163 (La. Ct. App. 2008). It has been said that a forensic interviewer's purpose is to prepare for trial. *See State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (observing "[t]he forensic interviewer's purpose was undoubtedly to prepare for trial" as "[f]orensic by definition means 'suitable to courts,'" (quoting *Merriam-Webster's Collegiate Dictionary* 490 (11th ed. 2005)); *Black's Law Dictionary* 721 (9th ed. 2009) (stating "forensic" is derived from the Latin terms "forensis" (public) and "forum" (court) and defining "forensic" as "[u]sed in or suitable to courts of law or public debate"). Smith testified that she used the RATAC method of interviewing. This is an acronym for Rapport, Anatomy, Touch, Abuse Scenario, and Closure. RATAC is reportedly used nationwide in the forensic interviewing of children. *State v. Douglas*, 380 S.C. 499, 500, 671 S.E.2d 606, 607 (2009).

Smith was qualified as an expert and, although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the

---

[4] The title of "forensic interviewer" is a misnomer. The use of the word forensic indicates that the interviewer deduces evidence suitable for use in court. It also implies that the evidence is deduced as the result of the application of some scientific methodology. The exact scientific methodology applied apparently defies identification. The RATAC style of interviewing is not scientific. It merely represents the objectives and topics of discussion between the interviewer and the child. Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption.

testimony of experts.[5] The label of expert should be jealously guarded by the court and never loosely bandied about.

Rule 703 of the South Carolina Rules of Evidence allows an expert giving an opinion to rely on facts and data that are not admitted into evidence or even admissible into evidence if they are of a type reasonably relied upon by experts in the particular field. Rule 703, SCRE. The rule does not, however, make hearsay automatically admissible simply because it was relied upon by the expert. *See Allegro, Inc. v. Scully*, 400 S.C. 33, 46-47, 733 S.E.2d 114, 122 (Ct. App. 2012)

---

[5] In this case, there was no objection made to Smith's qualification as an expert, but we have previously observed that such qualification may be unnecessary. *See, e.g., Douglas*, 380 S.C. at 504, 671 S.E.2d at 609 (concluding it was unnecessary for the forensic interviewer to be qualified as an expert because no specialized knowledge was required there; the interviewer testified only as to her personal observations and experiences, and her interview with the victim; the Court found no error, however, noting the interviewer gave no opinion concerning the victim's veracity). In considering the ongoing issues developing from their use at trial, we state today that we can envision no circumstance where their qualification as an expert at trial would be appropriate. Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom. The rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse. Part of the RATAC method, which is not without its critics, involves evaluating whether the victim understands the importance of telling the truth and whether the victim has told the truth, as well as the forensic interviewer's judgment in determining what actually transpired. For example, an interviewer's statement that there is a "compelling finding" of physical abuse relies not just on objective evidence such as the presence of injuries, but on the statements of the victim and the interviewer's subjective belief as to the victim's believability. However, an interviewer's expectations or bias, the suggestiveness of the interviewer's questions, and the interviewer's examination of possible alternative explanations for any concerns, are all factors that can influence the interviewer's conclusions in this regard. Such subjects, while undoubtedly important in the investigative process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights.

("However, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence.").

Further, even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others. It is undeniable that the primary purpose for calling a "forensic interviewer" as a witness is to lend credibility to the victim's allegations. When this witness is qualified as an expert the impermissible harm is compounded. Our courts have previously held that "[t]he assessment of witness credibility is within the exclusive province of the jury," and that witnesses generally are "not allowed to testify whether another witness is telling the truth." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012); *see also* L.A. Bradshaw, Annotation, *Necessity and Admissibility of Expert Testimony as to Credibility of Witness*, 20 A.L.R.3d 684 (1968 & Supp. 2012) (stating an expert witness should not vouch for the truthfulness of a witness). Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011); *cf. Smith v. State*, 386 S.C. 562, 564-65, 689 S.E.2d 629, 631 (2010) (observing the forensic interviewer interjected impermissible hearsay into the trial, which improperly bolstered the victim's testimony; the forensic interviewer testified that the victim told her that the defendant had sexually assaulted her and that she found the victim's statement "believable").[6]

---

[6] In *Seward v. State*, 76 P.3d 805, 814 (Wyo. 2003), the court found that a forensic interviewer's testimony about her use of "truthfulness criteria" and her assessment of the victim's credibility based on the content of the victim's interview responses was testimony that "directly vouched for the victim's credibility." The court stated, "It is evident that the purpose of [the interviewer's] testimony was twofold: establish the foundation for admitting her videotaped 'forensic interviews' with the victim and assess credibility of the victim's disclosure based on the content of those interviews." *Id.* The court noted that the interviewer herself had stated "the very purpose of a 'forensic interview' is to assess whether the victim's disclosure was 'credible or not'—a forensic interviewer is looking for 'elements that would support it either being a credible disclosure or a noncredible disclosure.'" *Id.* The court ultimately found that that State had not established that testimony of this nature assisted the jury in addressing an issue beyond the jurors' common experience. *Id.* at 816.

In *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), this Court held that the trial court erred in allowing the State to introduce portions of a forensic interviewer's written reports about interviews conducted with the three alleged minor victims. The Court stated, "In each report, the forensic interviewer stated that during the interviews, each child had 'provide[d] a compelling disclosure of abuse by [appellant].'" *Id.* at 480, 716 S.E.2d at 94 (alterations in original). The Court found this was error as "[t]here is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful." *Id.* Similarly, we find Smith's testimony about a "compelling finding" to be inappropriate here. Smith should not have been allowed to testify about a compelling finding of child abuse as that was the equivalent of Smith stating the Child was telling the truth.

Because the admissibility of forensic interviews and the testimony based thereon at trial has been the subject of several recent appeals, we believe it would be helpful to set forth, by way of example, the kinds of statements that a forensic interviewer should avoid at trial:[7]

- that the child was told to be truthful;
- a direct opinion as to a child's veracity or tendency to tell the truth;
- any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse;
- any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- an opinion that the child's behavior indicated the child was telling the truth.

A forensic interviewer, however, may properly testify regarding the following:

---

[7] The General Assembly has enacted provisions allowing the admission of out-of-court statements by child sexual abuse victims under the age of twelve when certain conditions are met. *See* S.C. Code Ann. § 17-23-175 (Supp. 2011); *State v. Bryant*, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009) (discussing the proper application of this provision).

· the time, date, and circumstances of the interview;
· any personal observations regarding the child's behavior or demeanor; or
· a statement as to events that occurred within the personal knowledge of the interviewer.

These lists are not intended to be exclusive, since the testimony will of necessity vary in each trial, but this may serve as a general guideline for the use of this and other similar testimony by forensic interviewers.

Although we find the admission of the challenged testimony by Smith was error, we conclude any error is properly deemed harmless beyond a reasonable doubt.

An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. *State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012); *see also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained); *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996) ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." (citing *Chapman v. California*, 386 U.S. 18 (1967))).

Smith testified in camera that the Child told her he had been hurt and that Kromah was the perpetrator. However, Smith's challenged testimony before the jury was that child abuse occurred in this case, the essential portion of which was outlined above, and it did not go so far as to indicate that Kromah was the perpetrator of the injuries. Rather, Smith restated what the overwhelming evidence had already indicated, that the injury was the result of physical abuse. *Cf. Jennings*, 394 S.C. at 480, 716 S.E.2d at 94-95 (finding error in the admission of hearsay evidence and the forensic interviewer's report making a "compelling finding" of child abuse, interpreted to mean the interviewer found the children believable; the error was not harmless where "[t]here was no physical evidence presented in this case" and [t]he only evidence presented by the State was the children accounts of what occurred and other hearsay evidence of the children's accounts").

According to her own testimony, Kromah was alone with the Child in the bathroom when the bleeding incident occurred, and he had not been bleeding prior to this time. Numerous medical experts testified that the Child's genital wound could not have been caused by an accidental injury. They reached this conclusion based on the pattern of the wound and the circumstances of the Child's injury (spontaneous bleeding along with straight-edged lacerations in a V-shape that were consistent with the Child being cut by a razor, knife, box cutter, or other sharp instrument). Thus, Kromah's statements that the Child spontaneously started bleeding after she applied a warm washcloth while giving him a bath and that she had no idea how the Child's testicle came to be protruding from the Child's scrotum are inconsistent with the overwhelming expert medical evidence in the record that the wound resulted from physical abuse.

In addition, there was evidence of other injuries to the Child, such as an abrasion on the forehead, lip lacerations, and abdominal bruising, all of which were recently inflicted and indicative of physical abuse. Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably have affected the result of the trial, so any error in its admission was harmless beyond a reasonable doubt.

IV. CONCLUSION

We find Kromah's issue on appeal is preserved and address it here in the interest of judicial economy. On the merits, Kromah has shown no abuse of discretion in the trial court's admission of Livingston's testimony, and any error in the admission of forensic interviewer Smith's testimony was harmless beyond a reasonable doubt. Consequently, the decision of the Court of Appeals, which upheld Kromah's convictions and sentences, is affirmed in result.

AFFIRMED IN RESULT.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of Steven Robert Lapham, Respondent.

Appellate Case No. 2013-000054

ORDER

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

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

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James D. Jolly, Jr., 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. Jolly's office.

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

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

Columbia, South Carolina

January 15, 2013

The Supreme Court of South Carolina

In the Matter of Scott Christen Allmon, Respondent.

Appellate Case No. 2013-000090

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

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

IT IS FURTHER ORDERED that respondent is hereby enjoined from access to any trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain.

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

Columbia, South Carolina

January 16, 2013

The Supreme Court of South Carolina

RE: Amendment to Rule 31(f), Rule 413, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Footnote 1 to Rule 31(f) of Rule 413 of the South Carolina Appellate Court Rules (SCACR) is hereby amended as follows:

> In an effort to balance the need to preserve the Lawyers' Fund for Client Protection with the need to, in certain situations, reimburse attorneys appointed pursuant to Rule 31, RLDE, Rule 413, SCACR, the following rates are currently established for reimbursement of the appointed attorney's fees, support staff costs and the cost of copies, but are subject to change at the discretion of the Court.

Appointed Attorney's Fees	$50.00 per hour
Support Staff	$10.00 per hour
Copies	$0.15 per page

This amendment shall be effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 17, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, Respondents,

v.

Greenville County, Herman G. Kirven, Jr., Judy Gilstrap, Eric Bedingfield, Jim Burns, Scott Case, Joseph Dill, Cort Flint, Lottie Gibson, Mark Kingsbury, Xanthene Norris, Robert Taylor, and Toney Trout, Appellants.

Appellate Case No. 2010-154507

Appeal From Greenville County
John C. Few, Circuit Court Judge
D. Garrison Hill, Circuit Court Judge

Opinion No. 5016
Heard June 7, 2012 – Filed August 1, 2012
Withdrawn, Substituted, and Refiled January 23, 2013

REVERSED

Boyd B. Nicholson, Jr. and Bonnie A. Lynch, both of Haynsworth Sinkler Boyd, PA, of Greenville, for Appellants.

James G. Carpenter and Jennifer J. Miller, both of Carpenter Law Firm, PC, of Greenville, for Respondents.

GEATHERS, J.: Respondents, South Carolina Public Interest Foundation (SCPIF) and Edward D. Sloan, Jr., brought this declaratory judgment action against Appellants, Greenville County and the individual members of Greenville County Council (Council) (collectively, the County), challenging the County's establishment of the "County Council Reserves" account as an unlawful delegation of legislative authority. The County seeks review of the trial court's order granting summary judgment to Respondents, arguing that the account in question is lawful and Respondents' current action is barred by res judicata. The County also seeks review of a second order granting Respondents' request for attorney's fees and costs. We reverse.

FACTS/PROCEDURAL HISTORY

For its 1994-95 fiscal year, the County established an account in its annual operating budget entitled "County Council Reserves." Funds in this account were set aside to enable Council to address "special community needs not normally falling with [sic] the operational purview of County government" and to "provide for nonrecurring community requests." In 1996, Council adopted a resolution limiting the use of the Council Reserves account to "infrastructure purposes such as flooding and drainage, roads, lights, sewer, and public buildings and grounds."

In 1996, Edward D. Sloan, Jr. (Sloan), filed an action against the County challenging the legality of the Council Reserves account, beginning with fiscal year 1994-95. Sloan's Third Amended Complaint listed donations from the County to several private organizations and political subdivisions spanning "from 1994 through September, 1997." The complaint, which set forth eleven causes of action, took issue with the use of Council Reserves for non-county matters. The complaint also cited perceived procedural irregularities in the continued use of Council Reserves without Council voting on each expenditure or appropriation. In the complaint's "Sixth Cause of Action," Sloan alleged that the creation and use of the Council Reserves account violated section 7-81 of the Greenville County Code.

In the complaint, Sloan sought a declaration that establishing the Council Reserves account and disbursing public funds as described in the complaint violated "the applicable statutes, Constitutions, ordinances, and policies." Sloan also sought preliminary and permanent injunctions against the County's "appropriation, expenditure, disbursement, and donation of public funds from the 1996-97 'Council

Reserves' in violation of the S.C. Constitution and Code and the Greenville County Codes [sic] regarding procedures for appropriation and expenditures."

Sloan subsequently filed a motion for summary judgment. In his supporting memorandum, Sloan explained his allegation that the Council Reserves account violated section 7-81 of the County of Greenville, South Carolina Code of Ordinances (Greenville County Code) as follows:

> [Section 7-81(b) requires that] all "requests for county funds will be submitted to council for review during the regular county budget process . . . ." Rather than the *entire council* reviewing "requests for county funds" that are "submitted for council review during the regular county budget process," *individual council members* receive requests throughout the year and respond to them by submitting *individual requisitions* to the clerk of county council . . . .

(emphasis added). The summary judgment motion and supporting memorandum requested, among other relief, an order enjoining Council's appropriations of public funds to entities when: (1) the appropriations were not made by County Council as a whole, but rather by individuals in violation of section 7-81(a) of the Greenville County Code, and (2) the requests were not submitted to Council during the regular county budget process, in violation of section 7-81(b) of the Greenville County Code. On February 10, 1998, the circuit court conducted a bench trial on stipulated facts. The circuit court subsequently issued an order ruling that the County was entitled to judgment in its favor, with one exception not relevant to this case.[1] The circuit court concluded that Council had complied with section 7-81. The circuit court stated that there was nothing in the record to support a finding that the County's actions rose "to the level of illegality in violation of the County Code." Sloan did not appeal this order.

Subsequently, on August 2, 2005, the County passed an ordinance adopting its budget for the 2006-07 fiscal year. Included in the operating expenses for the

[1] The circuit court addressed in a separate order a proposed disbursement to the Crestwood Forest Village Committee. The court found that this proposed disbursement was in violation of Council's guidelines for use of Council Reserves.

County Council Division of the Legislative and Administrative Services Department were line items for the Council Reserves, which included a separate line item for each Council member. Each individual Council member's routine expenses were funded from these line items. The line items were also available to fund costs "associated with special, non-recurring community requests for infrastructure purposes" and for "contributions to local governments in Greenville County for community projects." More specifically, each Council member's expenses and costs, designated as "Council District Expense," were described by the County as follows:

> Funds for a Council Member to address:
>
> ●Cost of general business supplies such as pens, paper, stationary, . . . ;
> ●Cost of special documents, incentives and awards given either to the public or county employees . . . ;
> ●Cost of periodicals, professional journals, and reference books;
> ●Cost of per diem and mileage involved in the conduct of county business;
> ●Costs associated with community functions, conferences and training seminars . . . ;
> ●Costs associated with special, non recurring [sic] community requests for infrastructure purposes such as:
> ●Flooding
> ●Roads
> ●Lights
> ●Sewer and drainage
> ●Public buildings and grounds
> ●Infrastructure related studies
> ●Contributions to local governments in Greenville County for community projects; . . . .

In 2006, Sloan, along with SCPIF, the foundation he chaired, filed the present action, challenging the Council Reserves account, a/k/a the "Council District

Expense" account, within the County's 2006-07 budget.[2] In their complaint, Respondents specifically challenged "[c]osts associated with special, nonrecurring community requests for infrastructure purposes[.]" The complaint's sole cause of action states, "Council's delegation of legislative power to an individual member . . . is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 13, 2003[.]"[3]

In their complaint, Respondents also sought injunctive relief as well as a declaration that Council's "delegation of [its] discretionary spending authority" was "illegal, invalid, and unconstitutional." The County submitted a motion to dismiss, and the parties submitted cross-motions for summary judgment. In its motion to dismiss, the County asserted that the present action was barred by res judicata and collateral estoppel. However, at the motions hearing, the County expressly waived its collateral estoppel defense.

Relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), the circuit court concluded that the action was not barred by res judicata by reasoning that the County's different fiscal years were comparable to the different tax years at issue in *Sunnen*. The circuit court also ruled that the creation of the Council Reserves account constituted an illegal delegation of legislative authority by Council to its individual members. However, the court declined to base its ruling on constitutional grounds, stating: "Plaintiffs have alleged a Constitutional basis for the legal proposition that County Council may not delegate legislative authority. However, Defendants' concession that County Council may not delegate legislative authority makes it unnecessary to decide whether this prohibition is based on the Constitution or not."

In a separate hearing, the circuit court received evidence on Respondents' attorney's fees, pursuant to section 15-77-300 of the South Carolina Code (Supp.

---

[2] The complaint indicates that this account has been "variously known as the Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." Likewise, in its appellate brief, the County indicates that several years after creating the Council Reserves account, it began using the name "Council District Expense" for the account. For the remainder of this opinion, we refer to the account as "Council Reserves."

[3] Attorney General opinions are persuasive but not binding authority. *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011).

2011).[4] The court subsequently issued an order granting Respondents' request for $60,084.15 in fees and costs incurred through January 31, 2010. The court also allowed Respondents to "file an affidavit addressing fees incurred after January 31, 2010." This appeal followed.[5]

ISSUES ON APPEAL

1. Did the circuit court err in concluding that the present action was not barred by res judicata?

2. Did the circuit court err in concluding that the creation of the Council Reserves account unlawfully delegated legislative authority to Council members in their individual capacities?

3. Did the circuit court err in awarding attorney's fees and costs to Respondents?

STANDARD OF REVIEW

Summary Judgment

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

---

[4] In a case brought by a party contesting "state action," section 15-77-300 authorizes an award of attorney's fees to the prevailing party, other than the State or a political subdivision of the State, under certain circumstances.

[5] The County timely filed a Notice of Appeal following each of the two orders issued by the circuit court; the appeals were consolidated.

In the present case, the circuit court noted in its order: "The parties agree that the case presents questions of law to be decided on undisputed facts." Neither party challenges this statement on appeal. Therefore, this court need not determine whether there are genuine issues of fact. The court need only concern itself with the resolution of questions of law.

Attorney's Fees

In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party, unless the prevailing party is the State or any political subdivision of the State, if (1) the court finds that the agency acted without substantial justification in "pressing its claim against the party[;]" and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust. S.C. Code Ann. § 15-77-300 (Supp. 2011). An appellate court may not disturb such an award unless the appellant shows that the trial court abused its discretion in considering the applicable factors. *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

LAW/ANALYSIS

I. Res Judicata

The County maintains the circuit court erred in concluding that the present action was not barred by res judicata. We agree.

A. South Carolina Law

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citation omitted). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id.* (citation and quotation marks omitted).

"Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former

proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). In *Beall v. Doe*, this court distinguished the two concepts as follows:

> The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984) (citations and quotation marks omitted).

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). "The doctrine [of res judicata] flows from the principle that *public interest* requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007) (emphasis added) (citation omitted); *see also S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 278 (Ct. App. 2001) ("'The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action.'" (quoting *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945))).

"The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995) (citing *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, our supreme court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

> Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation[])[.] . . . Res judicata is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

205 S.C. at 221-22, 31 S.E.2d at 319-20 (citations omitted) (emphasis added); *see also First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56-57 (citing *Watson*) (contrasting the origins of res judicata and collateral estoppel).

In the present case, the parties do not dispute that the 1996 action involved the same parties or their privies—Sloan brought the 1996 action; and, along with SCPIF, the foundation he chaired, he brought the present action.[6] *See Yelsen*, 397 S.C. at 22, 723 S.E.2d at 596 (holding that the concept of privity rests on each party's relationship to the subject matter of the litigation); *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986) ("The term 'privy', when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding.").

However, Respondents maintain that in the 1996 action, the circuit court neither ruled on nor could have ruled on the County's 2006 and 2007 appropriations and expenditures. Respondents argue that res judicata does not bar their challenge to these specific appropriations because "the allegations arise from different fiscal years." We find this argument unavailing. In the present action, Respondents' complaint challenges the legality of the *practice* underlying these expenditures, i.e., use of the Council Reserves account as a delegation of legislative authority to individual Council members, a practice continuing from year to year since the 1994-95 fiscal year. Likewise, the Third Amended Complaint in the 1996 action challenged this same practice with regard to multiple fiscal years.

---

[6] In his affidavit dated February 19th, 2007, Sloan stated that he was the Chairman of the Board of Directors and President of SCPIF.

In determining whether allegations arising from different fiscal years must be brought in the same action, the *Restatement (Second) of Judgments* is instructive:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to *all or any part of the transaction, or series of connected transactions, out of which the action arose*.
> (2) *What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically*, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1982 & Supp. 2012) (emphasis added). The plaintiff's claim is extinguished even when the plaintiff is "prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action." *Id.* at § 25 (emphasis added).

Here, the "Sixth Cause of Action" in Sloan's 1996 complaint effectively challenged the creation and use of the Council Reserves account as an illegal delegation of legislative authority in violation of section 7-81 of the Greenville County Code. *See* Greenville County Code § 7-81 (requiring the appropriation of public funds to be made only by Council as a body); *Gregory v. Rollins*, 230 S.C. 269, 274, 95 S.E.2d 487, 490 (1956) ("It is fundamental that the appropriation of public funds is a legislative function."). The circuit court, in the 1996 action, concluded that Council had complied with section 7-81. The circuit court stated that there was nothing in the record to support a finding that the County's actions rose "to the level of illegality in violation of the County Code." Sloan did not appeal the circuit court's ruling. In the present action, Respondents base their claim challenging the

creation and use of the Council Reserves account on the ground that the Council's delegation of legislative power to its individual members is "unconstitutional."[7]

Even if a constitutional challenge to the Council's delegation of authority to individual members through the Council Reserves account was neither raised nor ruled on in the 1996 action, the theory could have been brought in the prior action. Hence, both the cause of action and this theory of relief are barred in the present action. *See Restatement (Second) of Judgments* §§ 24, 25 (1982 & Supp. 2012) (applying claim preclusion "with respect to all or any part of the transaction, or series of connected transactions, out of which the [first] action arose" even when the plaintiff is prepared to present a theory in the second action not presented in the first action).

In *Judy*, our supreme court addressed the question of whether a claim should have been raised in a prior action and stated:

> *Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties*. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."

393 S.C. at 172, 712 S.E.2d at 414 (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)) (emphasis added). The court also explained the term "cause of action" for res judicata purposes: "*[F]or purposes of res judicata, "cause of action" is* not the form of action in which a claim is asserted but, rather *the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon*." *Id.* (emphasis added) (citations and quotation marks omitted).

---

[7] Neither Respondents' pleadings nor their appellate brief cite any specific constitutional provision supporting the general assertion that the use of the Council Reserves account is unconstitutional. Further, at oral argument, counsel did not articulate any specific constitutional provision on which Respondents may rely for their assertion.

Here, Respondents' claim, which challenges the County's use of the Council Reserves account to delegate spending authority to its individual members, constitutes the "same transaction or occurrence" that was the subject of the prior case. Although the budget years and dollar amounts differ, the "*cause for action*," as defined in *Judy*, is the same in both the 1996 action and the present action.

Our supreme court's recent discussion of res judicata in *Judy* acknowledged that there are certain circumstances in which the policy underlying the doctrine of res judicata is outweighed by a more compelling policy; there, the court looked to the *Restatement (Second) of Judgments* § 26 for guidance on those circumstances in which courts should decline to apply res judicata. 393 S.C. at 168 n.5, 712 S.E.2d at 412 n.5 (quoting *Restatement (Second) of Judgments* § 26(1)(a)-(c) (1982 & Supp. 2011)); *see also Restatement (Second) of Judgments* § 26(1)(a)-(f) cmts. a-j (1982 & Supp. 2012) (discussing exceptions to the general rule against claim splitting). Nonetheless, in *Judy*, the court did not find any of these exceptions applicable to the plaintiff's filing of a claim for waste in circuit court after having raised a waste claim in his probate court pleadings. 393 S.C. at 168-74, 712 S.E.2d at 412-15. Likewise, we find none of these exceptions applicable to Respondents' present claim. The parties have not cited, nor have we found, any binding authority applying any of these exceptions to a case with facts similar to the present case.

While the potential adverse impact on the public interest has been recognized as a reason to depart from the doctrine of collateral estoppel,[8] the parties have not cited, nor have we found, any binding authority recognizing a comparable exception for res judicata.[9] Rather, the doctrine of res judicata itself is a doctrine founded upon

---

[8] *See Restatement (Second) of Judgments* § 28(5) (1982 & Supp. 2012) (referencing the "public interest" exception to collateral estoppel).

[9] We see no injustice in this dichotomy because the reach of issue preclusion is broader than that of claim preclusion. Unlike claim preclusion, issue preclusion can affect the outcome of a different, unrelated claim and can also affect a party in a second action with an unrelated third party. *See Restatement (Second) of Judgments* § 27 (1982 & Supp. 2012) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *Restatement (Second) of Judgments* § 29 (1982 & Supp. 2012) ("A party precluded from

the objective of preserving and protecting the public interest. *See, e.g.*, *Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 ("The doctrine [of res judicata] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action.").

Previous opinions of this court have addressed circumstances in which it was inappropriate to apply the doctrine of res judicata. In *Mr. T v. Ms. T*, the plaintiff filed a paternity action naming his ex-wife as a defendant and alleging that she committed fraud in leading him to believe he was the biological father of her children. 378 S.C. 127, 130-32, 662 S.E.2d 413, 415-16 (Ct. App. 2008). The plaintiff also sought relief from the parties' prior decree of divorce, which had incorporated the parties' settlement agreement and had found that two children were born of the marriage. *Id.* at 130-32, 662 S.E.2d at 414-16. The family court had found that the plaintiff's paternity action was barred by "res judicata/collateral estoppel." *Id.* at 131, 662 S.E.2d at 415. On appeal, the plaintiff argued that the family court erred in this regard. *Id.* at 132, 662 S.E.2d at 415-16. This court reversed the family court's dismissal of the case and remanded the case for further development of the record. *Id.* at 139, 662 S.E.2d at 419.

Also, in *Johns v. Johns*, this court held a consent order's finding that the parties had a common-law marriage should not be given res judicata effect because the marriage was bigamous and South Carolina's policy of not recognizing bigamous marriages had been expressed in a statute declaring them to be void. 309 S.C. 199, 201-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992). Likewise, in *Jennings v. Dargan*, this court held that an order approving a settlement regarding paternity and child support was void and thus did not have a preclusive effect against the child in her action for support. 308 S.C. 317, 320-21, 417 S.E.2d 646, 647-48 (Ct. App. 1992). The court so ruled because the record did not indicate the family court had complied with statutes requiring a finding that the settlement was in the best interest of the minor and requiring review and approval of the settlement. *Id.* The court acknowledged the policy respecting finality of judgments but stated that the policy expressed in the cited statutes (protecting minors) was the overriding concern. *Id.*

---

relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.").

We find these opinions to be consistent with the requirement that a judgment must be "valid" in order to preclude a second action concerning the same transaction, and this validity requirement is already built into the doctrine of res judicata. *See Basnight*, 346 S.C. at 248-49, 551 S.E.2d at 278 (citing *Griggs v. Griggs*, 214 S.C. 177, 184, 51 S.E.2d 622, 626 (1949)) ("Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, *without fraud or collusion*, is conclusive as to the rights of the parties and their privies." (emphasis added)); *Restatement (Second) of Judgments* § 24(1) (1982 & Supp. 2012) (conditioning the extinguishment of the second claim on the validity and finality of the prior judgment); *Restatement (Second) of Judgments* § 26(1) cmt. j (1982 & Supp. 2012) (discussing the defendant's fraud, misrepresentation, or mistake as a factor contributing to the prior judgment). In each of these cases, there existed a specific, compelling concern as to the validity of the prior judgment. No such concern has been presented in the present case.

B. The *Sunnen* Decision

In concluding that the present action was not barred by res judicata, the circuit court relied primarily on the reasoning of *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). The circuit court stated:

> Because the 'Council District Expense Fund' appears in each annual budget for Greenville County, the enactment of each budget creates separate legal claims. As the United States Supreme Court has explained in the context of federal income taxes levied on an annual basis, '*[e]ach year is the origin of a new liability and a separate cause of action*.' *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). The same reasoning applies here. The fact that Mr. Sloan might have, or even did, challenge the legality of an identical line item in a previous budget does not bar Plaintiffs from the causes of action brought in this case.

(emphasis added).

The circuit court's reliance on the tax-year analysis in *Sunnen* was misplaced; *Sunnen*'s explanation of res judicata in the context of differing tax years is not

binding outside of the tax context. *See United States v. Stauffer Chemical Co.*, 464 U.S. 165, 172 n.5 (1984) (rejecting the general applicability of *Sunnen*'s collateral estoppel analysis outside of the tax context); *see also Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) ("We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation."). *Compare Grp. Health Inc. v. United States*, 662 F. Supp. 753, 764 (S.D.N.Y. 1987) (holding the plaintiff's claim that a Medicare regulation was unconstitutional did not depend "on the specific cost year involved") *and Carroll Twp. Auth. v. Mun. Auth. of City of Monongahela*, 518 A.2d 337, 341 (Pa. Commw. Ct. 1986) (holding that a township authority's 1985 complaint against a city's municipal authority challenging the inclusion of legal fees as an operating expense in utility rates presented a claim that was identical to the claim in the township authority's 1983 complaint because it did not appear that the 1985 complaint challenged "the actual amount paid or to be paid by [the city] for legal services as being excessive" and the ultimate issue in both actions appeared to be "one and the same, to wit, whether any legal fees incurred by [the city] in defending its rate charges may be passed on to [the township authority] through their inclusion in operating expenses") *with M.C.G. v. Hillsborough Cnty. Sch. Bd.*, 927 So. 2d 224, 227 (Fla. Dist. Ct. App. 2006) ("A cause of action to establish *entitlement to services* under the IDEA *by its nature* pertains to a particular period of time and is *based on the factual circumstances at that time*." (emphasis added)).

Like the claims challenging a regulation in *Group Health*, the claim in the present case does not depend on any specific budget year; the complaint states "*for several years* Defendants have authorized and operated a fund variously known as the Council District Expense Fund, Council Reserves, Discretionary Funds, or the Slush Fund." (emphasis added). The complaint further states "County Council's delegation of legislative power to an individual member, as described herein, is unconstitutional and illegal, as explained in a South Carolina Attorney General opinion dated November 13, 2003 . . . ." The complaint's prayer seeks injunctive relief as well as an order "Declaring that the delegation of the discretionary spending authority is illegal, invalid, and unconstitutional[.]"

Further, as in *Carroll Township Authority*, the complaint in the present case does not challenge specific dollar amounts as excessive. Hence, no specific budget or monetary amount constituted the "res" in the 1996 action or the present action.

Rather, the complaint challenges the practice underlying the Council Reserves account, i.e., the delegation of authority to individual council members. Moreover, unlike the relief sought in *M.C.G.*, i.e., the provision of educational services by a local school board, the relief sought in the present case does not depend on any one time period; rather, the complaint challenges the creation and continued use of the Council Reserves account as an illegal delegation of legislative authority.

In sum, *Sunnen* does not alter our application of South Carolina preclusion principles to the present action. Therefore, the circuit court erred in holding that the present action was not barred by res judicata.

II. Attorney's Fees

The County asserts that the trial court abused its discretion in awarding attorney's fees to Respondents. We agree. In a case brought by a party who is contesting state action, a court may award attorney's fees to the prevailing party under certain circumstances. S.C. Code Ann. § 15-77-300 (Supp. 2011). Because the present action is barred by res judicata, Respondents do not qualify as prevailing parties. Therefore, we reverse the award of attorney's fees and costs.

CONCLUSION

Accordingly, we reverse the orders granting summary judgment and attorney's fees and costs to Respondents.

REVERSED.[10]

PIEPER, J., and CURETON, A.J., concur.

---

[10] Because this action is barred by res judicata, we decline to address the merits of the present action. *See, e.g.*, *Duckett*, 374 S.C. at 464, 649 S.E.2d at 81 (holding that res judicata flows from the principle that public interest requires an end to litigation); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shenandoah Life Insurance Company, Respondent,

v.

Lakeisha E. Smallwood, Appellant.

Appellate Case No. 2011-195270

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5076
Heard October 31, 2012 – Filed January 23, 2013

REVERSED AND REMANDED

Eleanor Duffy Cleary, of Columbia, and D. Reece Williams, III, Callison Tighe & Robinson, LLC, of Columbia, for Appellant.

George Verner Hanna, IV, Howser Newman & Besley, LLC, of Columbia, for Respondent.

FEW, C.J.: Shenandoah Life Insurance Company brought this action to void an insurance policy it issued on the life of Lorenzo Smallwood. The circuit court granted partial summary judgment to Shenandoah, and thus narrowed the issue for trial to whether Lorenzo intended to defraud the insurance company when he did not disclose information related to his medical history on the insurance application. At trial, the court granted Shenandoah's motion for a directed verdict. Lakeisha

Smallwood appeals the directed verdict. We hold a jury could reasonably conclude that Shenandoah failed to meet its burden of proving Lorenzo made the misrepresentations with the requisite fraudulent intent. Therefore, the issue should have been decided by a jury. We reverse and remand for trial.

I. Facts

Lorenzo Smallwood joined the U.S. Marine Corps following the 9/11 terrorist attacks and served tours of duty in both Afghanistan and Iraq. He was honorably discharged from the Marines in 2004. On October 2, 2006, Lorenzo visited the emergency department of William Jennings Bryan Dorn Veteran's Medical Center in Columbia. He complained to nurse Pamela O'Toole about not being able to sleep well in the two years since his return from his tours overseas and stated he believed he suffered from post-traumatic stress disorder (PTSD). O'Toole noted on her medical assessment, "[p]atient admits to drug and alcohol use." However, Lorenzo's exact statement concerning his drug use is unclear from the record, and by the time of trial, O'Toole had no independent recollection of treating Lorenzo. O'Toole referred him to an urgent-care doctor to discuss his psychological symptoms and also referred him for a psychological evaluation to be performed at a later date.

Later in the afternoon, Lorenzo saw Nirav Pathak, M.D., who recorded in his notes Lorenzo "cannot sleep well," "feels depressed," and "thinks that he suffers from PTSD since he came home 2 years ago from Iraq/Afghanistan." Dr. Pathak also noted, "alcoholic, 12 pack beer every day." In his assessment, Dr. Pathak wrote,

> Substance Abuse (Alcohol) – current;
> Cocaine Abuse – current.

When Dr. Pathak later testified, he explained that this assessment of Lorenzo "was based upon what [he] had talked to [Lorenzo] about." Though neither Dr. Pathak's notes nor his testimony reveal exactly what Lorenzo told him, Dr. Pathak testified that his notes showed Lorenzo expressed his understanding of the assessment. However, Dr. Pathak could not confirm, nor is it clear from the record, that Lorenzo agreed because, by the time of trial, Dr. Pathak also had no independent recollection of treating Lorenzo. Dr. Pathak referred Lorenzo for a mental health consultation, which was scheduled for November 24, 2006, but Lorenzo did not show up for the appointment.

A year later, on November 19, 2007, Lakeisha Smallwood sought an insurance policy through Shenandoah on the life of her husband Lorenzo. She initially consulted Lorenzo's aunt, Gayle Smallwood, who sold insurance for Shenandoah. Gayle asked her colleague, Laura Haynes, an independent insurance agent representing Shenandoah, to write the policy. Haynes met Lorenzo and Lakeisha at their home to fill out the insurance application. While seated at the kitchen table, Haynes asked Lorenzo the application questions and recorded his answers on the application. Lakeisha and Gayle were present at the home when the application was being filled out but were primarily in another room with Lorenzo's and Lakeisha's children. Haynes testified she told Lorenzo to answer the application questions truthfully, and that both Lorenzo and Lakeisha had an opportunity to review the application before they signed it. The application contained a number of questions regarding Lorenzo's medical history, particularly,

> Within the last 10 years, have any persons proposed for coverage been diagnosed or treated by a member of the medical profession for . . . mental or nervous disorder, alcohol or drug dependency?
>
> Within the past 5 years, have any persons proposed for coverage . . . [u]sed cocaine?

Lorenzo answered "No" to each of these questions. Shenandoah issued the policy.

On September 18, 2008, Lorenzo was shot to death. The shooter was found guilty of voluntary manslaughter and sentenced to eighteen years. Shenandoah denied Lakeisha's claim on the policy on the ground that Lorenzo provided false statements on the application regarding his medical history.

II. Procedural History

Shenandoah brought an action against Lakeisha to void the life insurance policy. To void a life insurance policy for misrepresentation on the application, an insurer must prove five elements by clear and convincing evidence: (1) the applicant made a false statement on the application; (2) the applicant knew the statement was false; (3) the applicant's misrepresentation was material to the risk undertaken by the insurance company; (4) the insurer issued the policy in reliance on the

misrepresentation; and (5) the applicant made the misrepresentation with the intent to defraud the insurance company. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 364, 563 S.E.2d 331, 334 (2002).

Shenandoah filed a motion for summary judgment, which was partially granted when the Honorable George C. James, Jr. ruled the first four elements were established as a matter of law. As to the fifth element, Judge James wrote:

> While there is certainly a circumstantial inference that [Lorenzo] made the misrepresentations with the intent to defraud the plaintiff, the evidence presented to the court is also susceptible of the inference (at least at this stage) that he made the misrepresentations to hide his alcohol and drug abuse and his mental health issues from his wife. A jury should decide this issue, especially in light of the plaintiff's heightened burden of proof.

The case was called to trial before the Honorable W. Jeffrey Young. Shenandoah tried the case on the basis that Lorenzo's answers to the questions regarding mental or nervous disorder, drug or alcohol dependency, and cocaine use were made with the intent to defraud Shenandoah.[1] The court granted Shenandoah's motion for a directed verdict after the close of all evidence. Lakeisha filed a motion to alter or amend the judgment, which the court denied, stating, "This is another of those 'rare cases in which the undisputed facts can reasonably give rise to only one inference, namely, that the policy was procured by fraud.'" (quoting *Johnson v. N.Y. Life Ins. Co.*, 165 S.C. 494, 501, 164 S.E. 175, 177 (1932)).

III. Directed Verdict Standard

"When reviewing the trial court's ruling on a motion for a directed verdict . . . , this Court must apply the same standard as the trial court . . . ." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). Viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, "[t]he trial court must deny a motion for a directed verdict . . . if

[1] Lorenzo made other false statements on the application. However, Shenandoah did not present evidence of those misrepresentations in its motion for summary judgment or at trial.

the evidence yields more than one reasonable inference." 399 S.C. at 331-32, 732 S.E.2d at 171. On appeal from an order granting a motion for a directed verdict, therefore, the appellate court must determine whether it would have been reasonably possible for the jury to return a verdict for the party opposing the motion. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Id*. Ordinarily, an applicant's intent to defraud an insurance company is a question for the jury to decide. *Winburn v. Minn. Mut. Life Ins. Co.*, 261 S.C. 568, 578, 201 S.E.2d 372, 376 (1973); *Johnson*, 165 S.C. at 501, 164 S.E. at 177.

IV. Directed Verdict Analysis

We begin our analysis of the facts by acknowledging that there is not much evidence in the record of Lorenzo's intent, as is to be expected in cases where the applicant is deceased. The intent with which misrepresentations are made on a life insurance application is usually shown by circumstantial evidence, since the direct evidence is "locked up in the heart and consciousness of the applicant." *Smiley v. Woodmen of the World Life Ins. Soc.*, 249 S.C. 461, 465, 154 S.E.2d 834, 836 (1967) (quoting *Johnson*, 165 S.C. at 500, 164 S.E. at 177). The lack of evidence of intent works against the party who bears the burden of proof.

Shenandoah presented evidence from which a jury could reasonably conclude, based on the clear and convincing evidence standard, that Lorenzo made the misrepresentations with the intent to defraud the insurance company. However, the question we must answer is whether there is evidence in this record from which a jury could reasonably reach the opposite conclusion—that Shenandoah failed to prove by clear and convincing evidence that Lorenzo intended to defraud the insurance company. We find there is.

There are several plausible explanations for Lorenzo's failure to disclose the requested information. For example, a jury could reasonably conclude he was attempting to hide this information from his wife, who did not know he had used drugs. Haynes testified that if Lorenzo had disclosed his drug use, Lakeisha would have seen that on the application when she signed it. His aunt Gayle's presence when the application was being completed and Gayle's friendship with Haynes could provide another reason Lorenzo wanted to hide the information. Gayle testified Lorenzo was extremely close to her—she was "like a second mother to

him" and had no knowledge of his previous drug use. As to Shenandoah's claim that Lorenzo's failure to disclose his PTSD was fraudulent, in addition to the fact that Lakeisha did not know Lorenzo thought he had PTSD**,** there is no evidence Lorenzo was ever diagnosed with or treated for it—only Lorenzo's statement to O'Toole and Dr. Pathak that he suspected he suffered from it.

The facts of this case are significantly different from the facts of cases our courts have deemed "rare" enough to merit determination of fraudulent intent as a matter of law. In *Johnson*, for example, the insured had been treated for alcoholism on ten separate occasions, was at one point confined to a hospital, and was warned by his physician to discontinue the use of alcohol completely to avoid "ruin[ing] his health." 165 S.C. at 499, 164 S.E. at 176. However, when the insured filled out his application for insurance only fourteen months after his last treatment for alcoholism,[2] he denied any consumption of alcohol other than "[a]n occasional drink" and claimed he had neither drunk alcohol to excess nor seen a doctor in the five years leading up to his application. 165 S.C. at 498, 164 S.E. at 176. He also falsely answered "no" and "none" to questions that would have revealed his severe alcoholism, including "Have you ever consulted a physician or practitioner for any ailment or disease . . . ?" and "What physicians or practitioners . . . have you consulted or been examined or treated by within the past five years?" *Id*. On these facts, our supreme court stated "this is one of those rare cases in which the undisputed facts can reasonably give rise to only one inference, namely, that the policy was procured by fraud." 165 S.C. at 501, 164 S.E. at 177.

In *Winburn*, the insured was diagnosed with angina and was hospitalized for nine days for "an infected right Bartholin's gland cyst, an upper respiratory infection, subacute bronchitis, and hypertensive arteriosclerotic heart disease, with coronary insufficiency" less than two years prior to filling out an application for life insurance. 261 S.C. at 572, 577, 201 S.E.2d at 373, 376. Although the application specifically asked whether the insured knew "of any impairment now existing in your health" or had "consulted a physician for any illness" within three years prior to filling out the application, the insured did not reveal this information on her application. 261 S.C. at 573, 201 S.E.2d at 374. Our supreme court affirmed the

[2] *See* 165 S.C. at 504, 164 S.E. at 178 (Carter, J., dissenting) (stating the insured's last treatment for alcoholism was November 7, 1928, and he made the application for insurance January 8, 1930).

circuit court's order granting the insurance company's motion for a directed verdict, stating:

> We recognize that ordinarily, the question of fraud in a case of this kind is for the jury, but we feel that this is one of those rare cases where the only reasonable conclusion from the uncontradicted facts is that the insured intended to deceive and defraud the respondent when she deliberately suppressed the truth and gave false answers as to her health or physical condition and prior medical treatment, of which she had full knowledge.

261 S.C. at 578, 201 S.E.2d at 376.

In *Parker v. Pacific Mutual Life Insurance Company of California*, 179 S.C. 117, 183 S.E. 697 (1935), a disability insurance case, the insured stated he had previously suffered from influenza and pneumonia, but that he had completely recovered seven years prior to filling out the application. 179 S.C. at 119, 120, 183 S.E. at 697, 698. In reality, the insured experienced frequent and recurring attacks of both illnesses during that seven-year period and had consulted numerous physicians regarding his condition. 179 S.C. at 124-29, 183 S.E. at 700-02. The insured was a physician practicing in a specialty dealing with the illnesses he suffered from and, as the court stated, "he was certainly aware of their significance and materiality in connection with his application for insurance." 179 S.C. at 122, 183 S.E. at 699. Based on these facts, the supreme court stated:

> It is inconceivable that Dr. Parker did not know that, if he told the insurance company [the truth], the insurance would not have been issued to him. The only reasonable inference to be drawn, therefore, is that Dr. Parker deliberately withheld this information, with the fraudulent purpose of procuring the insurance.

179 S.C. at 133, 183 S.E. at 703-04.

The nature of the facts concealed by the insured is a consistent theme in these "rare" cases. In *Johnson*, *Winburn*, and *Parker* for example, the facts concealed were indisputably known by the insured to relate directly to a significantly

increased risk of death or, in *Parker*, disability. From the insureds' knowledge of this increased risk, the court found the existence of fraudulent intent in those cases as a matter of law. Additionally, in the cases the trial court cited in support of its directed verdict, the insured was diagnosed with a grave illness and applied for life insurance with the intent to defraud the insurance company as to that illness.[3] In these cases, the insured obviously knew at the time of the misrepresentation that he or she faced a substantially increased risk of death from the very condition he or she lied about on the insurance application.

This case, on the other hand, is not one of those rare cases. Shenandoah presented no evidence that Lorenzo, at age twenty-six, associated his alcohol or cocaine use with any increased medical risk. The medical records from Lorenzo's visit to Dorn Medical Center reveal that he admitted "drug and alcohol use" to a nurse, and that a doctor assessed it as alcohol and cocaine "abuse." However, neither the nurse nor the doctor remembered at trial what Lorenzo said that led them to write what they wrote in the records. Viewed in the light most favorable to the non-moving party, Dr. Pathak's used the term "abuse" to refer to isolated cocaine and alcohol use. As to any mental disorder, the record contains nothing more than Lorenzo's

---

[3] *See, e.g.*, *Nationwide Life Ins. Co. v. Attaway*, 254 F.2d 30, 32, 34 (4th Cir. 1958) (fraud as a matter of law where insured received extensive treatment for symptoms typical of heart disease that he did not disclose); *Washington v. Garden State Life Ins. Co*., No. 3:06-2824-MBS, 2007 WL 2363827, at *1-2, 4 (D.S.C. Aug. 16, 2007) (insured renewed application for insurance six months after HIV diagnosis but stated he had not tested positive for HIV or consulted a doctor in last five years); *Reese v. Woodmen of the World Life Ins. Soc*., 221 S.C. 193, 203, 69 S.E.2d 919, 923 (1952) (intent to defraud inferred as a matter of law because of applicant's recent and extended medical care for serious heart disease); *Robinson v. Pilgrim Health & Life Ins. Co*., 216 S.C. 141, 145, 57 S.E.2d 60, 62 (1949) (fraud as a matter of law where insured stated he was generally in sound health and concealed a recent operation for tuberculosis); *Murray v. Metro. Life Ins. Co.*, 193 S.C. 368, 370-71, 8 S.E.2d 314, 315 (1940) (insured stated he had not been treated by a physician and had no health problems when he had been hospitalized for advance tuberculosis); *McLester v. Metro. Life Ins. Co.*, 175 S.C. 425, 428-29, 179 S.E. 490, 491-92 (1935) (fraud as a matter of law where insured was informed she had an incurable cancer, sought an insurance agent's office away from her town, and failed to disclose her cancer).

suspicion he had PTSD. These facts support a reasonable inference that Lorenzo's failure to disclose the information was not fraudulent. *See Metro. Life Ins. Co. v. Bates*, 213 S.C. 269, 282, 280, 49 S.E.2d 201, 206 (1948) (supreme court reversed a directed verdict for insurance company, stating "[c]onscious fraud could not be inferred from mere inaccurate answers," and a "[r]easonable inference . . . is . . . that [the insured] considered [one consultation with a physician] of insufficient consequence to notify the company") (quotation marks omitted)).

V. Shenandoah's Other Arguments

Shenandoah makes two additional arguments that we reject. First, Shenandoah argues the fact that Lorenzo signed the application containing the misrepresentations is conclusive evidence he did so with fraudulent intent. We disagree. The simple fact that an answer on a signed application is false does not satisfy an insurer's burden of proving the applicant made the misrepresentation with the intent to defraud the company. *See Smiley*, 249 S.C. at 465, 154 S.E.2d at 836 (stating "the mere signing of the application containing the answers alleged to be false is not conclusive" of fraudulent intent (citation omitted)).

Second, Shenandoah argues there is no evidence in the record to support Lakeisha's position that Lorenzo concealed the information to hide it from his wife and aunt. This argument misapplies the burden of proof. *See Lanham*, 349 S.C. at 364, 563 S.E.2d at 334 ("[T]he burden of proof rests upon the insurer to show, by clear and convincing evidence, . . . that [the statements] were made with intent to . . . defraud the company."). In holding that a jury could reasonably conclude Shenandoah failed to meet its burden of proof, we do not rely on the existence of evidence presented by Lakeisha. Rather, we hold that the evidence Shenandoah presented is insufficient to support a conclusion that it proved Lorenzo's fraudulent intent clearly and convincingly as a matter of law. Our discussion of "several plausible explanations" is simply to illustrate that there is more than one inference a jury may reasonably draw from this evidence. This is particularly true in light of the clear and convincing standard of proof Shenandoah must meet. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) ("Clear and convincing evidence is: that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. The clear and convincing standard is the highest burden of proof known to civil law." (internal citations and quotation marks omitted)).

VI. Conclusion

We do not condone Lorenzo's misrepresentations. We find, however, a jury could have reasonably concluded Shenandoah failed to prove Lorenzo made the misrepresentations with the intent to defraud the insurance company. Therefore, the trial court should not have directed a verdict in favor of Shenandoah.

REVERSED AND REMANDED.

PIEPER, J., concurs.

WILLIAMS, J. dissents.

WILLIAMS, J., dissenting: I respectfully dissent and would affirm the order of the circuit court. I disagree with the majority's holding that a jury could reasonably conclude that Shenandoah failed to meet its burden of proving Lorenzo made the misrepresentation with the requisite fraudulent intent. The undisputed evidence indicates that Lorenzo reported alcohol and cocaine abuse to a nurse and treating physician just one year prior to completing the insurance application at issue in the this case.

Further, I disagree with the majority's reliance on its finding that no evidence indicated that Lorenzo associated his alcohol or cocaine use with any increased medical risk. I believe the association of a prospective insured's drug and alcohol abuse to an increased medical risk is patently apparent. *See Sadel v. Berkshire Life Ins. Co. of Am.*, 473 Fed. Appx. 152, 156 (3d Cir. 2012) (affirming the trial court's order granting the insurance company summary judgment on its rescission counterclaims because clear and convincing evidence indicated the insurer's application included fraudulent statements, namely denying past drug use and treatment for drug use); *Burkert v. Equitable Life Assur. Soc. of Am.*, 287 F.3d 293, 297-98 (3d Cir. 2002) (noting that under Pennsylvania law, misrepresentations regarding alcohol abuse in a life insurance application are deemed to be made in bad faith as a matter of law and extending those holdings to drug abuse); *Life Ins. Co. of Ga. v. Helmuth*, 357 S.E.2d 107, 108-09 (Ga. Ct. App. 1987) (reversing the trial court's denial of an insurance company's directed verdict motion based on undisputed evidence that the insured concealed information about her past treatment for drug and alcohol use). Moreover, evidence that Lorenzo failed to disclose his drug and alcohol use in order to conceal his conduct from his wife and

aunt is purely speculative and, further, is irrelevant to the question of his intent to defraud Shenandoah. I believe that, as a matter of law, Lorenzo's knowing and willful concealment of his drug and alcohol abuse demonstrated an intent to defraud Shenandoah and, thus, the trial court did not err in granting Shenandoah's motion for a directed verdict.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kirby L. Bishop, Herman G. Boney, Richard H. Brown, Michael D. Catt, Basilides F. Cruz, Robert B. Dozier, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, William J. Meyer, Charles F. Morris, Sr., and Joseph A. Smith, Plaintiffs,

Of whom Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith are, Appellants,

v.

City of Columbia, Respondent.

Appellate Case No. 2010-176227

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Opinion No. 5077
Heard March 28, 2012 – Filed January 23, 2013

AFFIRMED IN PART AND REVERSED IN PART

Nancy Bloodgood, of Foster Law Firm, LLC, of Charleston, for Appellants.

W. Allen Nickles, III, of Nickels Law Firm, LLC, and Matthew A. Nickles, of Walker & Reibold, LLC, both of Columbia, for Respondent.

WILLIAMS, J.: On appeal, Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gilliam, III, Alma C. Hill, Barry N. Martin, Charles F. Morris, and Joseph A. Smith (collectively, Retirees) claim the circuit court erred in granting the City of Columbia's (the City) motion for summary judgment on Retirees' claims for continuing free health insurance under claims for breach of contract, promissory estoppel, and equitable estoppel. We affirm in part and reverse in part.

FACTS/ PROCEDURAL HISTORY

Retirees are a group of retired firefighters and police officers who each worked at least twenty years for the City of Columbia. Retirees elected to have group health insurance provided by the City through BlueCross BlueShield of South Carolina. Prior to July 1, 2009, the City paid all costs required to fund the group health insurance for employees and retirees. Retirees received newsletters stating retiree health insurance was free and were told by the City's human resources department that retiree health insurance would be at no cost to the retiree.

Retirees received an employee handbook and an insurance benefits booklet each year they were employed by the City. Under the heading "Employee Benefits," the employee handbook provided, "All employees who retire at age 65 or later . . . will be kept under the City's group coverage with the City making a cash contribution." The employee handbook also outlined a policy for employees who retire with twenty years or more of continuous service, stating, "Currently the City will, at no cost to eligible employees, continue health coverage for eligible employees."

The employee handbook's cover page stated in large font that the employee handbook was "**(NOT A CONTRACT)**." The next page of the employee handbook was dedicated to an "**IMPORTANT NOTICE**," which stated, "**NOTHING IN THIS HANDBOOK . . . SHALL BE DEEMED TO CONSTITUTE A CONTRACT OF EMPLOYMENT**." The important notice further noted, "The City reserves the right to revise, supplement, or rescind any policies or portion of the employee handbook, from time to time, as it deems appropriate in its sole and absolute discretion."

The insurance benefits booklet provided to employees and Retirees each year stated health insurance was "not just fringe benefits, but because the City pays the vast majority of the cost for [Retirees], they represent a significant cost of compensation far beyond your paycheck."

Retirees stated they relied on assurances made by supervisors that retiree health insurance would continue to be free, and they stated they accepted lesser salaries while employed by the City because of the City's policy of providing free health insurance to retirees.

In planning for the 2009-2010 budget, the City considered a number of cost-saving measures, including shifting part of rising health care costs to participants in the City's group health insurance plan. Plan participants, including Retirees, received information, offered objections, and attended meetings concerning the proposed changes to the group health insurance policy. On May 6, 2009, the City Council unanimously voted to require financial contributions by employees and retirees for participation in the group health insurance plan beginning July 1, 2009. Each of the Retirees left employment with the City before July 1, 2009.

On August 10, 2009, thirteen retirees sued the City seeking: (1) reimbursement of all premiums paid since July 1, 2009; (2) individual health insurance on the same terms as provided on the date of retirement prior to July 1, 2009; (3) guarantee of no future reductions in benefits for life; and (4) guarantee of no charges for health benefits for life. The Retirees alleged four causes of action: (1) breach of contract; (2) promissory estoppel; (3) violation of the South Carolina Unfair Trade Practices Act; and (4) declaratory judgment. With the consent of the City, the Retirees amended their complaint to assert equitable estoppel as a cause of action. The City filed a motion to dismiss, and the circuit court dismissed Retirees' unfair trade practices claim but allowed the remaining actions to proceed. The City timely filed a motion for reconsideration, or in the alternative, a motion to stay pending appeal. The circuit court denied both of the City's motions. The City made a summary judgment motion on May 6, 2010. After a hearing, the circuit court granted the City summary judgment on Retirees' breach of contract, promissory estoppel, and equitable estoppel causes of action.[1] Seven of the thirteen retirees bring this appeal.

---

[1] The circuit court found Retirees' claims were not actionable in contract because: (1) Retirees were at-will employees and the City promised Retirees unvested fringe benefits, rather than compensation; (2) the City could not be legally bound by promises and representations made by its employees; (3) the City's handbooks and benefits booklets used present tense language that did not make permanent guarantees to support a contractual right; (4) any contract for future benefits would violate public policy because it would bind future city councils in the performance of their governmental functions; and (5) the benefits are governed by the contract between the City and BlueCross BlueShield of South Carolina. The court found

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c) provides a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). In *Hancock*, our supreme court clarified that the level of evidence required to defeat a motion for summary judgment is dependent upon the non-moving party's burden of proof at trial. 381 S.C. at 330-31, 673 S.E.2d at 803.

LAW/ANALYSIS

I. Breach of Contract

Retirees argue the circuit court erred in granting summary judgment on their cause of action for breach of contract because the record establishes the City breached the contract they had with Retirees. We disagree.

Specifically, Retirees argue the City offered to pay the cost of the retiree health insurance through the employee handbook, insurance benefits booklet, and

---

Retirees' claims were not actionable in promissory or equitable estoppel because the actions and statements of the City's employees could not bind a municipality in the council–manager form of government; Retirees are deemed to know this limitation; and Retirees therefore could not reasonably rely on any of the alleged promises or representations in deciding to work for the City.

statements made by City representatives. Retirees contend they accepted the offer by complete performance, working for the City for over twenty years. Further, Retirees argue working for the City for more than twenty years constituted valid consideration for the contract because they could have earned higher salaries from other employers.

The City argues the employee handbook, insurance benefits booklet, and verbal representations do not create a unilateral contract for continuing free health insurance. We agree with the City and address each assertion in turn.

A. Employee Handbook

Retirees argue the employee handbook created a unilateral contract. We disagree.

A unilateral contract has three elements: (1) a specific offer; (2) communication of the offer to the employee; and (3) performance of job duties in reliance on the offer. *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 336, 516 S.E.2d 923, 926 (1999). "The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract's existence is questioned and the evidence is either conflicting or is capable of more than one inference." *Watkins v. Disabilities Bd. of Charleston Cnty.*, 444 F.Supp.2d 510, 514 (D.S.C. 2006). However, a court should resolve whether the employee handbook constitutes a contract as a matter of law when the employee handbook's policies and disclaimers, taken together, establish that an enforceable promise does or does not exist. *Id.* An employee handbook forms a contract when: (1) the handbook provisions and procedures in question apply to the employee; (2) the handbook sets out procedures binding on the employer; and (3) the handbook does not contain a conspicuous and appropriate disclaimer. *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 20 (Ct. App. 2006).

Here, we find the employee handbooks applied to the Retirees during their employment, and the employee handbooks set out a policy of continuing free health insurance. Specifically, the 1987 version stated, "The City of Columbia hereby declares as a matter of policy that the City government . . . can better serve the public by administering . . . a personnel program which provides for and incorporates the following: . . . 5. Providing a program of extended benefits including . . . retirement benefits. " Later versions of the handbook added the following: "Currently, the City will, at no cost to eligible employees, continue health coverage for eligible employees in accordance with the following" eligibility requirements. We hold a contract does not exist.

In *Marr v. City of Columbia*, 307 S.C. 545, 547, 416 S.E.2d 615, 616 (1992), our supreme court held an employee handbook did not form a contract when the employee handbook had a large disclaimer on the front cover stating, "Not a Contract"; there was no evidence the employee handbook was treated as a contract notwithstanding the disclaimer; and there was no evidence the parties waived the disclaimer. Further in *Marr*, the next page of the employee handbook contained an "IMPORTANT NOTICE" that explicitly stated nothing in the handbook should be deemed to constitute a contract. *Id.* The court went on to state the following:

> If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document. . . . Where, as here, the employer conspicuously disclaims the handbook as a contract and the parties have not waived the disclaimer, summary judgment for the employer on the issue of whether the handbook forms an employment contract is appropriate.

Id.

Since at least 1987 the employee handbooks contained the same disclaimer as the employee handbook in *Marr*, stating in large font, "Not a Contract" on the front cover of the employee handbooks. Further, the page after the cover page of the employee handbooks was devoted to an "IMPORTANT NOTICE," which provided in bold, conspicuous language: "NOTHING IN THIS HANDBOOK OR IN ANY OF THE CITY'S PERSONNEL POLICIES SHALL BE DEEMED TO CONSTITUTE A CONTRACT OF EMPLOYMENT . . . ." Each Retiree signed numerous acknowledgment forms confirming the employee handbooks did not create a contract. We find the plain language of the employee handbook conspicuously disclaims the existence of a contract, and no evidence indicates the City treated the handbook as a contract despite the disclaimer.

Moreover, our current statutory framework supports the conclusion that the employee handbook contained a conspicuous disclaimer. On March 15, 2004, the South Carolina General Assembly passed section 41-1-110 of the South Carolina

Code (Supp. 2011), which states a handbook shall not create an employment contract if it is conspicuously disclaimed. Section 41-1-110 provides:

> It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, *shall not create an express or implied contract of employment if it is conspicuously disclaimed*. For purposes of this section, a disclaimer in a handbook or personnel manual must be in *underlined capital letters on the first page of the document and signed by the employee*. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

(emphasis added). Section 41-1-110 applies to all employee handbooks issued by the City after June 30, 2004.[2] The only employee handbook provided in the record after June 30, 2004, is the employee handbook for 2005. As said before, the second page of the 2005 employee handbook contained a disclaimer stating, "NOTHING IN THIS HANDBOOK OR IN ANY OF THE CITY'S PERSONNEL POLICIES SHALL BE DEEMED TO CONSTITUTE A CONTRACT OF EMPLOYMENT . . . ." This disclaimer was in all capital letters and was underlined. Additionally, beginning in 2004, Retirees signed a disclaimer contained in the employee handbook. Analogizing to the current statute, we find the disclaimer contained in the 2005 employee handbook was conspicuous as a matter of law, and the City did not waive the disclaimer. *See* § 41-1-110 ("[A] handbook . . . issued by an employer . . . shall not create an express or implied contract of employment if it is conspicuously disclaimed."); *Marr v. City of Columbia*, 307 S.C. 545, 547, 416 S.E.2d 615, 616 (1992) ("Where, as here, the employer conspicuously disclaims the handbook as a contract and the parties have not waived the disclaimer, summary judgment for the employer on the issue of whether the handbook forms an employment contract is appropriate."). Accordingly, the circuit court did not err in granting summary judgment on Retirees' breach of contract claim.

[2] All other employee handbooks provided in the record are not subject to section 41-1-110 as they were issued prior to June 30, 2004.

B. Insurance Benefits Booklet

Retirees also argue the insurance benefits booklet created a unilateral contract for continuing free health insurance. We disagree.

We need not address whether performance in accordance with the insurance benefits booklet creates a unilateral contract because, even if it did, nowhere in the insurance benefits booklet does it provide that Retirees are entitled to continuing free health insurance. Under the title, "Retiree Participation Requirements (Must have 20 years of City Employment),"[3] the insurance benefit booklet states:

> Health coverage is available to retiring employees and dependents if certain eligibility requirements are met . . . . An eligible participant must qualify for a City of Columbia Retirement Program, Fire Fighters Retirement, or Police Retirement. The participant must have worked for the city as a regular employee (at least 30 hours a week) . . . . Retiree Health Coverage for this program will be paid under the benefits specified in this booklet until the attainment of 65. At age 65, the retiree must be enrolled in Medicare PART A and PART B under TITLE XVIII of the Social Security Act.

Accordingly, we find the circuit court did not err in finding the insurance benefits booklet did not create a contract for continuing free health insurance for Retirees.

C. Representations by City Employees

Retirees argue representations made by City employees, such as supervisors and human resource employees, created enforceable unilateral contracts that were consummated by Retirees' continued employment with the City. We disagree.

The authority of the City's employees to contract with Retirees is limited to the authority that can be traced from those employees to the provisions of legislation from which they derive their power. *See* S.C. Code Ann. § 5-7-160 (2011) ("All

[3] The number of years of employment required to qualify for participation in the Retiree Program increased over the years from no time requirement, to ten years, to fifteen years, to twenty years.

powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law."); City of Columbia Ordinance § 1-2(a) (providing that whenever the ordinances require or authorize the head of a department or other officer of the city to do some act or perform some duty, the department head or other officer is authorized to designate, delegate and authorize subordinates to do the required act or perform the required duty unless the terms of the provision specifically designate otherwise); *cf.* 56 Am. Jur. 2d Municipal Corporations, Etc. § 237 ("The general rule with regard to municipal officers is that they have only such powers as are expressly granted by . . . sovereign authority or those which are necessarily to be implied from those granted.").

Here, the City has adopted the council–manager form of municipal government. City of Columbia Ordinance § 2-1. Under that form, the City's legislative and policy powers are vested in the City Council, and the salaries of the City's employees and officials must be approved by the City Council. S.C. Code Ann. § 5-13-30 (2011); City of Columbia Ordinance § 2-111. The City Manager is the chief executive officer and administrative head of the City. Thus, he is responsible for the administration of the municipality's affairs, including the employment of assistants to exercise such supervisory responsibilities over departments as he may delegate. S.C. Code Ann. § 5-13-90 (2011); City of Columbia Ordinance § 2-114(a)-(b). Further, each officer and department head has supervisory control of his department subject to the City Manager's direction and is authorized to delegate power to subordinates to perform their duties. City of Columbia Ordinance § 2-151(a)-(b); City of Columbia Ordinance § 2-125.

Therefore, to survive summary judgment on this argument, Retirees must provide a scintilla of evidence that the supervisors and human resource personnel who made the alleged promises had authority to create contracts for continuing free life insurance. Retirees have failed to do so. They have failed to show any action by the City Council or City Manager authorizing such contracts or granting the authority to these employees to enter the contract. They also failed to provide any evidence the supervisors and human resource employees who made the promises either had authority to enter these contracts directly or through the proper delegation of authority. Consequently, these alleged promises cannot bind the City under a theory of unilateral contract.[4]

[4] The City also argues, and Retirees dispute, that summary judgment on the contract claims was appropriate because: (1) Retirees were "at-will" employees; (2)

II. Promissory Estoppel and Equitable Estoppel

Retirees argue the circuit court erred in granting the City's motion for summary judgment on the promissory estoppel and equitable estoppel causes of action. Retirees maintain a genuine issue of material fact exists as to whether they reasonably relied on statements by City's representatives and written promises to provide continuing free health insurance after retirement. We agree in part.

As a general rule, to prove estoppel against a city, the relying party must prove: (1) lack of knowledge and of the means to obtain the knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position. *S.C. Dep't of Transp. v. Horry Cnty.*, 391 S.C. 76, 83, 705 S.E. 2d 21, 25 (2011). Similarly, the elements of promissory estoppel are: (1) a promise unambiguous in its terms; (2) the party to whom the promise is made reasonably relies on it; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993).

A. Written Promises

Retirees assert summary judgment was inappropriate because there is evidence they reasonably relied to their detriment on the City's written promises to provide free health insurance made in the employee handbook, insurance benefits booklet, and employee newsletters.[5] We agree in part.

---

contracts for continuing free health insurance would violate public policy; and (3) Retirees could not have a permanent right to free lifetime health insurance under *Alston v. City of Camden*, 322 S.C. 38, 471 S.E.2d 174 (1996). Because we affirm the grant of summary judgment against the contract claims on other grounds, we need not address these arguments. *See Futch v. McAllister Towing Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

[5] We do not address the employee newsletters in light of our finding that summary judgment was not appropriate as a result of the City's oral promises and representations.

Retirees argue they relied upon the employee handbook and benefits booklet in deciding to remain employed with the City each year until they reached twenty years' service. However, the employee handbook conspicuously disclaimed any binding promises, and the benefits booklet made no promises of continuing free health insurance at all. Therefore, Retirees cannot claim reasonable reliance on those materials, and the estoppel claims cannot survive summary judgment to the extent the claims are based on them.

B. Statements by City Employees

Retirees argue summary judgment on estoppel was inappropriate because there is a genuine issue of fact as to whether they reasonable relied on promises and representations made by City employees. We agree.

The acts of a city official acting within the proper scope of his or her authority may give rise to estoppel against a municipality. *Charleston Cnty. v. Nat'l Advert. Co.*, 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987); *Landing Dev. Corp. v. City of Myrtle Beach*, 285 S.C. 216, 221, 329 S.E.2d 423, 426 (1985) ("Government agents, acting within the proper scope of their authority, can by their acts give rise to estoppel against a municipality."); *Abbeville Arms v. City of Abbeville*, 273 S.C. 491, 493-94, 257 S.E.2d 716, 718 (1979) (holding the city was not immune from an estoppel claim because a permit applicant bought property in reliance upon: (1) a zoning ordinance passed by the city council and a zoning map issued by the city pursuant to the ordinance that indicated the applicant's property was zoned for the applicant's intended purpose and (2) a statement by the city zoning administrator confirming what the ordinance and zoning map said). "The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment." *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987).

The City cites to a number of cases, arguing that they indicate Retirees could not rely upon the representation of City employees as to whether they were entitled to free health insurance for life. However, two of the cases do not involve governmental entities. *See McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008); *West v. Gladney*, 341 S.C. 127, 134-35, 533 S.E.2d 334, 337-38 (Ct. App. 2000). Other cases involve civil rights claims alleging violations of the plaintiffs' constitutional rights as a result of official policy by the City. *See Stanley v. Kirkpatrick*, 357 S.C. 169, 176, 592 S.E.2d 296, 299 (2004); *Todd v. Smith*, 305 S.C. 227, 230-31, 407 S.E.2d 644, 646-47 (1991).

Another case addresses whether a public officer could sustain a contract claim. *See Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 131, 459 S.E.2d 876, 880 (Ct. App. 1995), *aff'd by* 324 S.C. 239, 478 S.E.2d 836 (1996). Further cases hold that estoppel will not lie against a governmental entity when the government's employee gives erroneous information in contradiction of a statute. *See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210-11, 417 S.E.2d 579, 582-83 (1992); *Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 319-20, 659 S.E.2d 263, 267 (Ct. App. 2008). One also holds that a party cannot reasonably rely on government conduct to create a contract where the governmental actor purports to act pursuant to legislation that itself does not give authority to make the contract. *See Ahrens v. State*, 392 S.C. 340, 353-57, 709 S.E.2d 54, 61-63 (2011). Lastly, a case holds that the plaintiffs could not rely upon representations by a governmental employee where the employee explicitly said his assertions were subject to the school board's approval. *See Davis v. Greenwood School Dist.*, 365 S.C. 629, 634-35, 620 S.E.2d 65, 67-68 (2005).

None of the above cases answer whether a private party may rely on the representations of municipal employees for estoppel claims when the authority to make those representations *can* be traced back to the legislation that granted the municipal authority. *See Oswald v. Aiken Cnty.*, 281 S.C. 298, 303, 315 S.E.2d 146, 150 (Ct. App. 1984) ("The County cannot escape liability to Oswald under a policy it had the general power to implement on the ground that the administrator was not technically authorized to approve payment for compensatory time."). Here, the evidence does not conclusively indicate the City's employees gave information that contradicted a statute or ordinance. Nor does the evidence conclusively indicate the employees acted outside their authority when they explained Retirees' benefits.

Retirees provided a scintilla of evidence that they reasonably relied upon the representations and promises of the City's human resource employees' explanations of the health insurance benefits to their detriment. Retirees presented evidence the City's human resource employees repeatedly told them that retiree health insurance would continue to be free throughout retirement, specifically during discussions on how to explain the City's obligations to new recruits. The City provided employees with newsletters stating free insurance would continue upon retirement. The City Manager indicated that human resource employees were authorized to

inform Retirees about their insurance benefits, and the City's ordinances support this testimony.[6]

Retirees also testified that several supervisors informed them they would receive free health insurance for life during their individual merit interviews and evaluations, which were incidental to the supervision of their employment. Therefore, the employment review context during which the representations were made provides a scintilla of evidence to suggest the representations and promises were within the supervisors' authority and reasonably relied upon.

Therefore, instead of holding Retirees were charged with knowledge of the extent to which the City's employees were incorrect, it is a question of fact as to whether these explanations were authorized and reasonably relied upon. As a result, the trial court erred in granting summary judgment on Retirees' estoppel claims.

CONCLUSION

Based on the foregoing, we find the trial court properly granted summary judgment against Retirees on their contract claims. We also find the trial court properly granted summary judgment against Retirees on all of their estoppel claims to the extent those claims are based upon the employee handbook and benefits booklet. However, we find the trial court erred in granting summary judgment against

---

[6] *See* City of Columbia Ordinance § 2-114 ("(a) Duties. The city manager shall be the chief executive officer of the city and head of the administrative branch of city government. The city manager shall perform and exercise the duties and responsibilities prescribed by law for this office and such other duties and responsibilities as prescribed by the City Council. (b) Assistants. The city manager may employ assistants to exercise such supervisory responsibilities over departments as the city manager may delegate."); City of Columbia Ordinance § 2-151 ("(a) The following departments of the city are created: . . . Human resources; . . . Fire; . . . (b) The head of each department shall be a director, who shall be an officer of the city and shall have supervision and control of his department, subject to the city manager. The city manager may serve as director of one or more departments or divisions within any department."); City of Columbia Ordinance § 2-125 ("The director of human resources, subject to the city manager, shall have administrative supervision over the department of human resources and shall be responsible for those activities relating to employment, employee relations, and training and shall perform such additional duties as may be assigned by the city manager.").

Retirees on their estoppel claims based upon representations made by their supervisors and the City's human resource personnel.

Accordingly, the circuit court's rulings are

AFFIRMED IN PART and REVERSED IN PART.

THOMAS and LOCKEMY, JJ., concur.