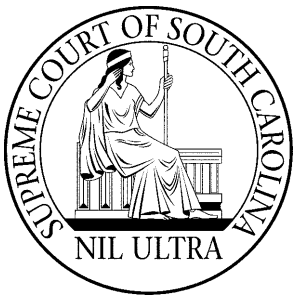

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48
December 9, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, and South Carolina Solar Business Alliance, LLC, Appellants,

v.

Dominion Energy South Carolina, Inc. and South Carolina Office of Regulatory Staff, Respondents.

Appellate Case No. 2018-001165

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

December 9, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, and South Carolina Solar Business Alliance, LLC, Appellants,

v.

Dominion Energy South Carolina, Inc. and South Carolina Office of Regulatory Staff, Respondents.

Appellate Case No. 2018-001165

Appeal from the Public Service Commission

Opinion No. 27994
Heard September 26, 2019 – Filed September 9, 2020
Re-Filed December 9, 2020

DISMISSED

James Blanding Holman IV, Christopher Kaltman DeScherer, and Katherine Lee Mixson, Southern Environmental Law Center, of Charleston, for South Carolina Coastal Conservation League and Southern Alliance for Clean Energy. Joseph Samuel Dowdy and Benjamin L. Snowden, Kilpatrick Townsend & Stockton LLP, of Raleigh, NC; Richard L. Whitt, Austin & Rogers, PA, of

Columbia, for South Carolina Solar Business Alliance, LLC.

John Marion S. Hoefer, Mitchell Willoughby, and Chad Nicholas Johnston, Willoughby & Hoefer, PA, of Columbia; Matthew William Gissendanner and K. Chad Burgess, of Cayce, for Dominion Energy South Carolina, Inc. Jenny Rebecca Pittman and Andrew McClendon Bateman, of Columbia, for South Carolina Office of Regulatory Staff.

JUSTICE FEW: This is an appeal from an order of the Public Service Commission setting rates an electric utility must pay to solar and other qualifying renewable energy producers for electricity the utility will then sell to its customers. We dismiss the appeal because the appeal is moot.

I. Introduction

Federal law requires electric utilities to offer to purchase renewable electric energy from any qualifying facility that seeks to sell it. South Carolina law implementing the federal requirements required that our Public Service Commission (PSC) conduct annual proceedings and set the rates an electric utility must pay. In 2018, the PSC set the rates for Dominion Energy South Carolina, Inc., then known as South Carolina Electric & Gas Company. This is an appeal from the PSC's 2018 order.

South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, and South Carolina Solar Business Alliance, LLC intervened at the PSC. Each filed notices to appeal the PSC's order to this Court. Following oral argument, at which the Court raised the questions of standing and mootness, Dominion filed a motion to dismiss the appeal on those grounds.

We find the appeal is moot. The rates the PSC set in 2018 have been superseded by rates the PSC set in 2019. The General Assembly enacted new legislation in 2019 that significantly changed the procedures the PSC followed in 2019 and must follow in future proceedings. Thus, any guidance this Court could provide by addressing this appeal would be academic.

II. Federal and State Law

We begin by summarizing the rather complicated governing federal and state law.

a. Public Utility Regulatory Policies Act

The Public Utility Regulatory Policies Act,[1] commonly called PURPA, was enacted "to encourage (1) conservation of energy supplied by electric utilities; (2) the optimization of the efficiency of use of facilities and resources by electric utilities; and (3) equitable rates to electric consumers." 16 U.S.C.A. § 2611 (2010). Congress specifically intended to promote the production of renewable energy from sources such as solar. *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404, 103 S. Ct. 1921, 1924, 76 L. Ed. 2d 22, 27 (1983). A renewable energy producer that qualifies for the provisions of PURPA is called a "qualifying" facility. 16 U.S.C.A. § 796(17)(A), (C), (18)(A), (B) (2010).

PURPA requires that electric utilities offer to purchase renewable energy from qualifying facilities. It provides the Federal Energy Regulatory Commission (FERC) "shall prescribe . . . rules [which] require electric utilities to offer to . . . purchase electric energy from [qualifying] facilities," 16 U.S.C.A. § 824a-3(a)(2) (2010), and the rules "shall insure that . . . the rates for such purchase" are "just and reasonable to the electric consumers of the electric utility and in the public interest" and do not "exceed[] the incremental cost to the electric utility of alternative electric energy." 16 U.S.C.A. § 824a-3(b).

The terms "incremental costs" and its synonym "avoided costs" are central to the rate-setting procedures under PURPA. Congress defined "incremental cost" as "the cost to the electric utility of the electric energy which, but for the purchase from such [qualifying facility], such utility would generate or purchase from another source." 16 U.S.C.A. § 824a-3(d) (2010).[2] In other words, the PSC may not set the rates for

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[1] Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of titles 7, 15, 16, 42, and 43 U.S.C.).

[2] FERC rules and regulations use the term "avoided costs" and define the term to mean "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities,

renewable energy higher than the combination of expenses and capital costs the utility would incur if it produced the electricity itself, or if it purchased the electricity from another provider.

b. South Carolina Law Implementing Federal Requirements

In 2018, South Carolina law required the PSC to set the rates for renewable energy as part of a utility's annual "fuel cost" review proceeding. S.C. Code Ann. § 58-27-865 (2015). The applicable statute—still in effect for other purposes—required the PSC to conduct "twelve-month reviews to determine whether an increase or decrease in the base rate amount designed to recover fuel cost should be granted." § 58-27-865(B). "The term 'fuel cost' . . . includes . . . fuel costs related to purchased power." § 58-27-865(A)(1). The term "fuel costs related to purchased power" includes "costs under . . . PURPA." § 58-27-865(A)(2).

In 2019, the General Assembly enacted the South Carolina Energy Freedom Act. Act No. 62, 2019 S.C. Acts 368. Section 1 of the Act sets forth new procedures through which the PSC must set rates for renewable energy under PURPA. *See* S.C. Code Ann. §§ 58-41-05 to -40 (Supp. 2019). Subsection 58-41-20(A)(1) specifically provides the proceedings are now "separate from the electrical utilities' annual fuel cost proceedings conducted pursuant to Section 58-27-865." The new procedures "include . . . discovery, filed comments or testimony, and an evidentiary hearing." § 58-41-20(A)(2). Under one particularly important new procedure, the PSC "shall engage . . . a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section." § 58-41-20(I). The PSC must now conduct these proceedings and set new rates "at least once every twenty-four months." § 58-41-20(A).

III. Standing and Mootness

At oral argument, we questioned whether any of the appellants had standing to appeal the PSC's decision to this Court. In our original opinion dismissing the appeal, we held appellants Coastal Conservation League and Southern Alliance do

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such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (2020).

not meet the standard for appellate standing in either Rule 201(b), SCACR or section 58-27-2310 of the South Carolina Code (2015). *S.C. Coastal Conservation League v. Dominion Energy*, Op. No. 27994 (S.C. Sup. Ct. filed Sept. 9, 2020) (Shearouse Adv. Sh. No. 35 at 53, 57). In their petition for rehearing, which we granted, Coastal Conservation League and Southern Alliance make two points that cause us to withdraw the holding regarding standing to appeal.[3] First, they concede the appeal is moot. Second, they claim two federal statutes grant them standing to appeal to this Court, despite the lack of state authority for their standing. *See* 16 U.S.C.A. § 824a-3(g)(1) (2010) ("Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority . . . in the same manner . . . as judicial review may be obtained under [16 U.S.C.A. §] 2633."); 16 U.S.C.A. § 2633(c)(1) (2010) ("Any person . . . may obtain review of any determination made under subchapter I or II or under this subchapter with respect to any electric utility . . . in the appropriate State court if such person . . . intervened or otherwise participated in the original proceeding or if State law otherwise permits such review."). In light of Coastal Conservation League and Southern Alliance's concession the appeal is moot, we now find it unnecessary to address the standing question, including whether the federal statutes control appellate standing in state court.

We also questioned at oral argument whether any qualifying facility sought to sell renewable energy to Dominion under the 2018 rates, and if not, whether the appeal is moot as to Solar Business Alliance. Neither Dominion nor Solar Business Alliance could provide the Court with definitive answers at that time. After Dominion filed its motion to dismiss, the parties informed us that no qualifying facility sought to sell renewable energy to Dominion under the PR-2 rate, one of the rates set by the PSC in 2018. In fact, the PSC determined in its 2019 order, "in light of the requirements of [the Energy Freedom Act], the Company's Rate PR-2 is no longer necessary or required." *See* Docket No. 2019-184-E, Order No. 2019-847, at 90. All issues related to the PR-2 rate for 2018 are moot.

As to one other rate—the PR-1 rate—there were approximately forty qualifying facilities that sold renewable energy to Dominion under the 2018 order. Dominion explained that if the PSC had adopted the appellants' proposal concerning one component of the PR-1 rate—the avoided capacity cost component—rather than the

[3] Solar Business Alliance did not file a petition for rehearing, but did file what it termed an "Amicus Brief" in support of the petition filed by Coastal Conservation League and Southern Alliance, which addressed only standing, not mootness.

proposal made by Dominion, "these [qualifying facilities] collectively would have realized additional revenue of approximately $600 over a twelve-month period." The parties agree this would average out to approximately $15 for each qualifying facility. Solar Business Alliance concedes this amount is "relatively small," but asserts $15 per qualifying facility is "real and quantifiable." Importantly, however, not one of the forty qualifying facilities is owned by or known to be connected with any member of Solar Business Alliance.

This is not a claim for damages. This is not a claim brought by a qualifying facility. This is not a claim brought by an entity with any connection to any qualifying facility that would be affected by our decision. This is an appeal from an order setting rates a utility must offer for renewable energy. The rates have expired. If we were to reverse the PSC, our ruling would have no effect on Coastal Conservation League, Southern Alliance, or Solar Business Alliance. The only effect our decision could have would be that a non-party to this appeal would earn additional revenue of $15. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). We find any issues regarding the propriety of the PR-1 rate are moot.

Solar Business Alliance argues that an exception to mootness applies. It contends the Energy Freedom Act does not address several issues raised in this appeal, such as the burden of proof, and "with the biennial . . . rate updates now mandated . . . , it is likely that future challenged rates will have expired by the time this Court can decide any appeal of the Commission's . . . decisions." While the latter point is undoubtedly valid, we believe the Act does address all issues raised by Solar Business Alliance in this appeal. Specifically, the requirement in newly-enacted subsection 58-41-20(I) that the PSC "engage . . . a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs" relates directly to the burden of proof. The issues raised here should be addressed in an appeal from an order applying the Energy Freedom Act. For the same reason, this appeal does not present "questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *See Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (citation omitted).

IV. Conclusion

We find the appeal is moot.

DISMISSED.

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

The Supreme Court of South Carolina

Dr. Thomasena Adams, Rhonda Polin, Shaun Thacker, Orangeburg County School District, Sherry East, and the South Carolina Education Association, Petitioners,

v.

Governor Henry McMaster, Palmetto Promise Institute, South Carolina Office of the Treasurer, and South Carolina Department of Administration, Respondents.

Appellate Case No. 2020-001069

ORDER

After careful consideration of Respondents' petition for rehearing, the Court grants the petition, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ John D. Geathers A.J.

Columbia, South Carolina
December 9, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dr. Thomasena Adams, Rhonda Polin, Shaun Thacker, Orangeburg County School District, Sherry East, and the South Carolina Education Association, Petitioners,

v.

Governor Henry McMaster, Palmetto Promise Institute, South Carolina Office of the Treasurer, and South Carolina Department of Administration, Respondents.

Appellate Case No. 2020-001069

ORIGINAL JURISDICTION

Opinion No. 28000
Heard September 18, 2020 – Filed October 7, 2020
Re-Filed December 9, 2020

DECLARATORY JUDGMENT ISSUED

Skyler Bradley Hutto, of Williams & Williams, of Orangeburg, and W. Allen Nickles, III, of Nickles Law Firm, of Columbia, for Petitioners.

Thomas Ashley Limehouse, Jr. and Anita (Mardi) S. Fair, both of the Office of the South Carolina State Governor; Robert E. Tyson, J. Michael Montgomery, and Vordman Carlisle Traywick, III, all of Robinson Gray Stepp &

Laffitte, LLC; and Michael J. Anzelmo, of McGuireWoods LLP, all of Columbia, for Respondent Governor Henry D. McMaster.

Matthew Todd Carroll and Kevin A. Hall, both of Womble Bond Dickinson LLP, of Columbia, and Daniel R. Suhr and Brian K. Kelsey, both of Liberty Justice Center, of Chicago, IL, for Respondent Palmetto Promise Institute.

Shelly Bezanson Kelly and Shawn David Eubanks, both of the South Carolina Treasurer's Office, of Columbia, for Respondent South Carolina Office of the State Treasurer.

David Keith Avant, General Counsel, and Mason A. Summers, Deputy General Counsel, both of the South Carolina Department of Administration, and Eugene Hamilton Matthews, of Richardson Plowden & Robinson, PA, all of Columbia, for Respondent South Carolina Department of Administration.

Timothy J. Newton, of Murphy & Grantland, P.A., of Columbia, for Amicus Curiae Association of Christian Schools International.

Gray Thomas Culbreath, of Gallivan, White & Boyd, P.A., of Columbia, and Leslie Davis Hiner, of EdChoice, Inc., of Indianapolis, IN, for Amicus Curiae EdChoice, Inc.

Joshua W. Dixon, of Gordon Rees Scully Munsukhani, of Charleston, and Paul Sherman, of Institute for Justice, of Arlington, VA, for Amicus Curiae Institute for Justice.

Miles Landon Terry and Michelle K. Terry, both of Greenville, and Jay Alan Sekulow, Benjamin P. Sisney, and Jordan Sekulow, of Washington DC, all of The American Center for Law & Justice, for Amicus Curiae Members of South Carolina's U.S. Congressional Delegation and the American Center for Law and Justice.

David T. Duff, of Duff Freeman Lyon LLC, of Columbia, and Francisco M. Negron, Jr., Chief Legal Officer, of National School Boards Association, of Alexandria, VA, for Amicus Curiae National School Boards Association.

Reginald Wayne Belcher and Mark Brandon Goddard, both of Turner Padget Graham & Laney, P.A., of Columbia, for Amicus Curiae Palmetto State Teachers Association.

Lindsay Danielle Jacobs, of Public Education Partners Greenville County, of Greenville, and Robert Edward Lominack, of Richland County Public Education Partners, of Columbia, for Amici Curiae Public Education Partners Greenville County and Richland County Public Education Partners.

Matthew Anderson Nickles, of Richardson, Patrick, Westbrook, & Brickman, LLC, of Columbia, for Amici Curiae Public Funds Public Schools and Southern Education Foundation.

John Marshall Reagle, Vernie L. Williams, and Connie Pertrice Jackson, all of Halligan Mahoney Williams Smith Fawley & Reagle, P.A., of Columbia, for Amici Curiae South Carolina School Boards Association and South Carolina Association of School Administrators.

Eliot Bradford Peace, of Tampa, FL, and Lindsey C. Boney, IV, of Birmingham, AL, both of Bradley Arant Boult Cummings LLP, for Amici Curiae The Foundation for Excellence in Education, Inc., and The Alliance for School Choice.

Peter Michael McCoy, Jr., United States Attorney, of Charleston, and Tina Cundari, Assistant United States

Attorney, of Columbia, for Amicus Curiae United States of America.

Karl Smith Bowers, Jr., of Bowers Law Office LLC, of Columbia, for Amicus Curiae The South Carolina Independent Colleges and Universities, Bob Jones University, and Clinton College.

CHIEF JUSTICE BEATTY: We granted the petition for original jurisdiction in this declaratory judgment action challenging the constitutionality of Governor Henry McMaster's allocation of $32 million in federal emergency education funding for the creation of the Safe Access to Flexible Education ("SAFE") Grants Program. Petitioners contend the program, which provides one-time tuition grants for students to attend private and independent primary and secondary schools for the 2020-2021 academic year, violates our constitutional mandate prohibiting public funding of private schools. We hold the Governor's decision constitutes the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution.

I. FACTS

On March 13, 2020, the President declared a national emergency based on a determination that the coronavirus ("COVID-19") poses an actual or imminent public health emergency, and Governor McMaster ("the Governor") subsequently issued a State of Emergency in South Carolina. On March 27, 2020, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) ("the CARES Act"). In the Act, Congress appropriated $30.75 billion to the Education Stabilization Fund to prevent, prepare for, and respond to COVID-19. Specifically, Congress ordered the Secretary of Education to allocate the money to three sub-funds: (1) the Governor's Emergency Education Relief ("GEER") Fund; (2) the Elementary and Secondary School Emergency Relief ("ESSER") Fund; and (3) the Higher Education Emergency Relief ("HEER") Fund. *See* CARES Act § 18001(b). This matter concerns the award of GEER funds to the State of South Carolina to be distributed at the direction of the Governor. Under the Act, Congress provided that GEER funds may be used to:

> (1) provide emergency support through grants to local educational agencies that the State educational agency deems have been most significantly impacted by coronavirus to support the ability of such local educational agencies to continue to provide educational services to their students and to support the on-going functionality of the local educational agency;
>
> (2) provide emergency support through grants to institutions of higher education serving students within the State that the Governor determines have been most significantly impacted by coronavirus to support the ability of such institutions to continue to provide educational services and support the on-going functionality of the institution; and
>
> (3) provide support to any other institution of higher education, local educational agency, or education related entity within the State that the Governor deems essential for carrying out emergency educational services to students for authorized activities described in section 18003(d)(1) of this title or the Higher Education Act, the provision of child care and early childhood education, social and emotional support, and the protection of education-related jobs.

Id. § 18002(c). Under this section, the eligible grant recipients include local educational agencies, institutions of higher learning, and other education related entities. *Id*. The grants are awarded to each State based on the relative population of individuals aged 5 through 24 and the relative number of children counted under section 1124(c) of the Elementary and Secondary Education Act of 1965. *Id*. § 18002(b). States receiving GEER Fund grants must award the funds to eligible entities within one year of receiving the allocation. *Id*. § 18002(d). Any funds not awarded within the one-year period must be returned to the Department of Education for reallocation to other states. *Id*.

On May 8, 2020, the Governor applied for a GEER Fund grant, which the Department of Education approved and awarded $48,467,924 to South Carolina. On July 20, 2020, the Governor announced the creation of the Safe Access to Flexible Education ("SAFE") Grants Program to be funded using $32,000,000 of the GEER funds awarded under the CARES Act. The program would provide one-time, need-based grants of up to $6,500 per student to cover the cost of tuition for eligible students to attend participating private or independent schools in South Carolina for

the 2020-2021 academic year. Families with a household adjusted gross income of up to 300% of the federal poverty level would be eligible to apply through the program's online portal. The first 2,500 grants are to be awarded on a first-come, first-served basis, after which a lottery program will be instituted to allocate the balance of available grant funds.

Private schools wishing to participate in the SAFE Grants Program must satisfy certain criteria, including providing a certification that they have been impacted by COVID-19, and the Governor's advisory panel will select the independent schools eligible to receive grants. Once a student has selected the private school he or she would like to attend from a preapproved list, and the student's enrollment is confirmed, the parent or guardian directs electronic payment of the SAFE Grant funds to the school through a secure online platform. Approved schools enroll as a vendor within the online platform to receive SAFE Grant payments. In the event a student withdraws from the school during the school year, the school must issue a pro-rated refund to the SAFE Grants Program for any unexpended or pre-paid tuition.

Prior to the creation of the SAFE Grants Program, the Governor signed Act 135 of 2020 into law, which provided for supplemental appropriations for the State's fiscal year to combat COVID-19 and for the operation of state government during the public health crisis. Act No. 135, 2020 S.C. Acts ___. Act 135 required the Executive Budget Office to "establish the Coronavirus Relief Fund as a federal fund account separate and distinct from all other accounts" and authorized the Governor to receive federal money designated for the Fund on behalf of the State. *Id*. § 2(C)–(D).

Petitioners challenged the Governor's use of the State's GEER funds for the SAFE Grants Program, seeking a declaratory judgment and injunctive relief in the circuit court and naming the State of South Carolina, the Governor, and Palmetto Promise Institute ("Palmetto Promise") as defendants. The circuit court issued a temporary restraining order and scheduled a hearing. The Governor and Palmetto Promise filed motions to dissolve the temporary restraining order, and all three of the defendants moved to dismiss Petitioners' complaint. At the hearing, the court dismissed the State, finding a lack of subject matter jurisdiction. Subsequently, Petitioners advised the court of their intent to amend their initial complaint to refine the pleadings and include additional plaintiffs and expressed their desire to file a petition for original jurisdiction in this Court. The circuit court extended the original temporary restraining order for another ten days, struck the matter from the docket

pursuant to Rule 40(j), SCRCP, and allowed Petitioners to restore the action to the circuit court docket under the amended complaint if this Court did not grant the petition. Thereafter, Petitioners filed a petition for original jurisdiction, requesting declaratory and injunctive relief, which this Court granted.[1] We also granted Petitioners' request to expedite the case and for a preliminary injunction, ordering Respondents to temporarily cease and desist in distributing any SAFE Grants Program funds in order to avoid prejudice and the potential for irreparable harm. Following oral argument, we extended the injunction until the issuance of this opinion.

II. DISCUSSION

A. Standing

At the outset, the Governor moves to dismiss Petitioners' complaint because they lack standing to sue. "Standing to sue is a fundamental requirement to instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Generally, a party must be a real party in interest to obtain standing, meaning the party has "a real, material, or substantial interest in the outcome of the litigation." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (quoting *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006)). Standing may be achieved by statute, constitutional standing, or the public importance exception. *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). The Governor claims Petitioners have failed to identify a statute that gives them standing. He also argues Petitioners are unable to prove constitutional standing because they cannot demonstrate an injury-in-fact that is personal to them, since the GEER funds are to be used at the Governor's discretion, and public schools are not inherently entitled to them.

Petitioners claim standing under the public importance exception. "Unlike with constitutional standing, a party is not required to show he has suffered a concrete or particularized injury in order to obtain public importance standing." *S.C.*

[1] The Governor and Palmetto Promise filed substantive briefs in this case. The South Carolina Office of the State Treasurer defers to the Governor's brief on the substantive issues. The South Carolina Department of Administration states it "has acted and will act in this matter pursuant only to the authority bestowed upon it by the legislature of this State and in accordance with any order(s) issued by this Court."

Pub. Interest Found. v. S.C. Dep't of Transp., 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017). The party also need not show that he has "an interest greater than other potential plaintiffs." *Davis v. Richland Cty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007). Instead, standing under this exception "may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). "Whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented . . . ." *Id*. This Court has explained:

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). Thus, "courts must take these competing policy concerns into consideration . . . ." *S.C. Pub. Interest Found.*, 421 S.C. at 118, 804 S.E.2d at 859. We have also acknowledged "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341; *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 79–80, 753 S.E.2d 846, 853 (2014) ("Whether [public importance standing] applies in a particular case turns on whether resolution of the dispute is needed for future guidance . . . . [T]he need for future guidance generally dictates when [public importance standing] applies . . . .").

Applying this test to the case at hand, we find Petitioners have established public importance standing. The COVID-19 pandemic that has plagued our State in recent months has posed unprecedented challenges in every area of life and severely disrupted essential governmental operations. Since the President's declaration of a national emergency, the Governor has issued a State of Emergency and several Executive Orders implementing "social distancing" practices to slow the spread of COVID-19. This Court has likewise directed that judicial proceedings be conducted using remote communication technology to minimize the risk to the public, litigants, lawyers, and court employees. The virus's impact on education in this State has been no less great. Indeed, it is for this reason that Congress endeavored to appropriate emergency funds through the CARES Act to protect our nation's students and

teachers and to supply states with additional resources to continue providing educational services during this difficult time.

A resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future if and when Congress approves additional education funding in response to the continued COVID-19 pandemic. *See S.C. Pub. Interest Found.*, 421 S.C. at 119, 804 S.E.2d at 859 (finding although a "close call," the balance of the policy concerns weighed in favor of conferring public importance standing where the matter involved the conduct of a government entity and the expenditure of public funds and there was evidence the entity would undertake the conduct at issue again); *Breeden v. S.C. Democratic Exec. Comm.*, 226 S.C. 204, 208, 84 S.E.2d 723, 725 (1954) (finding the question of who is the nominee of the Democratic party for public office "is not only of public interest, but one which should be promptly decided"). Accordingly, Petitioners have public importance standing to bring this claim.

B. Constitutionality under Article XI, Section 4

Petitioners allege the Governor's use of GEER funds for his SAFE Grants Program violates Article XI, Section 4 of the South Carolina Constitution because the program uses public funds for the direct benefit of private schools.[2] Specifically, this constitutional mandate provides, "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, § 4.

Petitioners contend the GEER funds constitute "public funds" within the meaning of the constitutional provision because section 11-13-45 of the South Carolina Code requires the money be deposited in the State Treasury. They further argue the funds are not passively flowing through the State but are being actively utilized by the State, through the Governor as its Chief Executive, for the purpose of

[2] Petitioners also challenge the Governor's decision under Article XI, Section 3, which requires the government to provide public education to all children in this State. Because our constitutional determination under Article XI, Section 4 resolves this case, we need not address this issue. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

funding his grants program. In contrast, the Governor relies on this Court's decision in *Durham v. McLeod*, 259 S.C. 409, 413, 192 S.E.2d 202, 204 (1972) to support his argument that the GEER funds are not "public funds." In *Durham*, we considered the constitutionality of the State Education Assistance Act, which authorized the State Education Assistance Authority to issue "loans to students to defray their expenses at any institution of higher learning." *Id*. at 412, 192 S.E.2d at 203. The funds received by the Authority were "trust funds to be held and applied solely toward carrying out the purposes of the Act." *Id*. The Act also specified the funds did "not constitute a debt of the State or any political subdivision." *Id*. Accordingly, we held the funds used to support the program were not "public funds" but instead a "student loan fund under the Act" that is "held by the Authority as a trust fund." *Id*. at 413, 192 S.E.2d at 204.

We find this case is distinguishable from *Durham*. Here, the GEER funds awarded to South Carolina are to be received from the federal government in the coffers of the State Treasury and distributed through the Treasury, at the behest of the Governor, as a representative of the State, to be used in accordance with the education funding provisions of the CARES Act. Significantly, the General Assembly has mandated that all federal funds be deposited into and withdrawn from the State Treasury. S.C. Code Ann. § 11-13-45 (2011) ("All federal funds received *must* be deposited in the State Treasury . . . and withdrawn from the State Treasury as needed, in the same manner as that provided for the disbursement of state funds.") (emphasis added). *See id*. § 11-13-30 ("To facilitate the management, investment, and disbursement of *public funds*, no board, commission, agency or officer within the state government, except the State Treasurer shall be authorized to . . . deposit funds from any source . . . .") (emphasis added). Given this clear directive, we must conclude that when the GEER funds are received in the State Treasury and distributed through it, the funds are converted into "public funds" within the meaning of Article XI, Section 4. *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) ("Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature."); 63C Am. Jur. 2d *Public Funds* § 1 (2018) (defining public funds "to include money belonging to, received or held by . . . a state or subdivision thereof"). *See Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 402, 401 S.E.2d 161, 164 (1991) (characterizing federal grant money as "public funds" under the

South Carolina Freedom of Information Act); *see also Cain v. Horne*, 202 P.3d 1178, 1183 (Ariz. 2009) (noting the parties did not dispute the funds at issue constituted "public funds" within the meaning of the state constitution's no aid provision, where they "are withdrawn from the public treasury"); *Mallory v. Barrera*, 544 S.W.2d 556, 561 (Mo. 1976) (holding federal funds deposited in the state treasury were "public funds" within the meaning of the state constitution's no aid provision); *Gardner v. Bd. of Trs. of N.C. Local Gov't Emps.' Ret. Sys.*, 38 S.E.2d 314, 316 (N.C. 1946) ("Monies paid into the hands of the state treasurer by virtue of a state law become public funds for which the treasurer is responsible and may be disbursed only in accordance with legislative authority."); *Cooper v. Berger*, 837 S.E.2d 7, 17–18 (N.C. Ct. App. 2019) (expanding *Gardner* to hold federal block grant funds constitute "public funds" in the state treasury). Moreover, the GEER funds given to the private schools for student tuition must be returned pro rata to the State Treasury if the student leaves the school before the school term ends.

Petitioners further claim the Governor's allocation of the GEER funds to create one-time tuition grants for students to attend private schools violates our Constitution's prohibition on using public funds for the "direct benefit" of a "private educational institution." Specifically, they argue the money is transferred directly from the State Treasury to the private school the student chooses to attend. Petitioners also assert the payment of tuition undoubtedly provides a direct benefit to the private educational institution receiving the money.

In contrast, the Governor claims the SAFE Grants Program does not directly benefit the participating independent or private schools. Instead, the funds provide a direct benefit to the student recipient and his or her family, and the grants only indirectly benefit the private school. The Governor relies on the history of the amendment to the former Article XI, Section 9 following this Court's decision in *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971) to conclude that our Constitution now permits the use of public funds for the indirect benefit of private schools. In *Hartness*, we considered the constitutionality, under the former provision, of a legislative act providing tuition grants to students attending independent institutions of higher learning. *Id*. at 505, 179 S.E.2d at 908. The grants were not made directly to the school but were made to the student who was then required to pay it to the school he selected to attend. *Id*. at 507, 179 S.E.2d at 908. This Court held the use of public funds to provide these grants to students attending private religious institutions was prohibited under the former Article XI, Section 9. *Id*. at 508, 179 S.E.2d at 909.

The former provision stated:

> The property or credit of the State of South Carolina, or of any County, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, *directly or indirectly*, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society, or organization, of whatever kind, which is wholly or in part under the direction or control of any church or religious or sectarian denomination, society or organization.

S.C. Const. art. XI, § 9 (1895) (emphasis added), *amended by* S.C. Const. art. XI, § 4 (1972). In 1966, the West Committee engaged in a three-year study of the South Carolina Constitution and recommended revisions in its 1969 Final Report. In suggesting the amendment and adoption of the current provision, the Committee provided the following comments in the Report:

> The Committee evaluated this section in conjunction with interpretations being given by the federal judiciary to the "establishment of religion" clause in the federal constitution. The Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of the private institutions, *the Committee feels that public funds should not be granted outrightly to such institutions*. Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word "indirectly" currently listed in Section 9. By removing the word "indirectly" the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs . . . .

West Committee, Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, 99–101 (1969) (emphasis added). We offer no opinion on the efficacy of the Committee's report; however, based on this history and our decision in *Hartness*, the Governor urges this Court to find the private

schools here only indirectly benefit from the SAFE Grants Program, and it is the students and their families who are the primary beneficiaries of the funding. Under the facts of this case, we disagree. *See, e.g.*, *Cain*, 202 P.3d at 1184 (refusing to apply a "true beneficiary theory exception" to find the individuals benefit rather than the institution receiving the public funds because such a holding "would nullify the Aid Clause's clear prohibition against the use of public funds to aid private or sectarian education"); *see also Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 960, 962 (Cal. 1981) (rejecting the application of the "child benefit theory" and noting it could be used to justify any type of aid to sectarian schools because "practically every proper expenditure for school purposes aids the child"); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 556 (Neb. 1974) (reviewing similar constitutional provision and holding application of the theory "would lead to total circumvention of the principles of our [State] Constitution").

We reject the argument that the SAFE tuition grants do not confer a direct benefit on the participating private schools because unlike the grants in *Hartness*, which were made directly to the student, the SAFE Grants are directly transferred from the State Treasury to the selected school through use of a secure online portal. The direct payment of the funds to the private schools is contrary to the framers' intention not to grant public funds "outrightly" to such institutions. Nevertheless, the Governor argues the student's act of choosing which school to attend and her parent or guardian's direction of the electronic payment attenuate the connection of the funds to the private school so as to transform it into merely an incidental, indirect benefit. This argument is unavailing. *See Cain*, 202 P.3d at 1184 ("[T]he voucher programs do precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial."). In fact, the CARES Act prohibits direct payment of the funds to individuals and instead permits the grants to be awarded only to entities. *See* CARES Act § 18002(c) (allowing the GEER funds to be used to provide support to local educational agencies, institutions of higher learning, and education related entities).

In addition, the facts of this case are distinguishable from our decision in *Durham*. There, we emphasized the "scrupulously neutral" nature of the student loan program, which left "all eligible institutions free to compete for [the student's] attendance," and the aid was not made "to any institution or group of institutions" in particular. *Durham*, 259 S.C. at 413, 192 S.E.2d at 203–04. Here, the SAFE Grants are made available for use only at private educational institutions selected by the

Governor's advisory panel. The program does not provide students with the independent choice we found to be acceptable in *Durham*. *See Sheldon Jackson College v. State*, 599 P.2d 127, 131 (Alaska 1979) (holding a state tuition grant program violated the state constitution where the only incentive it created was to enroll in a private school). Accordingly, we hold the Governor's SAFE Grants Program uses public funds for the direct benefit of private educational institutions in violation of Article XI, Section 4 of our Constitution.

Notwithstanding our holding, the Governor claims the CARES Act grants him absolute discretion in using the GEER funds such that the federal law preempts this state constitutional provision under the Supremacy Clause. U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) ("The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution . . . .").

This Court has recognized that "[f]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement in the language of the legislation of Congress' intent to alter the usual constitutional balance of state and federal powers." *Edwards v. State*, 383 S.C. 82, 92, 678 S.E.2d 412, 417 (2009) (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991))). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. "Consideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Accordingly, "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Priester*, 401 S.C. at 43, 736 S.E.2d at 252 (quoting *Cipollone*, 505 U.S. at 516)). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Id*. (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)).

We find there is no clear congressional intent in the education provisions of the CARES Act to allow the Governor to allocate the GEER funds in his discretion in contravention of our State Constitution. If that were the case, Congress certainly understood how to make such intention clear, as evidenced by its inclusion of a preemption clause in the provisions of the Act regarding support for health care workers. *See* CARES Act § 3215(c)(1) ("This section preempts the laws of a State or political subdivision of a State to the extent that such laws are inconsistent with this section, unless such laws provide greater protection from liability."). We therefore reject the Governor's assertion that the discretion provided him in the CARES Act preempts our constitutional mandate prohibiting the use of public funds for the direct benefit of private educational institutions.

III. CONCLUSION

Without question, the effects of the COVID-19 pandemic have been unfathomable. While not an inclusive list, COVID-19 has taken precious lives, taxed our health care system, impacted our economy, and caused us to alter our court operations. Our system of education has not been spared as we have witnessed teachers valiantly work to adapt to different methods of educating South Carolina's children.

This crisis has created unprecedented challenges for the leaders in our state government. The Governor has faced issues that have never been presented to any other administration. We recognize and fully appreciate the difficulty of making decisions that impact our entire state during this public health emergency.

However, having accepted this matter in our original jurisdiction, we must fulfill our duty to review the Governor's decision to expend GEER Fund grant monies on the SAFE Grants Program. Even in the midst of a pandemic, our State Constitution remains a constant, and the current circumstances cannot dictate our decision. Rather, no matter the circumstances, the Court has a responsibility to uphold the Constitution.

Based on the foregoing, we hold the Governor's allocation of $32 million in GEER funds to support the SAFE Grants Program constitutes the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution. We further find the issuance of an injunction unnecessary, as we are assured Governor McMaster, as a duly elected constitutional officer of this State, will adhere to this

Court's decision. As the Governor's lawyer stated during oral argument, the Governor is a "strong proponent of the rule of law." Equally, we respect the Executive Branch, and our decision should in no way be construed as diminishing that respect. The preliminary injunction currently in effect is hereby dissolved.

DECLARATORY JUDGMENT ISSUED.

KITTREDGE, HEARN, FEW, JJ., and Acting Justice John D. Geathers, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William Loflin and Leslie Loflin, Respondents,

v.

BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants,

Of which Chicago Title Insurance Company is Petitioner.

Appellate Case No. 2019-001768

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28002
Heard November 18, 2020 – Filed December 9, 2020

AFFIRMED AS MODIFIED

Louis H. Lang and Demetri K. Koutrakos, both of Callison Tighe & Robinson, LLC, of Columbia, for Petitioner.

Ranee Saunders, of McGown, Hood & Felder, LLC, of Mt. Pleasant; and Daniel A. Speights and A. Gibson Solomons III, both of Speights & Solomons, LLC, of Hampton, all for Respondents.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *Loflin v. BMP Development, L.P.*, 427 S.C. 580, 832 S.E.2d 294 (Ct. App. 2019). We adopt the court of appeals' well-reasoned opinion reversing the trial court's grant of summary judgment to Chicago Title Insurance Company (Chicago). We modify the opinion only insofar as Chicago's challenge to the court of appeals' finding concerning contractual incompetency. The two sentences in the court of appeals' opinion referring to contractual incompetency are vacated.[1] We therefore affirm the court of appeals' decision as modified.

AFFIRMED AS MODIFIED.

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

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[1] The court of appeals' two references to contractual incompetency were: (1) "We also note this item covers incompetency, which would fit [the Loflins'] allegation that Balsam recorded the wrong plat, i.e., the December 10, 2001 plat, when it should have recorded the February 6, 2002 plat."; and (2) "Hence, the Preserve Road encroachment and [the Loflins'] loss in acreage fall within items 1, 3, and 14 of the Policy's 'Covered Title Risks,' i.e., 'Someone else owns an interest in your title,' 'Forgery, *fraud*, duress, *incompetency*, incapacity, or impersonation,' (emphases added) and 'Other defects, liens, or encumbrances.'" (Internal alteration marks omitted).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Crystal L. Wickersham; Crystal L. Wickersham, as personal representative of the Estate of John Harley Wickersham Jr., Plaintiffs,

v.

Ford Motor Company, Defendant.

Appellate Case No. 2018-001124

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinion No. 28003
Heard September 17, 2020 – Filed December 9, 2020

CERTIFIED QUESTION ANSWERED

Kathleen Chewning Barnes, Barnes Law Firm, LLC; Ronnie Lanier Crosby, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., both of Hampton, for Plaintiffs.

Adam H. Charnes and Thurston H. Webb, Kilpatrick Townsend & Stockton LLP, of Winston-Salem, NC; Joseph Kenneth Carter Jr. and Carmelo Barone

Sammataro, Turner Padget Graham & Laney P.A., of Columbia, for Defendant.

Steve A. Matthews, Haynsworth Sinkler Boyd, P.A., of Columbia; Victor E. Schwartz, Cary Silverman, and Phil Goldberg, Shook Hardy & Bacon LLP, of Washington, D.C., all for amicus curiae the Alliance of Automobile Manufacturers, Inc.

Gray Thomas Culbreath and Jessica Ann Waller, Gallivan White & Boyd, P.A., of Columbia, for amicus curiae the Product Liability Advisory Counsel, Inc.

Frank L. Eppes, Eppes & Plumblee, P.A., of Greenville, for amicus curiae the South Carolina Association for Justice.

JUSTICE FEW: Responding to two questions certified to us by the United States Court of Appeals for the Fourth Circuit, we hold traditional principles of proximate cause govern whether a personal representative has a valid claim for wrongful death from suicide, and comparative negligence does not apply to a plaintiff's non-tortious actions that enhance his injuries in a crashworthiness case.

I. Facts and Procedural History

John Harley Wickersham Jr. was seriously injured in an automobile accident. After months of severe pain from the injuries he received in the accident, he committed suicide. *See Wickersham v. Ford Motor Co.*, 194 F. Supp. 3d 434, 435-37 (D.S.C. 2016) (a complete explanation of the facts of this case). His widow filed lawsuits for wrongful death, survival, and loss of consortium against Ford Motor Company in state circuit court. She alleged that defects in the airbag system in Mr. Wickersham's Ford Escape enhanced his injuries, increasing the severity of his pain, which in turn proximately caused his suicide. She included causes of action for negligence, strict liability, and breach of warranty.

Ford removed the cases to the United States District Court for the District of South Carolina. Ford then filed a motion for summary judgment in the wrongful death suit,

arguing Mrs. Wickersham has no wrongful death claim under South Carolina law because Mr. Wickersham's suicide was an intervening act that could not be proximately caused by a defective airbag. The district court denied Ford's motion. 194 F. Supp. 3d at 448. The court ruled Mrs. Wickersham could prevail on the wrongful death claim if she proved the enhanced injuries Mr. Wickersham sustained in the accident as a result of the defective airbag caused severe pain that led to an "uncontrollable impulse" to commit suicide. Ford renewed the motion during and after trial, but the district court denied both motions.

During trial, the parties disputed the cause of Mr. Wickersham's enhanced injuries. Mrs. Wickersham alleged the defective airbag caused them, while Ford argued Mr. Wickersham caused his enhanced injuries by being out of his proper seating position.

The jury returned a verdict for Mrs. Wickersham on all claims. The jury found the airbag was defective and proximately caused Mr. Wickersham's enhanced injuries and suicide. However, the jury also found Mr. Wickersham's actions in being out of position enhanced his injuries, and found his share of the fault was thirty percent. The district court entered judgment for Mrs. Wickersham, but denied Ford's request to reduce the damages based on Mr. Wickersham's fault. Ford filed motions to alter or amend the judgment, for judgment as a matter of law, and for a new trial, all of which the district court denied.

Ford appealed, and the Fourth Circuit certified the following questions to this Court.

> 1. Does South Carolina recognize an "uncontrollable impulse" exception to the general rule that suicide breaks the causal chain for wrongful death claims? If so, what is the plaintiff required to prove is foreseeable to satisfy causation under this exception—any injury, the uncontrollable impulse, or the suicide?
>
> 2. Does comparative negligence in causing enhanced injuries apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty and is seeking damages related only to the plaintiff's enhanced injuries?

We issued an opinion on July 24, 2019 answering both questions. *Wickersham v. Ford Motor Co.*, Op. No. 27904 (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 55). Mrs. Wickersham filed a petition for rehearing addressing only our answer to the second question. We granted rehearing, and now revise our answer. Our answer to the first question is unchanged.

II. Recovery for Wrongful Death from Suicide

In its order of certification, the Fourth Circuit acknowledged this Court might restate the certified questions. In answering the first question, we find it necessary to do so.

South Carolina does not recognize a general rule that suicide is an intervening act which breaks the chain of causation and categorically precludes recovery in wrongful death actions. Rather, our courts have applied traditional principles of proximate cause to individual factual situations when considering whether a personal representative has a valid claim for wrongful death from suicide.

In *Scott v. Greenville Pharmacy*, 212 S.C. 485, 48 S.E.2d 324 (1948), we stated,

> In every case of this character the inquiry is: Was the injury a natural and probable consequence of the wrongful act, and ought it to have been foreseen in the light of the attendant circumstances? In this case the deceased took his own life by hanging. Can it be reasonably said that his tragic end was a natural and probable consequence of the sale to him of the barbiturate capsules, and should it have been foreseen in the normal course of events?

212 S.C. at 493-94, 48 S.E.2d at 328. In *Scott*, the plaintiff brought a wrongful death action against a pharmacy, claiming her husband committed suicide after becoming addicted to barbiturate capsules the pharmacy sold him in violation of state law. 212 S.C. at 487-88, 48 S.E.2d at 325. The circuit court dismissed the case. 212 S.C. at 487, 48 S.E.2d at 325. On appeal, we found "it would be going entirely too far . . . to hold that the unlawful sale of the barbiturate capsules brought about a condition of suicidal mania as the natural and probable consequence of the sale, or that this result should have been reasonably foreseen by the respondent." 212 S.C. at 495, 48 S.E.2d at 328.

Likewise, in *Horne v. Beason*, 285 S.C. 518, 331 S.E.2d 342 (1985), this Court affirmed the dismissal of a wrongful death action brought by the estate of Horne, a seventeen-year-old who hung himself with a cloth bathrobe belt tied to overhead bars in his jail cell shortly after being arrested. 285 S.C. at 521-22, 331 S.E.2d at 344-45. We explained, "Foreseeability is often a jury issue but not here." 285 S.C. at 522, 331 S.E.2d at 345. We applied standard proximate cause principles and found the defendants could not be expected to foresee that Horne would hang himself. 285 S.C. at 521-22, 331 S.E.2d at 344-45. We specifically addressed the unique facts of the case, stating "the presence of overhead bars is of no real significance" and there are "few things more unlike a dangerous instrumentality than a bathrobe belt." 285 S.C. at 521-22, 331 S.E.2d at 345. We concluded, "Under the circumstances, none of the defendants should have been expected to foresee that Horne would likely commit suicide." 285 S.C. at 522, 331 S.E.2d at 345.[1]

As *Scott* and *Horne* illustrate, South Carolina courts apply traditional proximate cause principles in analyzing whether a particular plaintiff can recover for wrongful death from suicide. "Each case must be decided largely on the special facts belonging to it." *Scott*, 212 S.C. at 494, 48 S.E.2d at 328. *See* Alex B. Long, *Abolishing the Suicide Rule*, 113 NW. U. L. Rev. 767 (2019) (discussing the "trend among court decisions away from singling out suicide cases for special treatment and toward an analytical framework that more closely follows traditional tort law principles"). Thus, we restate the first question as asking us to explain how our standard proximate cause analysis applies to an alleged wrongful death from suicide.

Proximate cause requires proof of cause-in-fact and legal cause. *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). In causation, as in other contexts, "proximate" is the opposite of "remote." *See Stone v. Bethea*, 251 S.C. 157, 162, 161 S.E.2d 171, 173 (1968) ("When the [conduct] appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be

[1] *Cf. Hearn v. Lancaster Cty.*, 566 F. App'x 231, 236 (4th Cir. 2014) (explaining that because of qualified immunity, the personal representative of an inmate who committed suicide in jail may recover from a governmental entity or employee only if the representative meets the "deliberate indifference" standard "that is generally only satisfied by government conduct that shocks the conscience" (citing *Parrish v. Cleveland*, 372 F.3d 294, 302 (4th Cir. 2004))).

deemed the direct or proximate cause, and the former only the indirect or remote cause."). The cause-in-fact and legal cause elements are designed to enable courts and juries to differentiate between proximate and remote causes in a reliable manner.

As to legal cause, "foreseeability is considered 'the touchstone . . . ,' and it is determined by looking to the natural and probable consequences of the defendant's act or omission." *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (quoting *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)). In most cases, foreseeability ends up being addressed as a question of fact for the jury. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992). In the first instance, however, legal cause is just what its name suggests—a question of law. "[W]hen the evidence is susceptible to only one inference . . . [legal cause] become[s] a matter of law for the court." *Id.* (citing *Matthews v. Porter*, 239 S.C. 620, 625, 124 S.E.2d 321, 323 (1962)); *see also Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (discussing foreseeability, and stating "in rare or exceptional cases . . . the issue of proximate cause [may] be decided as a matter of law" (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))).

In cases involving wrongful death from suicide, our courts have consistently decided legal cause as a matter of law. *See Horne*, 285 S.C. at 522, 331 S.E.2d at 345 (finding as a matter of law the suicide was not foreseeable); *Scott*, 212 S.C. at 495, 48 S.E.2d at 328 (same); *Crolley v. Hutchins*, 300 S.C. 355, 357-58, 387 S.E.2d 716, 718 (Ct. App. 1989) (same). Therefore, whether a suicide is a foreseeable consequence of tortious conduct is first a question of law for a court to decide. If a court determines a particular suicide is not unforeseeable as a matter of law, legal cause—foreseeability—becomes a question for the jury.

A plaintiff must also prove cause-in-fact. "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Hurd v. Williamsburg Cty.*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005) (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130). This is a difficult burden in claims for wrongful death from suicide. For instance, proving causation-in-fact in this case required Mrs. Wickersham to prove the following sequence of causal events: Ford's defective design of the airbag enhanced Mr. Wickersham's injuries, which in turn caused him to suffer severe pain he would not otherwise have had, which in turn caused him to experience an uncontrollable impulse to commit suicide,

which in turn caused him to take his own life involuntarily, which he would not have done but for Ford's defective design.

We answer the Fourth Circuit's first certified question as follows:

> South Carolina does not recognize a general rule that suicide is an intervening act that always breaks the chain of causation in a wrongful death action. Rather, our courts apply traditional principles of proximate cause. First, the court must decide as a matter of law whether the suicide was unforeseeable. If the court determines the suicide was not unforeseeable as a matter of law, the jury must consider foreseeability. The jury must also consider causation-in-fact, including whether the defendant's tortious conduct caused a decedent to suffer from an involuntary and uncontrollable impulse to commit suicide.

III. Proximate Cause of Enhanced Injuries

In *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017), we addressed the following question certified to us by the United States District Court for the District of South Carolina:

> Does comparative negligence *in causing an accident* apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty and is seeking damages related only to the plaintiff's enhanced injuries?

420 S.C. at 11, 800 S.E.2d at 480 (emphasis added). We answered the certified question "no" and held "comparative negligence does not apply to permit the negligence of another party—whether the plaintiff or another defendant—*in causing an initial collision* to reduce the liability of a manufacturer for enhanced injuries in a crashworthiness case." 420 S.C. at 20, 800 S.E.2d at 485 (emphasis added). In reaching our decision, we adopted the reasoning of *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999), *rev'd in part on other grounds*, 269 F.3d 439 (4th Cir. 2001), in which the district court explained "the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury

caused by a defective part that was supposed to be designed to protect in case of a collision." 420 S.C. at 18, 800 S.E.2d at 484 (quoting *Jimenez*, 74 F. Supp. 2d at 566). Therefore, we held, "[b]ecause a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant." *Id*. (quoting *Jimenez*, 74 F. Supp. 2d at 566).

In this case, the Fourth Circuit asks a different question. We are now asked whether comparative negligence—which is normally thought of as a defense[2]—applies in a strict liability or breach of warranty case when the plaintiff's conduct (1) is not tortious conduct and is not misuse;[3] and (2) relates only to the enhancement of the injuries, not to the cause of the accident. As asked, the answer is "no."

In our original opinion, we restated the question, explaining, "We address the question as one of proximate cause." *Wickersham*, (Shearouse Adv. Sh. No. 30 at 62). Mrs. Wickersham argues in her petition for rehearing the Fourth Circuit's question is not about proximate cause. We do not agree. Ford alleged Mr. Wickersham was out of his seating position when the airbag deployed, but Ford made no argument he was "negligent" in being so or that his being so constituted misuse. Likewise, the district court did not charge the jury on any standard—negligence, misuse, or otherwise—by which the jury may judge whether Mr. Wickersham was at "fault." Therefore, in this case, the "defense" of comparative negligence or fault is simply not relevant.

Proximate cause, however, is relevant. Ford argued Mr. Wickersham was out of position by leaning into the passenger seat when the airbag deployed, and Mr. Wickersham being out of position was a proximate cause of the enhancement of his injuries. Whether Mr. Wickersham's being out of position can be a proximate cause of his enhanced injuries is a valid and relevant question. We anticipated this question in *Donze*. *See* 420 S.C. at 20 n.4, 800 S.E.2d at 485 n.4 (noting our ruling applied only to a plaintiff's fault "in causing the collision," and leaving open the possibility

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[2] *See Donze*, 420 S.C. at 10, 800 S.E.2d at 480 (stating "the defense of comparative negligence does not apply in crashworthiness cases").

[3] *See* S.C. Code Ann. § 15-73-20 (2005) ("If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.").

a plaintiff's conduct independent of the initial collision—such as "'tying a door shut for example'"—could reduce a plaintiff's recovery for his enhanced injuries (quoting *Jimenez*, 74 F. Supp. 2d at 566 n.11)); *see also* 420 S.C. at 24-25, 800 S.E.2d at 488 (Kittredge, J., concurring) ("I would limit the holding to true crashworthiness cases where it is established as a matter of law that the plaintiff's comparative fault was not a proximate cause of the 'enhanced injuries.'").

We are concerned that our "no" answer to the Fourth Circuit's second question may lead to confusion on how to address causation of enhanced injuries in the crashworthiness context. Because of this concern, we supplement our answer. We address what we believe is the issue the district court struggled to frame as a jury question: whether a plaintiff's actions that cause only the enhancement of his injuries—not the accident itself—may be proximate, or are they necessarily legally remote as in *Donze*, and therefore irrelevant. We hold a plaintiff's actions that do not cause the accident, but are nevertheless a contributing cause to the enhancement of his injuries, are not necessarily a legally remote cause.[4]

Under *Donze*, any fault Mr. Wickersham may have had in causing the accident is a legally remote cause, and thus irrelevant. In this case, the jury found Mr. Wickersham was thirty percent at fault for enhancing his injuries. We hold, however, Mr. Wickersham's non-tortious actions that were not misuse are not relevant to Ford's liability for enhancement of his injuries in terms of the defense of comparative negligence or fault.

CERTIFIED QUESTIONS ANSWERED.

KITTREDGE, HEARN and JAMES, JJ., concur. BEATTY, C.J., concurring in result only.

[4] It bears mentioning here that there can be more than one proximate cause of an injury. *Matthews*, 239 S.C. at 627, 124 S.E.2d at 325.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lindsay Allison Sellers, Appellant,

v.

Douglas Anthony Nicholls, Respondent.

Appellate Case No. 2017-001108

Appeal From Greenville County
Tarita A. Dunbar, Family Court Judge

Opinion No. 5754
Submitted April 1, 2020 – Filed August 5, 2020
Withdrawn, Substituted, and Refiled December 9, 2020

AFFIRMED

Tucker S. Player, of The Player Law Firm, of Columbia, for Appellant.

Marcus Wesley Meetze, of Law Office of Marcus W. Meetze, LLC, of Simpsonville, for Respondent.

LOCKEMY, C.J.: In this child custody action, Lindsay Allison Sellers (Mother) appeals the family court's order denying her motion for a continuance, finding it was in the children's best interest to be placed with Douglas Anthony Nicholls (Father), and granting Father $15,000 in attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

Mother and Father married in August 2006. During their marriage, they lived in Greenville and had two children: a daughter, who is now twelve years old (Daughter) and a son, who is now eight years old (Son) (collectively, Children). Mother and Father separated in 2012 and divorced on June 6, 2014. The original final order (the Original Order) incorporated an agreement that provided for joint legal custody and joint week-to-week physical custody. It ordered that neither party pay child support; however, Mother was to pay for medical insurance and childcare costs. The Original Order also restrained the parties from having Children overnight in the presence of members of the opposite sex.

One year later, Mother filed a complaint requesting sole custody and that Father receive supervised visitation with no overnights. Father filed an answer and counterclaim alleging there had been a change in circumstances and he should be awarded sole custody of Children, child support, and attorney's fees. Thereafter, Mother filed a motion for temporary relief requesting sole custody of Children. The family court ordered the Original Order remain in effect.

The guardian ad litem (the GAL) subsequently filed a second motion for temporary relief after Mother relocated to Columbia. The family court then issued a temporary order granting Mother custody, finding the move was for legitimate purposes and based on Mother's reported ability to make more money if she was promoted to a management position. The temporary order granted Father standard visitation, but it did not address child support.

On June 13, 2016, Mother's first attorney was relieved by order of the family court. On October 14, 2016, Mother filed an emergency motion for temporary relief requesting child support, which included Mother's affidavit stating she informed her attorney that Son was having stomach pain, issues defecating, and had wet the bed multiple times. Her affidavit stated her attorney believed these were red flags of sexual abuse and she asked her attorney to conduct a forensic interview. The affidavit detailed that during Son's forensic interview, he disclosed "something" to Mother's attorney that was then reported to law enforcement. The South Carolina Department of Social Services (DSS) conducted an investigation. DSS determined the allegations were unfounded.

Father filed a motion to disqualify Mother's attorney, arguing she had become a necessary fact witness regarding custody based on her forensic interview of Son. Neither Mother nor her attorney attended the hearing on Father's motion to disqualify. At the hearing, the GAL and Father asked the court not to continue the final hearing based on the disqualification. In its November 17, 2016 order, the family court granted Father's motion and stated, "The disqualification of [Mother's] counsel shall not, under any circumstances, be a basis for continuing the trial in this matter . . . . This case remains set for trial on December 13[, 2016]."

On November 28, 2016, Mother filed a Rule 59(e), SCRCP motion to reconsider, arguing the disqualification created substantial hardship because she would be unable to find an attorney in time for the hearing. The family court did not rule on the motion. On December 7, 2016, Mother and her disqualified attorney signed a consent order relieving Mother's attorney as counsel. In the consent order, Mother agreed she would "represent herself pro se in this action in the event she is unable to obtain counsel."

At the outset of the December 13, 2016 hearing, Mother requested to continue the hearing based on her attorney's disqualification. The family court stated the disqualification order indicated "that this case remains set for trial and shall not be continued" and "I believe only the[] Administrative Judge[] can continue this case." Mother stated she filed a motion for reconsideration of the disqualification order, but there had been no resolution of that motion. The family court reiterated it could not continue the case because the previous order stated the case "shall not" be continued.

Mother testified that during the marriage she worked as a manager at Walmart and earned $54,500 a year. Mother explained she was selected to be promoted but needed to move to a Columbia store first. She stated she took a new position in Columbia but did not receive a raise.

Mother explained Father hired a private investigator to place a GPS tracking device on her car while she was at work, and a customer reported that it was a bomb. She recalled she took medical leave from Walmart because Father continually distracted and stalked her. Mother testified that after she left her employment with Walmart, she worked for her former attorney from September 2016 until November 2016. She explained she then took a job working for a

plastic surgeon making $39,000 a year, received rental income of $350 a month, and earned another $500 a month from work as a guardian ad litem.

Mother stated Father made it difficult to coordinate the drop-off of Children and other plans; however, Mother also stated the week-to-week visitation was a nonissue and worked. Mother admitted she violated the Original Order by having her boyfriend stay overnight when Children were with her. Mother asserted Father failed to pay Children's medical bills as required by the Original Order.

Connie Drake, Mother's stepmother, testified she and George Sellers, Mother's father, (Grandfather) (collectively, Grandparents) allowed Mother to move into their home in Lexington County. She explained that during Mother's stay, Grandfather was the primary caretaker for Children and was responsible for picking them up from daycare, providing them dinner, and putting them to bed while Mother was at work. Drake stated Mother would get into irrational screaming matches with Children. She testified Mother left Children in Grandparents' care so she could travel to Europe and stay overnight with her boyfriend. Drake also stated Mother and Children spent nights at Mother's boyfriend's house. She explained Mother stopped letting Children see her and Grandfather as of February 2016. She testified Father arranged for Children to visit with Grandparents, and she believed placement with Father was in Children's best interest because Mother was unable to discipline them.

Grandfather testified Mother and Children argued every morning while at his house. He recalled that on one occasion, Mother got into an argument with Children because they did not want to stay the night alone with Grandfather while she spent the night with her boyfriend. He recalled Children cried for hours following Mother's departure, and Mother refused to come back to get them. Grandfather recalled Children behaved well around Father and enjoyed spending time with him. He testified he and Father made amends following the divorce, and Father allowed Grandparents to see Children after Mother stopped letting them visit. Grandfather stated he was Children's primary caregiver at least two days a week.

Father testified he worked as a school resource officer on weekdays from 7:30 a.m. to 4:00 p.m. Father explained he hired a private investigator who placed a GPS tracking device on Mother's car after she refused to disclose where she lived. He testified Mother filed an order of protection in Lexington County, which was

dismissed. Father stated he never went to Mother's work following the divorce. Father testified Mother failed to inform him about any of Son's ADHD medical appointments or prescriptions. He explained he was on a waiting list for a three-bedroom apartment and expected to be able to move into that apartment two weeks after the hearing. Father stated Mother did not inform him she was moving, and he did not find out until six months after she moved when she filed this action. He believed Mother moved to Columbia to be closer to her former boyfriend. Father testified the temporary order removing Children from Greenville hurt his relationship with Children. He explained Mother failed to inform him about Children's extracurricular activities.

Father explained that after Mother accused him of sexually abusing Son, the results of law enforcement's forensic interview showed "no signs of sexual abuse in [Son]." He believed Mother and her attorney accused him of sexual abuse after Son had "grabbed himself in the anal area several times during a soccer game, complain[ed] of stomach hurting, dance[d] around when he ha[d] to defecate and began to wet his bed." Father stated he believed Son acted this way because of his ADHD medication, which caused constipation. Father recalled Mother initially failed to inform him that Son was taking medication and failed to provide the medication during his week of custody. He testified he never failed to pay medical bills as Mother alleged. Father stated Mother's behavior was erratic and unpredictable, she had moved multiple times since the temporary hearing, and her changing romantic relationships created instability in Children's lives. He testified placement with him was in Children's best interest because he had remained consistent in how he lived, worked a schedule that matched theirs, and continued to live in Greenville where Children had grown up and developed friends. Father testified the week-to-week arrangement had worked well for Children. Father requested $25,000 in attorney's fees, and his attorney's fees affidavit was admitted without objection.

Karen Sykes, Children's maternal grandmother, testified she lived in Aiken but took a job in Richland County to be closer to Children. She stated Children had been living a consistent life and doing well in Columbia. Sykes recalled Children had many friends and participated in extracurricular activities in Columbia.

Grace Morgan, Children's former daycare provider in Greenville, testified that on one occasion, Mother dropped off Children and said she was going to work, but instead, she left on an overnight trip to Disney World with her boyfriend. She

stated Mother did not leave her any clothes for Children, and Father had to bring them clothing and pick them up at night. Morgan testified Father was very caring and worked to build memories with Children. Jennifer Worley, Mother's supervisor at Walmart, testified Mother was no longer employed with Walmart because she chose not to return after taking medical leave.

The GAL testified Father's one-bedroom apartment was clean and organized, but she admitted Children would do better with separate bedrooms. The GAL stated she had no concerns with Mother's home and had no recommendation for placement. The GAL described Mother as argumentative and dismissive of anyone who disagreed with her. She stated she had concerns about Mother's overnight visits with her boyfriend and that Mother changed Children's daycare five times since the Original Order. The GAL explained she was concerned that both parents would likely struggle financially. The GAL stated she did not believe week-to-week placement was in Children's best interest.

The family court found there had been "a change in circumstances as far as the parties remaining in joint physical custody" because the parents did not get along. The family court also found Mother failed to meet her burden that it was in Children's best interest to remain in Columbia. Specifically, the family court found it was not in Children's best interest for Mother to end their relationships with Grandparents; change their daycare five times; fail to properly parent or discipline Children; or fail to care for Children by handing them off to Grandfather because she wanted to spend the evening with her boyfriend. The family court also found it was not in Children's best interest for Mother to fail to inform Father about Son's medication as the temporary order required, which the court believed possibly led to the report of sexual abuse and DSS investigation. The family court found Mother's father and stepmother's testimony was credible and found Father was commendable for his ability to put aside his differences and mend his relationship with Grandfather for the benefit of Children. The family court further found Morgan's testimony that Father was good with Children was credible.

The family court granted parents joint custody of Children and granted Father primary placement. It ordered alternating weekend visitation, ordered Mother to

pay $689.00 per month in child support and $15,000 in attorney's fees within ninety days. The family court weighed both the *E.D.M.*[1] and *Glasscock*[2] factors.

Father filed a Rule 59(e), SCRCP motion, which the family court granted, altering child support to $963.00 a month. Mother also filed a Rule 59(e) motion, arguing the family court erred by (1) denying her motion to continue, (2) failing to rely on the temporary order, (3) failing to find Father violated the order by stalking and harassing her, (4) failing to grant her sole custody, (5) failing to consider Father did not provide child support for the last year, and (6) awarding Father attorney's fees. The family court dismissed Mother's motion as untimely. This appeal followed.

ISSUES ON APPEAL

1. Did the family court abuse its discretion by denying Mother's request for a continuance?

2. Did the family court err by awarding Father primary custody of Children?

3. Did the family court err by awarding Father $15,000 in attorney's fees to be paid in ninety days?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "Our standard of review, therefore, is *de novo*." *Id.* "[W]hile this court has the authority to find facts in accordance with its own view of the preponderance of the evidence, 'we recognize the superior position of the family court . . . in making credibility determinations.'" *Lewis v. Lewis*, 400 S.C. 354, 361, 734 S.E.2d 322, 325 (Ct. App. 2012) (quoting *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655). "Further, de novo review does not relieve an appellant of his burden to 'demonstrate error in the family court's findings of fact.'" *Id.* (quoting *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655). "Consequently, the family court's factual findings will be affirmed unless [the] appellant satisfies

[1] *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992).
[2] *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* (second alteration in original) (quoting *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655).

When "reviewing a family court's evidentiary or procedural rulings," appellate courts apply "an abuse of discretion standard." *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018). "Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019). A motion for a continuance is a procedural matter involving the progress of a case. *See* Rule 40(i)(1), SCRCP. "An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support." *Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004).

LAW/ANALYSIS

I. Continuance

Mother argues the family court abused its discretion when it denied her motion for a continuance. She contends she demonstrated good cause for the continuance because her attorney was disqualified from representing her four weeks prior to the final hearing and she had not had sufficient time to secure new counsel for the hearing. Mother asserts the family court never ruled on her motion to reconsider her attorney's disqualification, which prohibited her from obtaining new counsel for the hearing. We disagree.

"As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court." Rule 40(i)(1), SCRCP. "A failure to exercise discretion amounts to an abuse of that discretion." *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). "There is a long-standing rule in this State that one judge of the same court cannot overrule another." *Charleston Cty. Dep't of Soc. Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995).

> [T]he prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases where the right to do so has been

> reserved to the succeeding Judge, when it is allowed by rule or statute, or when the subsequent order does not substantially affect the ruling or decision represented by the previous order.

Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 410, 581 S.E.2d 161, 168 (2003) (quoting *Dinkins v. Robbins*, 203 S.C. 199, 202, 26 S.E.2d 689, 690 (1943)). However, "an interlocutory order [that] merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered . . . by the court before entering a final order on the merits." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). "[A]n order [ruling upon] a motion for a continuance is an interlocutory order not affecting the merits [of a case]." *Townsend v. Townsend*, 323 S.C. 309, 313, 474 S.E.2d 424, 427 (1996). "In any case, we will not set aside a judge's ruling on a motion for a continuance unless it clearly appears there was an abuse of discretion *to the prejudice of the movant.*" *Id.*

In *Varn v. Green*, our supreme court reversed the circuit court's denial of a motion to continue the trial because the court failed to exercise its discretion. 50 S.C. 403, 27 S.E. 862 (1897). At trial, the appellant moved for a continuance because his two attorneys were sick: one was confined to bed rest and the other could barely speak. *Id.* at 403, 27 S.E. at 862. The trial court denied the motion stating "that under such circumstances it was his custom to require clients to employ other counsel." *Id.* Another attorney volunteered to represent the appellant, and the trial proceeded the next day. *Id.* On appeal, our supreme court found new counsel was unprepared, which prejudiced the appellant. *Id.* Our supreme court reversed the trial court, ordered a new trial, and held the appellant was entitled to a continuance. *Id.* Our supreme court explained "that the circuit judge abused his discretion in forcing the case to trial under the circumstances." *Id.*

Here, Mother requested a continuance at the beginning of the hearing, which the family court denied, relying on the order disqualifying Mother's counsel. The order stated Mother's attorney's disqualification "shall not" under any circumstances be a basis for continuing the trial. The family court stated *only* the administrative judge could continue this case.

We hold the family court judge who decided the disqualification could not usurp the discretion of the family court judge hearing the case at trial. First, Rule 40(i)(1), SCRCP, provides counsel may request a continuance "as actions are called." We hold the "as" in "as actions are called" means "at the time" actions are called, which indicates the discretion to grant a continuance rests with the judge currently hearing the case, and a preceding judge cannot usurp this discretion.

Second, an order granting or denying a continuance is an interlocutory order that does not affect the merits of a case; instead, a continuance delays the progress of a case and the discretion to grant or deny the motion vests with the judge with whom the case is before. *See Townsend*, 323 S.C. at 313, 474 S.E.2d at 427 (providing an order ruling upon on a motion for a continuance is an interlocutory order not affecting the merits of a case). Here, the substantial issue addressed in the order was counsel's disqualification, and the prospective denial of a motion for a continuance was therefore an interlocutory order. As such, this order could not prevent the family court from considering Mother's motion to continue. Therefore, the family court erred by determining it was bound by such order and abused its discretion by failing to exercise any discretion in ruling upon Mother's motion for a continuance.[3] *See Samples*, 329 S.C. at 112, 495 S.E.2d at 216 ("A failure to exercise discretion amounts to an abuse of that discretion."); *Varn*, 50 S.C. at 403, 27 S.E. at 862 (holding the trial court erred by relying on custom rather than exercising its discretion in denying a motion for a continuance).

Nevertheless, we find Mother was not prejudiced because the family court reached the correct result when it denied Mother's request for a continuance. During the course of this litigation, Mother was represented by two attorneys: the first moved to be relieved because Mother failed to pay her attorney's fees, and Mother relieved the second attorney following the attorney's disqualification. Further, Mother

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[3] After a thorough review of the record it appears the denial of the motion for a continuance occurred after the case was older than 365 days; thus, it is possible the family court denied the motion based on the 365-day rule. *See RE: Family Court Benchmark*, S.C. Sup. Ct. Order dated Aug. 27, 2014. ("Once a case older than 365 days has been scheduled for a final hearing, only the Chief Administrative Judge for the circuit or county may continue it, even if the request for continuance is received by the assigned judge during the week of trial."). However, the family court did not note in the record that it relied on the 365-day rule and neither party raised the rule on appeal.

signed a consent order seven days prior to the final hearing on the merits of the custody issue, which stated she would represent herself pro se if she were unable to find new counsel. Based on the foregoing, we find Mother failed to show "good and sufficient cause" to grant a continuance. *See* Rule 40(i)(1), SCRCP ("If good and sufficient cause for continuance is shown, the continuance may be granted by the court."). Thus, we affirm the family court's ruling denying Mother's request for a continuance. As to Mother's argument the family court failed to rule on her Rule 59(e) motion to reconsider the disqualification of her counsel, we find this issue is moot because she signed a consent order relieving counsel. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.").

II. Child Custody

Mother argues the family court erred in awarding primary custody to Father. She asserts her move from Greenville to Columbia was a substantial change of circumstances warranting a review of Children's best interests. We disagree.

A parent's relocation from one city to another when a true joint physical custody arrangement is in place is an issue of first impression in this state. We hold, as other jurisdictions have, that when one parent relocates when there is joint physical and legal custody, we must first address a modification of primary physical custody. *See Potter v. Potter*, 119 P.3d 1246, 1249 (Nev. 2005) (providing a relocation from joint physical custody is first governed by the law modifying primary physical custody); *Voit v. Voit*, 721 A.2d 317, 326 (N.J. Super. Ct. Ch. Div. 1998) (holding when a father requested the right to remove his son to another state and a change in custody, the case was "first and foremost a request for modification of [custody]"); *Maynard v. McNett*, 710 N.W.2d 369, 376 (N.D. 2006) (providing that before a motion to relocate can be granted in joint custody cases, the court must "first determine[that] the best interests of the child require a change in primary custody to that parent").

Relocation from joint physical custody is inherently a change to primary physical custody because one parent must lose the primary physical custody that was granted in the Original Order. Thus, we must determine whether there was a substantial change of circumstances affecting Children's welfare that occurred after the entry of the Original Order. "The change of circumstances relied on for a

change of custody must be such as would substantially affect the interest and welfare of the child." *Latimer v. Farmer*, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004). "A change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown to warrant the conclusion that the best interests of the children would be served by the change." *Id.* (quoting *Stutz v. Funderburk*, 272 S.C. 273, 278, 252 S.E.2d 32, 34 (1979)).

When a change in custody is sought, the moving party "must establish the following: (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the overall best interests of the child." *Id.* "[A] change in custody analysis inevitably asks whether the transfer in custody is in the child's best interests." *Id.* "The presumption against relocation is a meaningless supposition to the extent a custodial parent's relocation would, in fact, be in the child's best interest." *Id.* Thus, the overriding consideration as in all child custody matters is the children's best interests. *Id.*

First, we agree with the family court's finding there was a substantial change in circumstances. Specifically, the parties were not amicable toward each other and were unable to continue joint physical custody because they no longer lived near each other. We note relocation of a custodial parent alone is not enough to constitute a substantial change in circumstances. *See Walrath v. Pope*, 384 S.C. 101, 105-06, 681 S.E.2d 602, 605 (Ct. App. 2009) ("A change in the custodial parent's residence is not in itself a substantial change in circumstances affecting the welfare of the children that justifies a change in custody."). However, because both parents had true joint physical custody when Mother moved to Columbia, the relocation rendered compliance with the Original Order impossible. Thus, Mother's relocation to Columbia was a substantial change in circumstances.

Next, we must determine what custodial arrangement is in Children's best interest. Although South Carolina courts have not outlined the criteria for evaluating a child's best interests when a custodial parent relocates, our supreme court has acknowledged several factors that other states have considered when making this determination. *See Latimer*, 360 S.C. at 382–83, 602 S.E.2d at 35–36. Our supreme court weighed the following factors from the New York Court of Appeals: (1) each parent's reason for seeking or opposing the relocation; (2) the relationship between the children and each parent; (3) the impact of the relocation on the quality of the children's future contact with the non-custodial parent; (4) the economic, emotional, and educational enhancements of the move; and (5) the

feasibility of preserving the children's relationship with the non-custodial parent through visitation arrangements. *Id.* (citing *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996)). Our supreme court also weighed the following factors from the Pennsylvania Superior Court: (1) the economic and other potential advantages of the move; (2) the likelihood the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a whim of the custodial parent; (3) the motives behind the parent's reasons for seeking or opposing the move; and (4) the availability of a realistic substitute visitation arrangement that will adequately foster an ongoing relationship between the non-custodial parent and the children. *Id.* at 383, 602 S.E.2d at 36 (citing *Gancas v. Schultz*, 683 A.2d 1207, 1210 (Pa. Super. Ct. 1996)).

Applying these factors and considering Children's overall best interests, we affirm the family court's order granting Father primary physical custody.

Here, the record shows both parents had strong, loving relationships with Children. Although Mother's motive for relocating from Greenville to Columbia was to reap the financial benefit of a promotion at Walmart, we must acknowledge this benefit did not accrue. Mother blamed Father for the fact she no longer worked at Walmart; however, Mother's manager testified her employment was terminated because she chose not to return after taking medical leave and that Mother could be rehired at Walmart. Thus, Mother failed to show Children would see the economic benefit, which was her basis for the move.

The GAL expressed concern that Mother was argumentative, had overnight visitation with her boyfriend in violation of the Original Order, and changed Children's daycares five times since the Original Order. We find it especially troubling that Mother was willing to violate the family court orders, failed to inform Father of Son's medication, and failed to provide that medication when Son was in Father's custody. We agree with the family court that Mother's decision to date following the divorce should be given no weight. Nevertheless, the record indicates Mother placed her personal interests ahead of Children's by choosing to spend time with her boyfriend during specific instances when Children needed her. We find these acts were not in Children's best interest.

Moreover, Drake testified she believed placement with Father was in Children's best interest because Mother was unable to discipline them. Grandfather also testified Mother had issues with Children's discipline, and he frequently had to act

as Children's caregiver when Mother had custody of them. We appreciate our de novo review allows us to determine the weight to give to this testimony; however, we recognize the family court was in a superior position to assess the witnesses' credibility. *See Stoney*, 422 S.C. at 595, 813 S.E.2d at 487 (recognizing "a trial judge is in a superior position to assess witness credibility"). We agree with the family court that Father's willingness to put aside his differences with Grandparents for the benefit of Children was commendable.

We find Children's move from Greenville would significantly impact Father's relationship with them because he previously benefitted from week-to-week custody; however, we note this impact would be true for either parent. Although we agree with the family court's concerns regarding Father living in a one-bedroom apartment, we also agree that Father's testimony that he was on a waiting list for a three-bedroom apartment was credible.

As to Mother's argument the family court failed to consider she financially supported Children, the Original Order stated neither parent was to pay child support because they had week-to-week, divided physical custody, and Mother admitted she made more money than Father. Finally, as to her argument the family court failed to consider maternal grandmother's bonding with Children, we find Children and maternal grandmother enjoy a positive relationship; however, this bonding did not outweigh the other factors presented at the hearing.

After considering all of the evidence, we find granting Father primary physical custody was in Children's best interests; thus, we affirm the family court's order granting Father primary custody.

III. Attorney's Fees

Mother argues the family court abused its discretion in awarding Father attorney's fees. She asserts the family court failed to discuss any of the *Glasscock* factors in determining whether to award Father attorney's fees. We find Mother's arguments are unpreserved for appellate review.

In *Buist v. Buist*, our supreme court held that raising an alleged error regarding the award of attorney's fees for the first time in a Rule 59(e) motion was sufficient to preserve the issue for appellate review. 410 S.C. 569, 576, 766 S.E.2d 381, 384 (2014).

> A failure to object to the affidavit only indicates the party's acceptance of the affidavit as a reasonable representation of the amount of fees the opposing party owes his or her attorney, thus obviating any need for the opposing party to produce additional evidence or testimony on the matter. The family court must still apply the *Glasscock* or *E.D.M.* factors to determine whether to award a fee, as well as the amount of the fee to award.

Id. "If the party is not reasonably clear in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal." *Id.* at 575, 766 S.E.2d at 384.

Here, Mother challenged attorney's fees for the first time in her Rule 59(e) motion. Ordinarily, this would be sufficient to preserve the issue for review, but here, the family court dismissed Mother's Rule 59(e) motion as untimely and never ruled on her attorney's fees argument. Mother's failure to challenge the family court's dismissal of her Rule 59(e) motion on appeal renders her argument regarding attorney's fees unpreserved. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Therefore, we affirm the family court's award of $15,000 in attorney's fees to Father.

CONCLUSION

For the foregoing reasons, we affirm the family court's order denying Mother's motion for a continuance, granting Father primary physical custody of Children, and ordering Mother to pay $15,000 in attorney's fees. According, the family court's order is

AFFIRMED.[4]

HILL and HEWITT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Annie R. Jackson, Respondent,

v.

Sammy Lee Jackson, Louise Jackson, and Walter Williams, Appellants.

Appellate Case No. 2016-001208

Appeal From Darlington County
Cely Anne Brigman, Family Court Judge

Opinion No. 5785
Submitted October 1, 2019 – Filed December 9, 2020

AFFIRMED IN PART AND REVERSED IN PART

M. Rita Metts, of Metts Law Firm, of Columbia, for Appellants.

Annie R. Jackson, of Darlington, pro se.

WILLIAMS, J.: Sammy Lee Jackson (Husband) appeals the family court's order granting Annie Jackson (Wife) a divorce and dividing the marital estate. Husband argues the family court erred in (1) failing to equitably divide the marital estate; (2) ordering him to pay half of their minor child's (Daughter's) graduation expenses and elective international school trip (the School Trip) costs; and (3) ordering him to pay alimony. We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Husband and Wife married in Darlington, South Carolina, in 1984 and subsequently moved to New York. Husband and Wife both worked, and Wife took care of their home and children. The parties had three children, but two were emancipated at the time this action was filed; the other child—Daughter—was in high school and living with Wife.

In 1998, Wife moved back to Darlington due to Husband's infidelity. Husband remained in New York but periodically traveled to Darlington, and the parties continued a marital relationship until they separated in 2006.

In 2007, Husband was convicted of check and credit card fraud. Husband was sentenced to fourteen months' imprisonment and was ordered to pay restitution. He was released from prison in 2008.

In March 2008, Wife obtained a family court order requiring Husband to pay $236.53 in weekly child support. Husband failed to make these payments. The family court reduced Husband's support obligation in 2011 due to the emancipation of the parties' two oldest children. In the same ruling, the court ordered Husband to make payments towards his accrued child support arrearage.

In 2012, Husband suffered an injury and began receiving Social Security Disability (SSD). However, neither he nor Wife received SSD benefits for Daughter because he did not disclose on his application that he had children. In 2013, Wife contacted the South Carolina Department of Social Services (DSS) regarding Husband's failure to pay child support. As a result, Husband began paying the child support, and Wife also started receiving SSD benefits for Daughter.

On March 20, 2014, Wife filed an action in family court, seeking a divorce on the grounds of adultery or one year's continuous separation; primary custody of Daughter; alimony; an upward modification of child support; a restraining order; and attorney's fees. Husband filed an answer and counterclaim, seeking a divorce

on the ground of adultery; equitable division of the marital estate; an order denying Wife alimony, custody, and child support; and attorney's fees.[1]

At the time of trial, Husband was unable to work, receiving SSD and Workers' Compensation (Workers' Comp) benefits.[2] Wife worked in school cafeterias earning minimum wage from 2004 until 2013. She stopped working because of a disability, and she had a pending SSD application. Wife received approximately $725 a month for Daughter's care—comprised of Husband's SSD benefits and child support—and $320 a month in food stamps.

Husband testified and offered documentation of outstanding back taxes, credit card debts, and court ordered restitution, all of which existed at the time the marital litigation began.[3] Husband asserted Wife's name was on all of the credit cards and she specifically used a Macy's credit card. However, he did not offer the cards as evidence, and he did not offer any receipts or billing statements showing Wife used the cards. Wife denied use of the credit cards, claiming Husband put her name on the credit card applications. Wife also asserted the parties began filing taxes separately in 1998.

Wife lives in a home on Society Hill Road (the Society Hill Property) that she and her siblings inherited in 2001. Wife agreed to purchase her siblings' interest for five dollars and future installment payments, and they conveyed the Society Hill Property to her in 2010. She testified she was still paying each sibling but was unable to regularly pay.

Husband lives in Brooklyn, New York. He admitted he purchased property on Crane Lane (the Crane Lane Property) but claimed he sold it back to the previous

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[1] Husband initially denied committing adultery but admitted at trial to two affairs during the marriage and that the affairs ended three or four years before trial. One affair resulted in a child born in 2003.

[2] Husband submitted a financial declaration on the first day of trial, but he testified it was not accurate. His financial declaration listed a monthly income of $2,832, but he testified his income fluctuated and could be as high as $3,500 per month. The financial declaration also listed $4,483 in monthly expenses, but he testified they were closer to $3,200 per month.

[3] Husband's testimony as to the amounts he owed for these obligations was inconsistent with the amounts in the record and in his appellate brief.

owner after learning it was subject to a substantial lien. He did not offer any other evidence of this transaction.

By order dated May 9, 2016, the family court found Husband's conduct contributed to the parties' separation and granted Wife a divorce on the ground of adultery.[4] The court imputed a monthly income to Husband of $4,000 based on his lifestyle, and the family court also imputed a monthly income to Wife of $1,256 per month based on minimum wage. The family court gave Husband a credit for a lump sum payment Wife previously received from Social Security for Daughter but found Husband still had a $34,869.93 arrearage in child support. The court ordered Husband to continue to pay $47.30 per week in child support for Daughter and to pay $9.46 per week toward his arrearage. The court also ordered his arrearage payment to increase to $100 per week once Daughter was emancipated. The family court found that Husband testified he was willing to pay for one-half of Daughter's graduation expenses and one-half of the School Trip and ordered him to pay accordingly. The family court awarded the Crane Lane Property to Wife, finding it was marital property and that Husband waived any interest in the property. The family court found Wife inherited the Society Hill Property and it was Wife's nonmarital property. The court also ordered an equal division of any future lump sum settlement from Social Security, Workers' Comp, or buyout from Husband's former employer, as well as Husband's retirement account. The court held Husband's criminal restitution was not a marital debt and both parties were responsible for the remaining debts in their respective names. The family court awarded Wife $200 per month in permanent periodic alimony and ordered the obligation to increase to $300 per month once Daughter was emancipated. The family court also ordered Husband to pay $5,000 of Wife's attorney's fees. This appeal followed.

ISSUES ON APPEAL

I. Did the family court err in ordering Husband to pay one-half of the expenses for Daughter's School Trip and graduation?

II. Did the family court err in dividing the marital estate?

III. Did the family court err in requiring Husband to pay alimony?

[4] Husband did not appeal this finding.

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). On appeal from the family court, an appellate court reviews factual and legal issues de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). Thus, an appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. *Lewis*, 392 S.C. at 384, 709 S.E.2d at 651. However, this broad scope of review does not require an appellate court to disregard the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Id.* at 385, 392, 709 S.E.2d at 651–52, 655. Moreover, the appellant bears the burden of convincing an appellate court that the family court committed error or that the preponderance of the evidence is against the family court's findings. *Id.* at 392, 709 S.E.2d at 655. The appellant also bears the burden of providing an appellate court with an adequate record for review. *Ricigliano v. Ricigliano*, 413 S.C. 319, 338, 775 S.E.2d 701, 711–12 (Ct. App. 2015).

LAW/ANALYSIS

As an initial matter, we find Husband abandoned several of his issues on appeal. Husband argues the family court erred in (1) imputing his income, (2) ordering him to pay attorney's fees, and (3) denying a motion for recusal. However, Husband did not cite any authority to support his assertions. Instead, he solely discussed the facts relating to his arguments and summarily concluded the family court erred. *See* Rule 208(b)(1)(E), SCACR (requiring each of the appellant's argument sections contain "discussion and citations of authority"); *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *see also Butler v. Butler*, 385 S.C. 328, 343, 684 S.E.2d 191, 199 (Ct. App. 2009) (declining to address issues on the merits after finding the issues were abandoned on appeal because the appellant cited no statute, rule, or case to support his arguments and made conclusory statements without supporting authority). Therefore, we find these issues are abandoned on appeal and affirm the family court on these issues.

I. Daughter's Expenses

Husband argues the family court erred in ordering him to pay part of Daughter's School Trip and graduation expenses because the Child Support Guidelines (the Guidelines) do not obligate him to pay for elective school trips and graduation expenses. We agree in part.

If a party concedes an issue before the family court, the issue is not preserved for appellate review. *See Widman v. Widman*, 348 S.C. 97, 118–19, 557 S.E.2d 693, 704–05 (Ct. App. 2001). When determining the appropriate child support amount, the family court considers the Guidelines. *See* S.C. Code Ann. §§ 43-5-580(b) (2015), 63-17-470 (2010); S.C. Code Ann. Regs. 114-4710 (Supp. 2019). Regulation 114-4710 and subsection 63-17-470(C) list factors unaccounted for by the Guidelines that the family court is required to consider when determining whether to deviate from the Guidelines. Two of these factors are (1) "educational expenses[,] . . . includ[ing] those incurred for private, parochial, or trade schools, other secondary schools, or post-secondary education where there is tuition or related costs," and (2) consumer debts. § 63-17-470(C)(1), (3); *see also* S.C. Code Ann. Regs. 114–4710(B)(1), (3). The "educational expenses" factor has been interpreted as applying to the cost of attending a school. *See LaFrance v. LaFrance*, 370 S.C. 622, 657–58, 636 S.E.2d 3, 21–22 (Ct. App. 2006) (affirming the family court's order that directed the husband to contribute to the tuition, "miscellaneous fees, books, uniforms, and school lunches" necessary for his children to attend private school), *overruled in part on other grounds by Arnal v. Arnal*, 371 S.C. 10, 636 S.E.2d 864 (2006); *see also Smith v. Smith*, 386 S.C. 251, 263–64, 687 S.E.2d 720, 726–27 (Ct. App. 2009) (reversing and remanding to the family court the issue of whether the cost of continued private school attendance was an appropriate deviation from the Guidelines). "Deviation from the [G]uidelines should be the exception rather than the rule. When the court deviates, it must make written findings that clearly state the nature and extent of the variation from the [G]uidelines." S.C. Code Ann. Regs. 114-4710(B); *see also Sexton v. Sexton*, 321 S.C. 487, 491, 469 S.E.2d 608, 611 (Ct. App. 1996) ("Although the family court may deviate from the . . . Guidelines, any deviation must be justified and should be the exception rather than the rule.").

We find the family court did not err in ordering Husband to pay half of Daughter's graduation expenses. The family court correctly found Husband conceded the issue of Daughter's graduation expenses because he testified he was willing to

contribute to those expenses. *See Widman*, 348 S.C. at 118–19, 557 S.E.2d at 704–05 (holding an issue is not preserved for appellate review if the party concedes the issue before the family court). Although Husband's concession was to pay some of the expenses and not half, we find fifty percent of the cost to be a reasonable division based upon the parties' ability to contribute to these costs.

However, based on our de novo review, we conclude the family court erred in finding Husband conceded to contributing toward the costs of the School Trip. *See Lewis*, 392 S.C. at 384, 709 S.E.2d at 651 (stating the appellate court reviewing family court orders has the authority to find facts in accordance with its own view of the preponderance of the evidence). Daughter was eligible to go on the School Trip because of her excellent grades, but Wife could not afford to pay for the trip. Husband was not asked about the School Trip during his testimony, and he did not state he was willing to pay for it. Because this court has interpreted "educational expenses" to include the cost of school attendance but not elective field trips, we find the School Trip is not an appropriate deviation from the Guidelines. *See LaFrance*, 370 S.C. at 657–58, 636 S.E.2d at 21–22 (interpreting the "educational expenses" factor to include tuition, books, uniforms, lunches, and miscellaneous fees). Thus, we hold the family court erred in requiring Husband to pay for half of the School Trip. Further, even if the School Trip was a valid consideration, Husband's limited income coupled with his consumer debt weighs against requiring him to pay for this elective School Trip. *See* § 63-17-470(C)(3) (listing consumer debt as a factor to consider when deviating from the Guidelines). Therefore, we affirm the family court's order as to Daughter's graduation expenses but reverse the family court's order as to the School Trip.

II. Marital Estate

Husband asserts the family court erred in equitably apportioning the marital estate because it failed to apply the required statutory factors. Specifically, he argues the family court erred in (1) finding his debts were nonmarital, (2) finding the Society Hill Property was nonmarital, (3) ordering him to assign any interest in the Crane Lane Property to Wife, and (4) considering properties owned by Sammie Jackson. We agree in part.

Marital property is "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation." S.C. Code Ann. § 20-3-630(A) (2014).

When a marriage is dissolved, marital property "should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title." *Mallett v. Mallett*, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996) (per curiam); *see Sanders v. Sanders*, 396 S.C. 410, 418, 722 S.E.2d 15, 18 (Ct. App. 2011) ("The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership."). Subsection 20-3-620(B) of the South Carolina Code (2014) provides fifteen factors the family court must consider when apportioning the marital estate. "In reviewing a division of marital property, an appellate court looks to the overall fairness of the apportionment." *Brown v. Brown*, 412 S.C. 225, 235, 771 S.E.2d 649, 654 (Ct. App. 2015). "Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is *fair*." *Bojilov v. Bojilov*, 425 S.C. 161, 184, 819 S.E.2d 791, 804 (Ct. App. 2018) (quoting *Doe v. Doe*, 370 S.C. 206, 214, 634 S.E.2d 51, 55 (Ct. App. 2006)).

A. Marital Debt

Husband presented evidence of significant debts for credit cards, back taxes, and criminal restitution. He asserts these obligations should be presumed marital debts because they existed prior to the marital litigation and were incurred for the benefit of the marriage. He further claims Wife failed to rebut the presumption that the debts were marital. Based on our de novo review, we disagree.

"[A] marital debt is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable." *Schultze v. Schultze*, 403 S.C. 1, 8, 741 S.E.2d 593, 597 (Ct. App. 2013) (quoting *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005)). "There is a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is marital and must be factored in the totality of equitable apportionment." *Id.* "[W]hen a debt is proven to have accrued before the commencement of the marital litigation, the burden of proving the debt is nonmarital rests on the party who makes such an assertion." *Id*. "If the [family court] finds that a spouse's debt was not made for marital purposes, it need not be factored into the court's equitable apportionment of the marital estate, and the [family court] may require payment by the spouse who created the debt for nonmarital purposes." *Hickum v. Hickum*, 320 S.C. 97, 103, 463 S.E.2d 321, 324

(Ct. App. 1995); *see Kennedy v. Kennedy*, 389 S.C. 494, 503–04, 699 S.E.2d 184, 188 (Ct. App. 2010) (affirming the family court's finding that credit card debts were nonmarital after noting there was conflicting testimony and the family court was in a superior position to adjudge credibility).

1. Credit Cards

Husband argues the family court erred in finding the credit card debts were nonmarital. We disagree.

At trial, Wife testified she did not use the credit cards and Husband did not use the cards to support the marriage. Wife asserted she did not fill out the application for many of the cards and Husband put her name on them. The family court—finding Wife was more credible than Husband—found she rebutted the presumption that the credit cards were marital debt.[5] *See Lewis*, 392 S.C. at 392, 709 S.E.2d at 655 (stating the appellate court's de novo standard of review does not require it to disregard the family court's credibility determination); *Kennedy*, 389 S.C. at 503–04, 699 S.E.2d at 188 (affirming the family court's finding that credit card debts were nonmarital after noting there was conflicting testimony).

As the appellant, Husband must show the family court erred. *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655 (stating the appellant bears the burden of proving the family court erred or its findings are not supported by the preponderance of the evidence). Husband testified Wife used the credit cards, some of the cards were in both of their names, and he had receipts of the cards' use. However, he testified the cards and receipts were in New York and did not present any credit cards bearing Wife's name or produce receipts evincing (1) Wife's use of the credit cards or (2) what was purchased with the credit cards. *See Brown v. Odom*, 425 S.C. 420, 432, 823 S.E.2d 183, 189 (Ct. App. 2019) ("[A] party cannot sit back at trial without offering proof, then come to this [c]ourt complaining of the insufficiency of the evidence to support the family court's findings." (alterations in original) (quoting *Honea v. Honea*, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987))); *Hudson v. Hudson*, 294 S.C. 166, 169, 363 S.E.2d 387, 389 (Ct. App. 1987)

[5] In addition to considering the family court's credibility determination, our own review of the record leads us to similarly conclude that Wife was more credible than Husband. Husband provided evasive—and sometimes false—answers during trial and admitted his financial declaration was inaccurate on the day he filed it.

(noting the party seeking equitable distribution must present evidence supporting his or her claim). The only documentary evidence of the credit card debts—collection letters, offers to settle, and a notice of garnishment—are addressed solely to Husband.

Based on the foregoing, we find Wife rebutted the presumption of marital debt through her aforementioned credible testimony and Husband failed to show the family court erred in finding the debt was nonmarital. *See Schultze*, 403 S.C. at 8, 741 S.E.2d at 597 ("[W]hen a debt is proven to have accrued before the commencement of the marital litigation, the burden of proving the debt is nonmarital rests on the party who makes such an assertion."). Accordingly, we find the credit card debts are nonmarital, and we affirm the family court.

2. Restitution

Next, Husband argues the family court erred in finding Husband's restitution was nonmarital. Husband asserts Wife should be partially responsible for paying his criminal restitution because she benefited from his criminal activity. We disagree.

Husband testified Wife knew of and benefited from his criminal activity. Although Wife testified she was aware of his criminal activity, the record is not clear whether Wife gained knowledge of his activity before or after his conviction in 2007. *Cf. Grumbos v. Grumbos*, 393 S.C. 33, 47, 710 S.E.2d 76, 84 (Ct. App. 2011) (stating the wife's credible testimony that she was unaware of the purported marital debts prior to filing for divorce was evidence that the debts were not incurred for the benefit of the marriage). Regardless, Wife, whom the family court found credible, testified Husband's activity occurred after she moved to South Carolina and Husband did not use the ill-gotten gains to support the marriage. *See Lewis*, 392 S.C. at 385, 392, 709 S.E.2d at 651–52, 655 (stating the appellate court's de novo review of the family court does not require it to disregard the family court's credibility determination). Because Husband presented no other evidence to show Wife or their children benefited from his criminal activity, we find the family court did not err in holding Husband solely responsible for his criminal restitution. *See Schultze*, 403 S.C. at 8, 741 S.E.2d at 597 ("[A] marital debt is a debt incurred for the *joint benefit of the parties* . . . ." (emphasis added) (quoting *Wooten*, 364 S.C. at 546, 615 S.E.2d at 105)); *see also Thompson v. Thompson*, 105 P.3d 346, 352–53 (Okla. Civ. App. 2004) (finding the wife's restitution was nonmarital debt and rejecting the wife's argument that the family

benefited from her criminal activity because she did not provide proof that the family benefited from her embezzlement). We affirm the family court.

3. Tax Liability

Husband also argues the family court erred in failing to apportion some of his outstanding tax liability to Wife. We disagree.

Income taxes incurred by the parties can be marital debt. *See Barrow v. Barrow*, 394 S.C. 603, 611–12, 716 S.E.2d 302, 306–07 (Ct. App. 2011) (finding the family court erred in apportioning all of the remaining tax liability to the husband when the wife's tax payments represented thirty-five percent of the total marital tax liability while the wife benefited from fifty percent of the marital income).

Husband presented documentation for taxes due between 2002 and 2010. The parties stopped filing joint tax returns after Wife moved to South Carolina in 1998. Between 1998 and the parties' separation in 2006, Husband provided support to Wife totaling less than $500 annually. Then, despite the 2008 child support order, Husband still failed to consistently support the children until Wife contacted DSS in 2013. Husband did not present any evidence of (1) his income between 2002 and 2010 or (2) the amount of financial support he provided to Wife and their children during those years. Without this information, the family court and this court cannot determine how much Wife benefited from Husband's income during the years of his back taxes. *See Hudson*, 294 S.C. at 169, 363 S.E.2d at 389 (noting the party seeking equitable distribution must present evidence supporting his or her claim); *Cf. Sanders*, 396 S.C. at 421, 722 S.E.2d at 20 (stating the husband's failure to present evidence to the family court regarding the value of his assets precluded this court from assigning the assets a definitive value). Based on our de novo review, we find the family court did not err in apportioning all of Husband's tax liability to him, and we affirm the family court.

B. Wife's Property

Husband argues the family court erred in determining the Society Hill Property was Wife's nonmarital property. We agree in part. Wife originally inherited the Society Hill Property in 2001, along with her six siblings, giving her a one-seventh interest in the property. Then in 2010, Wife agreed to purchase the remaining six-sevenths interest in the property from her siblings for five dollars and future

installment payments. Because Wife obtained the remainder of the interests in the Society Hill Property in a different manner, the family court erred in finding the entirety of the Society Hill Property was inherited property and therefore nonmarital. We examine each interest separately.

1. The Nonmarital One-Seventh Interest

As to the one-seventh interest, we find it is nonmarital property. Wife inherited this interest, and inherited property is nonmarital property. *See* S.C. Code Ann. § 20-3-630(A)(1). For this interest to be marital property, Husband must show it transmuted. *See Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "Transmutation is a matter of intent to be gleaned from the facts of each case. The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Id.* "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." *McMillan v. McMillan*, 417 S.C. 583, 591, 790 S.E.2d 216, 220 (Ct. App. 2016) (quoting *Smallwood v. Smallwood*, 392 S.C. 574, 579, 709 S.E.2d 543, 546 (Ct. App. 2011)). Based on our review of the record, we find there is no evidence the parties intended to treat the property as marital property. Wife testified she did not regard the property as marital property. Husband testified he paid an electric bill for the Society Hill Property on one occasion, but he said he did so "out of the kindness of [his] heart." This indicates he also did not view the Society Hill Property as marital property. *See Murray v. Murray*, 312 S.C. 154, 158, 439 S.E.2d 312, 315 (Ct. App. 1993) (finding the wife failed to produce objective evidence showing that real estate purchased by the husband prior to the marriage was regarded by the parties as common property during the marriage). Accordingly, as to Wife's inherited one-seventh interest in the Society Hill Property, we affirm the family court and find that it is nonmarital property.

2. The Marital Six-Sevenths Interest

As to the six-sevenths interest in the Society Hill Property, we find it is marital property. Wife did not inherit this interest but purchased it from her siblings in 2010 by agreeing to pay five dollars and future installment payments. Because she

purchased the property before she filed for a divorce in 2014, it is marital property. *See* § 20-3-630(A) (stating property acquired during the marriage and owned as of the date of commencement of marital litigation is marital property). Therefore, the family court erred insofar as it held the six-sevenths interest was nonmarital property.

However, despite concluding the family court erred in holding this interest was nonmarital, we find the family court's distribution of the interest to Wife fairly reflected her contribution, and Husband's lack thereof, to its acquisition. *See Bojilov*, 425 S.C. at 184, 819 S.E.2d at 804 ("Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is *fair*." (quoting *Doe*, 370 S.C. at 214, 634 S.E.2d at 55)); *see also* § 20-3-620(B)(3) (stating the family court must consider, among other factors, each spouse's contribution to the acquisition and preservation of marital property when equitably dividing the marital estate); *Mallett*, 323 S.C. at 150, 473 S.E.2d at 810 ("Upon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title."). Husband furnished no evidence that he was involved in the negotiation and execution of Wife's purchase of her siblings' interest. Husband also provided no evidence that (1) he gave any money to Wife for the purpose of acquiring the property or making the installment payments; (2) Wife used any of his provided support to make the payments; or (3) he was aware of Wife's purchase and payments prior to this action. *Cf. Sanders*, 396 S.C. at 421, 722 S.E.2d at 20 (stating the husband's failure to present evidence to the family court regarding the value of his assets precluded this court from assigning the assets a definitive value). The only evidence in the record of Husband financially contributing in any manner to the property was the aforementioned light bill. *See Mallett*, 323 S.C. at 150, 473 S.E.2d at 810 (stating the division of marital property should fairly reflect each spouse's contribution to the property's acquisition).

Based on the foregoing, we find the family court's error in designating the entirety of the Society Hill Property as Wife's nonmarital property does not disturb the fairness of its equitable division of the marital estate. *See Sanders*, 396 S.C. at 418, 722 S.E.2d at 18 ("The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership."); *see also Bojilov*, 425 S.C. at 184, 819 S.E.2d at 804 ("Even if the

family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is *fair*." (quoting *Doe*, 370 S.C. at 214, 634 S.E.2d at 55)). Because Husband failed to show that the family court erred in its overall equitable division of the marital estate, we affirm the result reached by the family court.

C. Future Settlements

The family court found Husband did not oppose sharing any future settlement he might receive from Social Security, Workers' Comp, or his employer's buyout and ordered him to share equally any settlement he might receive. Husband argues this was error, but he failed to cite any authority to support his arguments. We find the issues of Husband sharing any Workers' Comp settlement or employer buyout are abandoned on appeal, and we affirm the family court. *See Bryson*, 378 S.C. at 510, 662 S.E.2d at 615 ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *see also Butler*, 385 S.C. at 343, 684 S.E.2d at 199 (declining to address the issues on the merits after finding the issues were abandoned on appeal because the appellant cited no statute, rule, or case to support his arguments and made conclusory statements without supporting authority).

However, we address the family court's division of any future Social Security settlement because it implicates the family court's subject matter jurisdiction. "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *S.C. Dep't of Soc. Servs. v. Meek*, 352 S.C. 523, 530, 575 S.E.2d 846, 849 (Ct. App. 2002) (quoting *Pierce v. State*, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000)). Lack of subject matter jurisdiction can be raised at any time by the parties or sua sponte by the court. *S.C. Dep't of Soc. Servs. v. Tran*, 418 S.C. 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016) (per curiam). Lack of subject matter jurisdiction cannot be waived by consent of the parties, and this court has a duty to take notice and determine whether the family court had proper subject matter jurisdiction. *Id.* at 314–15, 792 S.E.2d at 257.

In the Social Security Act (the Act), an anti-assignment clause provides that "[t]he right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable . . . under this subchapter shall be subject to execution, levy, attachment,

garnishment, or other legal process." 42 U.S.C. § 407(a) (2018). Although Section 659 of the Act allows benefits to be reassigned for alimony, "any payment . . . by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses" is expressly excluded from the definition of alimony. 42 U.S.C. § 659(i)(3)(B)(ii) (2018). In *Simmons v. Simmons*, this court held (1) the Act's anti-assignment clause made Social Security benefits nonmarital for property divisions and (2) family courts lacked subject matter jurisdiction to equitably divide such benefits because the Act preempts state law. 370 S.C. 109, 115–16, 634 S.E.2d 1, 4–5 (Ct. App. 2006) ("It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void."). This court has also held a party's voluntary agreement to pay part of the benefits was "of no significance." *Id.* at 117, 634 S.E.2d at 5. "Because Congress preempted the Social Security arena, state courts do not have subject[ ]matter jurisdiction to mandate distribution of such benefits whether by agreement or otherwise." *Id.* at 118, 634 S.E.2d at 5.

Because the family court lacks subject matter jurisdiction to divide SSD benefits when equitably dividing marital property, we find the family court erred in ordering Husband to divide any future lump sum settlement from Social Security. *See id.* The fact that Husband may have conceded a willingness to divide any settlement is "of no significance." *Id.* at 117, 634 S.E.2d at 5. Accordingly, we reverse the family court on this issue.

D. Crane Lane Property

Husband argues the family court erred in awarding Wife the Crane Lane Property. We find this argument is unpreserved for appellate review.

On appeal, Husband claims he has a "rent-to-own" arrangement with the owner of the Crane Lane Property; however, he did not make this argument to the family court. At trial, Husband argued he had no interest in this property because he sold it back to the previous owners. Because Husband makes a different argument on appeal than he did before the family court, we find this issue is unpreserved for our review, and we affirm the family court. *See Wilburn v. Wilburn*, 403 S.C. 372, 386 n.2, 743 S.E.2d 734, 742 n.2 (2013) ("[An] appellant cannot argue one ground at trial and another ground on appeal."); *Doe v. Roe*, 369 S.C. 351, 375–76, 631 S.E.2d 317, 330 (Ct. App. 2006) ("An issue cannot be raised for the first time on

appeal, but must have been raised to and ruled upon by the [family court] to be preserved for appellate review.").

E. Sammie Jackson's Property

Husband argues the family court erred in finding real property titled in the name Sammie Jackson was marital property. Husband's contention is without merit. In its order, the family court noted that Wife asserted certain real property belonged to Husband. Another person named Sammie Jackson testified he owned the properties. The family court found the only real property held by Husband, Sammy Lee Jackson, was the Crane Lane Property. Because the family court did not rule Sammie Jackson's properties were part of the marital estate, this argument concerns a non-controversy. *See Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists.").

III. Alimony

Husband argues the family court erred in awarding Wife alimony. We disagree.

"Generally, alimony should place the supported spouse, as nearly as practical, in the same position as enjoyed during the marriage." *Craig v. Craig*, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). When determining alimony, the family court must consider the relevant statutory factors: (1) the marriage's duration along with the ages of the parties at the beginning of the marriage and at the beginning of the action; (2) each spouse's physical and emotional condition; (3) each spouse's educational background and whether either needs additional training or education to reach income potential; (4) each spouse's employment history and earning potential; (5) the standard of living enjoyed during the marriage; (6) each spouse's current and reasonably expected earnings; (7) each spouse's current and reasonably expected expenses; (8) marital and nonmarital property; (9) custody of children; (10) marital misconduct; (11) tax consequences of any award; (12) existence and amount of any prior support obligation; and (13) any other relevant factor. S.C. Code Ann. § 20-3-130(C) (2014).

Husband argues the family court erred in ordering him to pay alimony because Wife already receives child support from him, he has limited income, and both parties have similar educations and bad health. Based on our de novo review, we find Husband failed to show the family court erred in awarding Wife alimony. *See Lewis*, 392 S.C. at 392, 709 S.E.2d at 655 (stating appeals from the family court are reviewed de novo and the appellant bears the burden of proving the family court erred or its findings are not supported by the preponderance of the evidence). First, we note a large portion of Husband's child support payments come from Social Security, which Husband conceded at trial is separate from his benefits disbursements. Second, his argument ignores the fact that Wife was unable to work and had no income at the time of trial. Therefore, Husband was in a superior financial position to Wife. These facts do not weigh against an order of alimony.

Husband also argues the family court failed to consider the parties' standard of living during the marriage. He asserts the family court failed to consider that Wife still maintained her marital standard of living at the time of the trial or that she could apply for divorced spouse benefits through Social Security. Husband contends that because the purpose of alimony is to allow the supported spouse to maintain, as nearly as practical, the marital standard of living and because Wife was able to maintain her standard of living despite Husband providing little support, he should not have to pay alimony. However, marital standard of living is only one of the thirteen factors to be considered in the award of alimony. *See* § 20-3-130(C) (stating the family court should consider (1) the marriage's duration and each spouse's age at the beginning of the marriage and at the beginning of the action; (2) each spouse's physical and emotional condition; (3) each spouse's educational background and whether either needs additional training or education to reach income potential; (4) each spouse's employment history and earning potential; (5) the standard of living enjoyed during the marriage; (6) each spouse's current and reasonably expected earnings; (7) each spouse's current and reasonably expected expenses; (8) marital and nonmarital property; (9) custody of children; (10) marital misconduct; (11) the tax consequences of any award; (12) existence and amount of any prior support obligation; and (13) any other relevant factor when awarding alimony). We find the family court properly considered evidence attendant to other relevant factors. The family court noted the parties had been married for thirty-one years, were in their early twenties when they married, and were in their early fifties when they divorced. The family court also observed Husband's income was greater than Wife's at the time of trial and Husband's

infidelity contributed to the breakup of the marriage. Moreover, solely considering the marital standard of living, Husband's argument is still without merit. The record shows Husband's conduct contributed to Wife's lower standard of living. Husband provided little support to Wife and their children after she moved to South Carolina before the family court ordered him to pay child support, and then, he habitually failed to pay child support. Because Husband contributed to Wife's lower standard of living, we find this factor does not weigh in favor of denying alimony. *See Patel v. Patel*, 347 S.C. 281, 290 555 S.E.2d 386, 391 (2001) (finding it inappropriate to consider the low standard of living as basis for not awarding alimony when the husband deliberately chose to keep the family in inadequate housing well below their means during the marriage); *Allen*, 347 S.C. at 184, 554 S.E.2d at 424 ("It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded."). Based on our de novo review, we affirm the family court.

CONCLUSION

The decision of the family court is therefore

AFFIRMED IN PART AND REVERSED IN PART.[6]

HUFF and MCDONALD, JJ., concur.

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