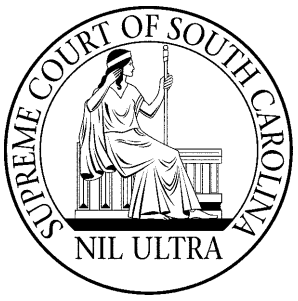

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
February 10, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2021-UP-042-State v. Jamaa Ato Washington, Jr.

2021-UP-043-Keith L. Montgomery v. Richland County

2021-UP-044-Dr. Gregg N. Battersby v. Pamela Reid

2021-UP-045-Kenneth Davis v. Cole Dunn

PETITIONS FOR REHEARING

5789-William Irvin v. City of Folly Beach (Rabon)	Pending
5790-James Provins v. Spirit Construction Services	Pending
5792-Robert Berry v. Scott Spang	Pending
5793-ABB, Inc. v. Integrated Recycling Group	Pending
2020-UP-333-SCDSS v. Michele Colditz	Denied 02/02/21
2021-UP-009-Paul Branco v. Hull Storey Retail Group	Denied 02/03/21

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5641-Robert Palmer v. State et al.	Pending
5691-Eugene Walpole v. Charleston Cty.	Pending
5714-Martha Fountain v. Fred's Inc.	Pending
5715-Christine LeFont v. City of Myrtle Beach	Pending
5716-Glenn Gunnells v. Cathy G. Harkness	Pending
5721-Books-A-Million v. SCDOR	Pending
5722-State v. Herbie V. Singleton, Jr.	Pending
5723-Shon Turner v. MUSC	Pending

5725-In the matter of Francis A. Oxner	Pending
5726-Chisolm Frampton v. SCDNR	Pending
5729-State v. Dwayne C. Tallent	Pending
5730-Patricia Damico v. Lennar Carolinas	Pending
5731-Jerico State v. Chicago Title Insurance	Pending
5735-Cathy J. Swicegood v. Polly A. Thompson	Pending
5736-Polly Thompson v. Cathy Swicegood	Pending
5741-Martha Lusk v. Jami Verderosa	Pending
5745-Steven K. Alukonis v. Wayne K. Smith, Jr.	Denied 02/04/21
5749-State v. Steven L. Barnes	Pending
5750-Progressive Direct v. Shanna Groves	Pending
5751-State v. Michael Frasier, Jr.	Pending
5755-Stephen A. Connelly v. The Main Street America Group	Pending
5758-State v. Deshanndon M. Franks	Pending
5759-Andrew Young v. Mark Keel	Pending
5760-State v. Jaron L. Gibbs	Pending
5764-State Farm v. Myra Windham	Pending
5767-State v. Justin Ryan Hillerby	Pending
5768-State v. Antwuan L. Nelson	Pending
5769-Fairfield Waverly v. Dorchester County Assessor	Pending
5773-State v. Mack Seal Washington	Pending

5783-SC Dep't of Commerce, Division of Public Railways v. Clemson	Pending	
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending	
2019-UP-386-John W. Mack, Sr. v. State	Pending	
2019-UP-393-The Callawassie Island v. Gregory Martin	Pending	
2020-UP-013-Sharon Brown v. Cherokee Cty. School District	Pending	
2020-UP-018-State v. Kelvin Jones	Pending	
2020-UP-020-State v. Timiya R. Massey	Pending	
2020-UP-026-State v. Tommy McGee	Pending	
2020-UP-032-State v. Kenneth S. Collins	Pending	
2020-UP-093-Michael Elders v. State	Pending	
2020-UP-108-Shamsy Madani v. Rickey Phelps	Pending	
2020-UP-118-State v. Samuel Lee Broadway	Denied	02/08/21
2020-UP-132-Federal National Mortgage Assoc. v. D. Randolph Whitt	Pending	
2020-UP-133-Veronica Rodriguez v. Peggy Evers	Pending	
2020-UP-144-Hubert Brown v. State	Pending	
2020-UP-145-Kenneth Kurowski v. Daniel D. Hawk	Pending	
2020-UP-148-State v. Ronald Hakeem Mack	Pending	
2020-UP-150-Molly Morphew v. Stephen Dudek	Pending	
2020-UP-151-Stephen Dudek v. Thomas Ferro (Morphew)(2)	Pending	
2020-UP-169-State v. James Alfonza Biggs, III	Pending	
2020-UP-178-State v. Christian A. Himes	Pending	
2020-UP-196-State v. Arthur J. Bowers	Pending	

2020-UP-197-Cheryl DiMarco v. Brian DiMarco (3)	Pending
2020-UP-198-State v. Sidney Moorer	Pending
2020-UP-199-State v. Joseph Campbell Williams, II	Pending
2020-UP-219-State v. Johnathan Green	Pending
2020-UP-221-SCDSS v. Shannon R. Jacob	Pending
2020-UP-235-Misty A. Morris v. BB&T Corp. (David Proffitt)	Pending
2020-UP-236-State v. Shawn R. Bisnauth	Pending
2020-UP-237-State v. Tiffany Ann Sanders	Pending
2020-UP-238-Barry Clarke v. Fine Housing, Inc.	Pending
2020-UP-241-State v. Mimi Joe Marshall	Pending
2020-UP-244-State v. Javon Dion Gibbs	Pending
2020-UP-245-State v. Charles Brandon Rampey	Pending
2020-UP-247-Ex Parte: Teresa L. Ferry (SCDSS v. Reavenell & Nelson)	Pending
2020-UP-255-State v. Angela D. Brewer	Pending
2020-UP-257-Melanie Maddox v. Richard Carroll	Pending
2020-UP-264-SCDSS v. Antonio Bolden	Pending
2020-UP-265-Jonathan Monte, Sr. v. Rodney Dunn	Pending
2020-UP-268-State v. Willie Young	Pending
2020-UP-269-State v. John McCarty	Pending
2020-UP-271-State v. Steward Jerome Middleton	Pending
2020-UP-272-State v. Heyward L. Martin, III	Pending

2020-UP-275-Randall Seels v. Joe Smalls	Pending
2020-UP-284-Deonte Brown v. State	Pending
2020-UP-290-State v. Phillip Wesley Walker	Pending
2020-UP-307-State v. Craig C. Busse	Pending
2020-UP-310-Christine Crabtree v. Donald Crabtree (3)	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark E. Schnee, Respondent.

Appellate Case Nos. 2018-001473 and 2020-000850

Opinion No. 28007
Submitted January 22, 2021 – Filed February 10, 2021

DISBARRED

John S. Nichols, Disciplinary Counsel, and Julie Kay Martino, Assistant Disciplinary Counsel, for the Office of Disciplinary Counsel.

Mark E. Schnee, pro se.

PER CURIAM: A set of formal charges was filed against Respondent Mark E. Schnee in July 2017 alleging various instances of misconduct, including failing to act competently and diligently on behalf of his clients, failing to communicate, failing to make reasonable efforts to expedite litigation, making false statements of fact to a tribunal, failing to refund unearned fees, and engaging in conduct involving dishonesty or misrepresentation. On these charges, a panel of the Commission on Lawyer Conduct (Hearing Panel) recommended a three-year suspension. Three days after the Hearing Panel Report was filed with this Court, the Office of Disciplinary Counsel (ODC) revealed that additional complaints had been filed against Respondent alleging similar conduct and asking that the 2018 matter be stayed pending the resolution of the new complaints. The Court agreed to hold the matter in abeyance. Additional formal charges were filed in March 2019, and the second Panel Report, which recommended disbarment, was issued in

June 2020. The Court thereafter consolidated the matters for the purposes of consideration. Neither party has filed exceptions to either Panel Report. We disbar Respondent.[1]

I.

The first set of Formal Charges involved five complaints, which are summarized below. In his Answer, Respondent admitted the factual allegations and acknowledged the findings of misconduct as set forth by ODC.

Matter A:

In April 2010, Respondent was appointed to represent Client A in her post-conviction relief (PCR) action following her guilty but mentally ill *Alford* plea to several criminal charges. Respondent failed to meet with Client A until five days before the PCR hearing—ten months after being appointed. Upon Respondent's request at the hearing, a continuance was granted for Respondent to seek a medical evaluation of Client A. Respondent failed to prepare an order for the PCR court's signature and failed to follow-up or communicate with his client for nineteen months. Client A filed a complaint with ODC.

After inquiry by ODC, Respondent prepared the order, which was signed by Judge Manning in December 2012; however, Respondent failed to timely forward the order to the Department of Mental Health (DMH). During a January 2013 status conference on Client A's PCR action, Respondent lied to Judge Cooper about having submitted the order to DMH and claimed that he had made "numerous telephone calls" to find out when the evaluation would be scheduled. In response, Judge Cooper signed an expedited order and called DMH to inquire about why no action had been taken on the previous order. DMH informed Judge Cooper that no order had been received and there had been no activity in Client A's case since 2007. Judge Cooper thereafter filed a complaint with ODC.

At the June 2013 PCR hearing, Respondent again requested a continuance. When it was denied, Respondent was unprepared to move forward. It also came to light during the hearing that Respondent failed to explain the proceeding to his client.

[1] Respondent failed to answer the second set of formal charges or appear at the second Panel hearing, either in person or through counsel, and he failed to file any exceptions to either Panel Report. Accordingly, we decline to hold oral argument in this matter.

Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); Rule 3.3 (knowingly making a false statement of fact to a tribunal); Rule 8.4(d) (engaging in conduct involving dishonesty); Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Matter B:

Respondent failed to communicate with Client B about the status of his case and the strategic reason he decided not to pursue a motion for reconsideration of sentence. Specifically, Client B pled guilty to first-degree burglary and received a sentence that was five years below the mandatory minimum sentence. Respondent was concerned that the motion would have exposed his client to an additional five years of incarceration. However, Respondent failed to explain to his client why pursuing the motion was not in his best interest. This conduct violated Rule 1.4 (communication).

Matter C:

Respondent was appointed to represent Client C on several criminal charges. Client C was convicted and sentenced to life without parole in April 2011. Respondent filed a motion for reconsideration the day of sentencing but failed to follow up for over three years. Eventually, Client C filed a PCR action, which was dismissed without prejudice in March 2015 because the motion for reconsideration of sentence was still pending. During this time, Respondent also failed to respond to Client C's request for his case file.

Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); 8.4 (conduct prejudicial to the administration of justice).

Matter D:

Client D retained Respondent to represent him on appeal. The agreed-upon fee was $5,000, of which Client D paid Respondent $2,500 up-front and agreed to

make monthly payments thereafter. Respondent sought and was granted two extensions in September and December 2013, making his Initial Brief and Designation of Matter due January 3, 2014. Respondent filed a third extension request on January 8, 2014, in which Respondent claimed he had finished the brief but due to holiday business closures, he was unable to have the necessary copies printed and bound in a timely manner. The Court of Appeals denied the extension request but indicated its willingness to entertain a motion to file out of time within fifteen days. Respondent failed to file a motion to file out of time or submit the Initial Brief and Designation of Matter. The Court of Appeals ultimately dismissed the appeal in March 2014. Respondent continued to request fee payments from Client D in February, April, May, and June of 2014 and accepted a fee payment of $300 from Client D on February 25, 2014.

In February 2015, after unsuccessful attempts to contact Respondent, Client D called the Court of Appeals and was informed his appeal had been dismissed due to Respondent's failure to file the required documents. Client D subsequently filed a complaint with ODC. In his answer to ODC's inquiry, Respondent explained that he had completed the majority of the legal research but had not completed the brief. Respondent also claimed to have been unable to contact Client D and claimed that was a violation of the fee agreement by Client D; however, Client D produced screenshots of text messages from Respondent that belied this assertion.

Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.5(f) (refund of prepaid fees if legal services are not provided); Rule 1.16 (withdrawal from representation); Rule 3.2 (reasonable efforts to expedite litigation); Rule 3.3 (knowingly making a false statement of fact to a tribunal); Rule 8.1(a) (knowingly making a false statement of fact in a disciplinary matter); 8.4(d) (engaging in conduct involving dishonesty); and 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Matter E:

Client E, through his father, retained Respondent in January 2010 to assist him in seeking a sentencing reduction under Fed. R. Crim. P. 35(b) Client E's parents paid Respondent $3,000. Respondent traveled to Virginia to visit Client E to discuss the information Client E had given the government during his federal prosecution.

In May 2015, Client E filed a complaint with ODC alleging that he had called, emailed, and written Respondent numerous times and had not received a response from Respondent in over a year.

During the disciplinary investigation, Respondent falsely claimed he spoke with various federal agents, including an Assistant United States Attorney (AUSA); however, the AUSA had no notes of any conversation with Respondent, and Respondent was unable to produce any notes or documentation about contact with that AUSA or any of the other federal agents he claimed to have contacted. Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 8.1(a) (knowingly making a false statement of material fact in a disciplinary matter).

Panel Hearing and Report:

Respondent appeared at the first Panel hearing in November 2017 and was represented by counsel. Because Respondent had admitted the misconduct in his Answer to the Formal Charges, the only issue at the Panel hearing was the appropriate sanction. Respondent called two character witnesses who testified they fully trusted him as a vigorous advocate for his clients and believed that the instances of dishonesty were out of character for Respondent.

Respondent also presented testimony that his home burned down in December 2012 causing him to lose almost all his material possessions, including his computer which contained client files. Respondent argued that he took responsibility for his misconduct and claimed that as a result of having to go through the disciplinary process, he was a more attentive, communicative lawyer. He also expressed his desire to "move forward as a lawyer" and explained that he had contingency plans in place to ask for help when he needed it.

The Panel found the most egregious aggravating factor was Respondent's dishonest or selfish motive. Specifically, the Panel observed Respondent made false statements to two separate tribunals in order to conceal his lack of diligence from the court and his client and to avoid the consequences of his actions. The Panel found this lack of honesty "highly troubling." The Panel was also troubled by Respondent's false statements to Disciplinary Counsel during the course of the investigation of Matters A, D, and E, as well as Respondent's pattern of

misconduct, multiple offenses, and prolonged periods of no contact with his clients.

As mitigating factors, the Panel acknowledged Respondent's house fire in December 2012; however, the Panel noted certain misconduct occurred before and several years after the fire and that the house fire would not mitigate dishonest conduct. The Panel also considered Respondent's character witnesses and his expression of remorse about his misconduct.

A divided Panel ultimately recommended that Respondent receive a three-year suspension, with one of the five members voting for disbarment. All five members concurred in the recommendation that Respondent be ordered to pay costs and restitution in the amount of $4,200 to Client D and $2,000 to Client E.

II.

As previously noted, three days after the final record on the first set of charges was filed with this Court, ODC requested that the matter be stayed in light of additional complaints against Respondent, which are summarized below. Respondent failed to submit a written response to several Notices of Investigation in the second set of Formal Charges, and he failed to appear at the Panel Hearing. Thus, all of the misconduct at issue in the second set of Formal Charges has been admitted. Rule 24(a)–(b), RLDE, Rule 413, SCACR.

Matter F:

Respondent was appointed to represent Client F, who was charged with attempted murder. Respondent was appointed in the case on June 2, 2017. Respondent replied to an email from the solicitor in February 2018 regarding a plea offer, but nothing was ever finalized. Respondent failed to appear for a meeting to discuss the case with the solicitor the following week and failed to return the solicitor's subsequent phone call or emails.

In April 2018, Client F filed a complaint with ODC alleging Respondent would not communicate with him about his case, and ultimately another attorney was appointed to represent Client F. During the disciplinary investigation, Respondent falsely claimed to have spoken with the solicitor about Client F's case "a few times," including once when they were both in court on other matters.

Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (communication), Rule 8.1(a) (knowingly making false statement to ODC), and Rule 8.1(b) (knowingly failed to respond to ODC's inquiry).

Matter G:

Client G was charged with several counts of larceny, and Respondent was appointed in the case on January 3, 2018. Client G filed a complaint with ODC four and a half months later, complaining Respondent failed to visit him, failed to respond to his letters or otherwise communicate about the case, and failed to appear for two scheduled preliminary hearings. Respondent failed to respond to the Notice of Investigation in this matter. Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (communication) and Rule 8.1(b) (failure to respond to ODC's inquiry).

Disciplinary Counsel Matter:

Respondent was scheduled to appear for jury selection in federal court on July 11, 2018. The day before he was scheduled to appear, Respondent called and spoke to the Courtroom Deputy to request a continuance, claiming he had been subpoenaed to appear as a witness at the Supreme Court. Respondent implied that someone from ODC had informed him that the ODC matter took precedence over jury selection. Respondent failed to disclose that he was subpoenaed in a matter in which he was a party, not merely a witness, and lied to the Courtroom Deputy about when he received the subpoena, claiming he received the subpoena approximately two weeks after he was personally served. Respondent failed to respond to ODC's inquiry about this matter.

Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 3.3 (candor toward the tribunal); Rule 8.4(d) (conduct involving dishonesty); Rule 8.4 (e) (conduct prejudicial to the administration of justice); and Rule 8.1(b) (failing to respond to ODC's inquiry).

Matter H:

Respondent was appointed to represent Client H on several drug charges. Respondent failed to communicate with his client for fourteen months, despite multiple attempts by Client H and his wife to contact Respondent. Respondent failed to respond to ODC's Notice of Investigation in this matter.

Respondent's conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); and Rule 8.1(b) (failure to respond to ODC's inquiry).

Matter I:

Client I and several other taxi owners paid Respondent $3,000 to represent them in a dispute with the Columbia Metropolitan Airport. Respondent filed a civil case in Richland County in November 2016. Upon the airport's motion, venue was transferred to Lexington County in June 2017, after which Respondent stopped communicating with his clients. After multiple unanswered phone calls and text messages to Respondent, Client I contacted the Lexington County Clerk of Court to inquire about the status of the case and was informed the court was waiting for Respondent to schedule mediation with opposing counsel. During the course of representation, Respondent failed to keep client ledgers or perform trust account reconciliations, preventing the Receiver from being able to reimburse any unearned fees.

Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (communication); Rule 1.15 (failure to properly identify and safeguard client funds); Rule 8.1(b) (failure to respond to ODC's inquiry); Rule 8.4(e) (conduct prejudicial to the administration of justice); and Rule 417, SCACR (failure to maintain trust account ledger records).

Commission on Indigent Defense Matter:

Respondent was a Rule 608 Contract Attorney through the South Carolina Commission on Indigent Defense (SCCID) for several years. Hervery Young, Deputy Director and General Counsel for SCCID, was alerted by the Richland County Public Defender's Office that they had received several complaints from

clients that Respondent was not communicating with them, that they could not get in touch with him, and that Respondent had failed to appear for hearings. Young emailed Respondent and went to his office but never received any response. Shortly thereafter, the Public Defender's Office informed Young that Respondent had requested to be relieved on all of his Rule 608 cases due to a conflict of interest. However, Respondent failed to provide a list of his Rule 608 clients.

At a hearing before the Chief Administrative Judge, Respondent presented a "Notice of Protection Pursuant to S.C. Code § 8-27-10 et seq. and Request for Appropriate Court Order." Respondent claimed:

> I'm working with the U.S. Attorney's Office and have been meeting with the FBI regarding a very wide, sweeping range of corruption, bribery, extortion, threats throughout the Solicitor's Office, the Sheriff's Department, including Judges, lawyers, and Congress members. Other than that, I do not wish to answer any questions. But I am, in fact, a material witness at this point and have already begun giving them information. So I am invoking the protections of the Whistleblowers Act under South Carolina law.

Respondent claimed it would be a conflict of interest for him to represent his clients in front of judges or have dealings with the Solicitor's Office, the Sheriff's Office, or the Columbia Police Department because he was a whistleblower.

Young informed the court that numerous clients had complained about Respondent's lack of diligence and communication and explained his own difficulty in contacting Respondent, all of which resulted in Respondent's Rule 608 contract not being renewed for the 2018-2019 fiscal year. Young also explained that Respondent was paid $900 or $950 per case at the time each client was assigned to him and requested that Respondent be required to refund unearned fees on the cases in which he was seeking to be relieved. Respondent objected, claiming Young's request constituted retribution under the whistleblower statute.

On August 30, 2018, Judge Newman ordered Respondent to provide a list of all his Rule 608 clients' names by 5:00 p.m. the next day. Respondent failed to produce a list of clients. SCCID was forced to go through the approximately 225 cases in their database that had been assigned to Respondent over the previous five years and compare documents with the county clerks' offices with the public index and

jail records to determine which matters were still pending. Eventually, Judge Newman issued a series of orders relieving Respondent from representation of 37 clients.

Young filed a complaint with the Office of Disciplinary Counsel in November 2018, in which he requested reimbursement in the amount of $32,100 based on Respondent's failure to perform the services for which he was contracted.[2]

Respondent failed to respond to the Notice of Investigation in this matter. However, the ODC investigation revealed that Respondent had not provided substantial assistance to the government in any investigation or prosecution.

Respondent's conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.2 (reasonable efforts to expedite litigation); Rule 3.3 (candor toward tribunal); Rule 8.4(d) (conduct involving dishonesty); 8.4(e) (conduct prejudicial to the administration of justice); and Rule 8.1(b) (failing to respond to ODC's inquiry).

Second Panel Hearing and Report:

Respondent failed to appear at the second Panel hearing. ODC presented witnesses detailing the extraordinary efforts required to personally serve Respondent with notices and case-related documents.

Also, Young testified that of the SCCID cases Respondent had been assigned, numerous cases were lacking discovery motions, and in many cases, Respondent had not even filed a notice of appearance. Respondent never provided the circuit court or SCCID with any time sheets, and Young requested that SCCID be reimbursed for unearned fees that were paid to Respondent.

Once again, the Panel considered Respondent's selfish and dishonest motive in attempting to conceal his own failures, particularly in creating a false story about being a whistleblower in a federal investigation in an attempt to be relieved from his appointed cases and avoid returning the unearned fees. The Panel also noted

[2] The requested reimbursement amount represents payment on 23 cases at $900 each and 12 cases at $950 each.

Respondent's pattern of misconduct and multiple offenses, his prior disciplinary offenses, his failure to cooperate, and his false statements during the disciplinary process. The Panel recommended that Respondent be disbarred, ordered to pay costs and restitution in Matter I ($3,000) and in the Commission on Indigent Defense Matter ($32,100). The Panel also recommended Respondent be ordered to reimburse the Lawyers' Fund for Client Protection for all claims that have been paid on Respondent's behalf.

III.

We find Respondent violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules of Professional Conduct); Rule 7(a)(3) (failing to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (conduct tending to pollute the administration of justice); and Rule 7(a)(7) (violation of a valid court order). We further find Respondent's misleading conduct and failure to maintain the dignity of the legal system violated the Lawyer's Oath found in Rule 402(h)(3), SCACR.

Considering the numerous instances of misconduct combined with Respondent's deception of his clients, the courts, and ODC, we accept the Panel's recommendation and disbar Respondent. *See In re Lapham*, 412 S.C. 541, 552–53, 773 S.E.2d 148, 153–54 (2015) (disbarring attorney who failed to respond to clients, failed to perform work or refund unearned fees, and engaged in dishonest conduct); *In re Jennings*, 321 S.C. 440, 449, 468 S.E.2d 869, 874–75 (1996) (disbarring attorney for, among other things, dishonest conduct and lack of candor toward a tribunal).

Within thirty (30) days of the date of this opinion, Respondent shall enter into an agreement with the Commission on Lawyer Conduct to pay the $5,451.81 in costs incurred in these matters. Also within thirty (30) days of the date of this opinion, Respondent shall repay or enter into a repayment plan to reimburse the Lawyers' Fund for Client Protection for all claims it has paid on behalf of Respondent and to pay restitution in the following amounts: (1) $4,200 to Client D; (2) $2,000 to Client E; (3) $3,000 to Client I; and (4) $32,100 to SCCID.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of this Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the

Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation, Amy Hill, and Rebecca Bonnette, Individually, and on behalf of all others similarly situated, Appellants,

v.

Calhoun County Council, Respondent.

Appellate Case No. 2019-001016

Appeal from Calhoun County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 28008
Heard October 15, 2020 – Filed February 10, 2021

AFFIRMED

James G. Carpenter, of Carpenter Law Firm, PC, of Greenville, for Appellants.

Charles Douglas Rhodes, III, Michael Wade Allen, Jr., and R. Patrick Flynn, all of Pope Flynn, of Columbia; Robert E. Tyson, Jr. and Benjamin Rogers Gooding, both of Robinson Gray Stepp & Laffitte, LLC, of Columbia, all for Respondent.

Joshua C. Rhodes, General Counsel, and John K. DeLoache, Senior Staff Attorney, both of South Carolina

Association of Counties, of Columbia, for Amicus Curiae South Carolina Association of Counties.

JUSTICE HEARN: This case concerns the scope of the thirty-day limitations period set forth in Section 4-10-330(F) under the Capital Project Sales Tax Act ("the Act"). S.C. Code Ann. §§ 4-10-300 to -390 (2019). Voters in Calhoun County approved a referendum in the November 2018 general election imposing a one percent sales and use tax—a penny tax—to fund a list of fifteen projects. Nearly five months later, Appellants filed suit, contending four of the projects were not authorized pursuant to section 4-10-330. The County responded that the statute of limitations had expired, and alternatively, the projects fell within the scope of the Act. The circuit court found the thirty-day limitations period barred the action and did not address the merits. We affirm, holding the statute of limitations has run.

FACTS

During the November 2018 general election, the voters of Calhoun County, by a margin of 57% to 43%, approved a referendum imposing a penny tax to fund fifteen projects. These proposed projects ranged from the construction of water distribution lines, to fire stations, to dredging and beautification of recreational and fishing facilities. At issue in this appeal are the following four projects:

> 4. Calhoun County-Sandy Run Fire District Ladder Truck Project-to include the acquisition and equipping of a new ladder truck in the Sandy Run Fire District. To support the northern portion of Calhoun County, particularly industry located therein. $350,000
>
> 11. Calhoun County Emergency Communications Project-to include the constructing, acquiring, and equipping of facilities and equipment to provide 800 MHz radio service for emergency service providers in Calhoun County. $500,000
>
> 12. Calhoun County Ambulance Project-to include the acquisition and equipping of ambulances to be operated by Calhoun County Emergency Services Department. $165,000

13. Calhoun County Sandy Run Fire District Tanker Truck Project- to include the purchase of the fire truck to serve the Sandy Run area. $267,000

On November 26, 2018, the County adopted a resolution declaring the results of the referendum. More than four months later, on April 3, 2019, the Foundation filed a declaratory judgment action seeking an order that the four projects exceeded the scope of the Act and therefore were invalid, and to enjoin the collection of the penny tax. The tax collection began May 1, 2019. Thereafter, the parties filed cross-motions for summary judgment, and the circuit court held a hearing. The Foundation contended penny tax proceeds could not be used for the four projects because none of them was specifically included in the Act. The County disagreed, arguing for a more expansive reading of the statute. The County also noted the Act expressly contains a thirty-day statute of limitations. In response, the Foundation argued the limitations period only applies to procedural challenges alleging election irregularities, not those which involve the substance of an approved project. Regarding the merits, the County contended the four projects clearly fell within the Act, as they were sufficiently tethered to an enumerated project. The circuit court ultimately concluded the thirty-day statute of limitations barred the Foundation's claims, and therefore did not reach the merits. The Foundation filed a direct appeal pursuant to Rule 203(d)(1)(A)(iii) and (iv), SCACR.

ISSUE

Did the circuit court err in determining section 4-10-330(F)'s thirty-day limitations period barred this action?

STANDARD OF REVIEW

When reviewing a circuit court's order from a motion for summary judgment, appellate courts sit in the same position as the circuit court. *Turner v. Milliman,* 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). When the parties file cross-motions for summary judgment, the issue becomes a question of law for the Court to decide de novo. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Additionally, the interpretation of a statute is a question of law for the Court to review de novo. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 300, 814 S.E.2d 513, 516 (2018).

DISCUSSION

The Foundation contends the thirty-day limitations period set forth in section 4-10-330(F) only applies to procedural challenges, such as a lawsuit asserting voting irregularities. Because the focus of the Foundation's lawsuit is on the substance of the referendum—whether the projects fall outside the scope of the Act—it argues the statute of limitations does not apply. Conversely, the County asserts section 4-10-330(F) does not distinguish between procedural and substantive challenges. We agree with the County.

Section 4-10-330 of the South Carolina Code authorizes a county governing body to establish a commission that designates projects to be included on a referendum for the voters' consideration during an election. Specifically, the provision requires the ordinance set forth the purpose of the penny tax funds, which, "may include the following types of projects: (b) courthouses, administration buildings, civic centers, hospitals, emergency medical facilities, police stations, fire stations, jails, correctional facilities, detention facilities, libraries, coliseums, educational facilities under the direction of an area commission for technical education, or any combination of these projects[.]" S.C. Code Ann. § 4-10-330(A)(1)(b). Additionally, section 4-10-330(E) requires in part, "The election commission shall conduct the referendum under the election laws of this State, mutatis mutandis,[1] and shall certify the result no later than November thirtieth to the county governing body and to the Department of Revenue." In this appeal, we are required to determine the import of section 4-10-330(F), which states,

> Upon receipt of the returns of the referendum, the county governing body must, by resolution, declare the results thereof. In such event, the results of the referendum, as declared by resolution of the county governing body, are not open to question except by a suit or proceeding instituted within thirty days from the date such resolution is adopted.

[1] Black's Law Dictionary provides, "mutatis mutandis: All necessary changes having been made; with the necessary changes <what was said regarding the first contract applies *mutatis mutandis* to all later ones>." *Mutatis Mutandis, Black's Law Dictionary* (11th ed. 2019).

Specifically, the key language set forth in this provision is "*the results of the referendum*. . . ." *Id.* (emphasis added).

The primary rule of statutory construction is to ascertain the intent of the General Assembly. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 597, 757 S.E.2d 408, 416 (2014). "Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). Accordingly, courts will "give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (citation omitted).

To begin, section 4-10-330(F) does not contain any express language limiting "the results of the referendum" to only procedural aspects, such as the vote count. While the Foundation contends the plain language of the phrase inherently creates this distinction, especially when viewed in comparison to the preceding subsection which describes election procedure, we disagree. It is not the province of this Court to engraft an additional provision onto a statute which is ostensibly clear on its face. *State v. Cty. of Florence*, 406 S.C. 169, 180, 749 S.E.2d 516, 522 (2013) (declining to "augment the statutory language" to include a requirement that is not contained in the statute at issue); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) (noting "when a statute is clear on its face, it is 'improvident to judicially engraft extra requirements to legislation'"). Further, when we look outside of subsection 4-10-330(F), the rest of the provision addresses the substance of the referendum, as demonstrated by the title of section 4-10-330, delineated as, "Contents of ballot question; purpose for which proceeds of tax to be used." *See S.C. Energy Users Comm. v. S.C. Elec. & Gas*, 410 S.C. 348, 357 n.5, 764 S.E.2d 913, 917 n.5 (2014) ("This Court may, of course, consider the title or caption of an act in determining the intent of the Legislature.") (citation omitted). Therefore, it would be entirely inconsistent for the limitations period to only apply to the vote count when section 4-10-330 addresses which projects are authorized to receive penny tax funds.

In addition to the absence of any qualifying language limiting the thirty-day limitations period to only procedural challenges, we find further support in our jurisprudence involving other abbreviated statutes of limitations. In *Hite v. Town of West Columbia*, landowners challenged the town's annexation of property, contending the town did not satisfy the statutory requirement to obtain a petition

signed by a majority of the property owners whose property was subject to the annexation. 220 S.C. 59, 63, 66 S.E.3d 427, 428 (1951). The provision at issue required any lawsuit to be commenced within ninety days from when the results were published. Despite filing suit approximately five months after the annexation, the landowners argued the limitations period only applied to the results of the election, rather than all the requirements for a valid annexation. *Id.* at 64, 66 S.E.2d at 429. The Court disagreed, rejecting the landowners' interpretation as "too technical." *Id.* Instead, the Court held the limitations period was not confined to a challenge over the "casting and counting of ballots," but instead to the entire annexation process. *Id.* at 65, 66 S.E.2d at 429.

Similarly, in *Morgan*, the Court upheld a thirty-day statute of limitations concerning a challenge to a county's decision to obtain bonds after approval from the voters. *Morgan v. Feagin*, 230 S.C. 315, 319, 95 S.E.2d 621, 623 (1956). The Court noted,

> Similar short statutes of limitation, applicable to actions which question the proceedings upon the issuance of municipal and other bonds have been of force in this State for many years, apparently without challenge heretofore. Code of 1952, Sec. 1–645, twenty days; Sec. 21–976, thirty days; and Sec. 47–842, thirty days. The practical necessity of them is obvious. Purchasers of bonds could hardly be found if the bonds were subject in their hands to attack for alleged illegality in the proceedings upon the issuance of them. Furthermore, it is within common knowledge that sales of bonds are frequently timed to take advantage of a favorable market, which might well be hindered by long delay.

Id. at 317, 95 S.E.2d at 622. Further, the Court relied on *Hite*, noting the wisdom of such a short limitations period was not for the courts to determine but instead was a matter for the General Assembly. *Id.* at 319, 95 S.E.2d at 623.

Finally, in *State ex rel. Condon v. City of Columbia*, the State filed a lawsuit challenging the city's annexation of state-owned land. 339 S.C. 8, 12, 528 S.E.2d 408, 410 (2000). The circuit court held that because the State failed to file its lawsuit within the ninety-day limitations period, it was barred by the statute of limitations. *Id.* at 13, 528 S.E.2d at 410. On appeal, the Court agreed, noting the limitations period applied to the State, and that limitation "statutes are designed to promote justice by forcing parties to pursue a case in a timely manner." *Id.* at 19, 528 S.E.2d at 413.

While these cases did not invoke section 4-10-330(F), the same principles apply and further buttress our conclusion that the provision does not distinguish between procedural and substantive challenges. For example, section 4-10-310 contemplates that penny tax revenue "may be used to defray debt service on bonds issued to pay for projects authorized in this article." S.C. Code Ann. § 4-10-310 (2019). As the Court explained in *Hite*, a longer delay may frustrate the effectiveness of obtaining favorable bonds. Therefore, it is entirely consistent for the General Assembly to enact a statute containing a short limitations period that is not limited to only challenges over the "casting and counting of ballots."[2] *Hite*, 220 S.C. at 65, 66 S.E.2d at 429. Regardless, any dispute over the length of the limitations period is beyond the purview of this Court and instead is a matter best left to the General Assembly.

Because we find the limitations period applies to this lawsuit, we now turn to the facts of this case. It is undisputed the county adopted a resolution on November 26, 2018, declaring the election results, meaning the thirty-day period expired in late December 2018. The Foundation did not file this lawsuit until April of 2019, nearly four months after the time period expired. Despite the Foundation's attempt to characterize this lawsuit otherwise, the result of the referendum is that a majority of voters agreed that the County should impose a penny tax to fund the fifteen items listed on the ballot. The Foundation's concern regarding four of the projects is a direct challenge to the results of the referendum—that a majority of voters cast their ballot in favor of funding the listed projects. Therefore, this lawsuit focuses on "the results of the referendum," and thus, is barred by section 4-10-330(F).

CONCLUSION

We hold the circuit court correctly determined that section 4-10-330(F)'s thirty-day limitations period applies. Accordingly, because the Foundation filed this lawsuit outside the limitations period, it is time-barred.[3]

---

[2] We note there has never been any allegation of deceit or nefarious conduct in this case, and we see absolutely no evidence of this in the record. Accordingly, equitable doctrines that may apply to suspend or toll a statute of limitations in certain cases, such as estoppel or equitable tolling, have no import here.

[3] We express no opinion as to whether the four projects are authorized under section 4-10-330(A)(1).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shaundra B. Daily, Respondent/Appellant,

v.

Julian D. Daily, Appellant/Respondent.

Appellate Case No. 2017-001199

Appeal From Pickens County
Karen S. Roper, Family Court Judge

Opinion No. 5801
Heard November 6, 2019 – Filed February 10, 2021

AFFIRMED AS MODIFIED

Nicole Nicolette Mace, of The Law Offices of Curt Sanchez, P.A., of West Palm Beach, Florida, for Appellant-Respondent.

Edward Delane Rosemond, of The Rosemond Law Firm, PA, and Kimberly Welchel Pease, of Kimberly R. Welchel, Attorney at Law, both of Seneca, both for Respondent-Appellant.

Floy Kenyon Anderson, of Kenyon Lusk & Anderson, of Anderson, Guardian ad Litem, pro se.

WILLIAMS, J.: In this cross-appeal from the family court, Julian D. Daily (Father) argues the family court erred in (1) awarding Shaundra Bryant Daily (Mother) sole custody of the parties' two minor daughters following her relocation to Florida, (2) setting the parallel parenting plan and his visitation, (3) finding him in contempt, and (4) ordering him to pay a portion of Mother's attorney's fees and one-half of the guardian ad litem's (GAL) fees. Mother argues the family court erred in failing to order Father to pay the full amount of her attorney's fees. We affirm as modified.

FACTS/PROCEDURAL HISTORY

Father and Mother (Parents) married in 2004, and they had two daughters: LGD and ZMD (collectively, Daughters), born in 2006 and 2009. Parents both filed for divorce on January 6, 2012, and subsequently reached an agreement resolving all matters in the divorce. On March 25, 2013, the family court issued an order granting Parents a divorce and adopting their agreement (Divorce Decree). Under the Divorce Decree, Parents had joint custody and Daughters were placed with Mother during the school year; Father had visitation alternating weekends, holidays, and the summer. After the divorce, Mother lived in Pickens, South Carolina, and Father lived in Atlanta, Georgia.

In 2015, Mother filed a complaint requesting permission to relocate to Gainesville, Florida; child support; attorney's fees and costs; and modification of Father's visitation. Mother, a professor, wanted to move because she received a job offer from the University of Florida. Father filed an answer and counterclaim, requesting dismissal of Mother's complaint and seeking full custody of Daughters or, alternatively, joint custody with primary placement. The family court issued a temporary order on March 26, 2015, (1) holding Parents would remain subject to the provisions of the Divorce Decree, (2) requiring Parents attend mediation, and (3) ordering a hearing in the event mediation was unsuccessful. The order also appointed a GAL and established the GAL's hourly rate and a fee cap of $3,500. On August 25, 2015, the family court issued a second temporary order (Temporary Order), which allowed Mother to relocate to Gainesville with Daughters. The court found the move was in Daughters' best interest and consistent with *Latimer v. Farmer*.[1] The Temporary Order gave Father visitation and ordered him to pay

[1] 360 S.C. 375, 602 S.E.2d 32 (2004).

child support. Father subsequently moved from Atlanta to Cincinnati, Ohio, without informing Mother or the GAL until after he moved.

Shortly before the final hearing scheduled for June 2016, the family court ordered Father to undergo a psychological evaluation (Evaluation Order) pursuant to Mother's request. The court rescheduled the hearing. Father did not undergo the evaluation. Parents also filed multiple rules to show cause, which were consolidated and considered at the final hearing.

On March 13, 2017, the family court issued a final order (Final Order) granting Mother sole custody. The family court found the joint custodial arrangement was no longer in Daughters' best interest and awarded visitation to the Father. It also instituted a "Parallel Parenting Plan" (Parenting Plan) and required Parents to communicate exclusively through Our Family Wizard[2] (OFW) absent an emergency. The Parenting Plan also contained a restraining order prohibiting Parents from coming within fifteen feet of each other or having any physical or verbal confrontation.

The family court additionally found Father failed to prove contempt by Mother but found Father in contempt for willfully violating the Divorce Decree and the Evaluation Order. The family court ordered Father to compensate Mother for enforcing the orders and fined him $1,500 for disobeying the Evaluation Order. The court also awarded Mother $5,400 in attorney's fees—which included the compensatory contempt award—and ordered Parents to each pay one half of the GAL's fees.

Parents both filed motions to reconsider. The family court denied Father's motion and partially granted Mother's motion as to summer visitation.[3] This appeal followed.

---

[2] Our Family Wizard is a digital program for divorced parents to use to communicate with each other and schedule their children's activities.

[3] In partially granting Mother's motion to reconsider, the family court also corrected typographical errors and made minor changes to the visitation exchange provision.

ISSUES ON APPEAL

I. Did the family court err in awarding Mother sole custody?

II. Did the family court err in setting the Parenting Plan and Father's visitation?

III. Did the family court err in finding Father in contempt for violating the Divorce Decree and the Evaluation Order?

IV. Did the family court err in ordering Father to pay $5,400 of Mother's attorney's fees?

V. Did the family court err in ordering Father to pay half of the GAL's fees?

STANDARD OF REVIEW

On appeal from the family court, the 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, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). However, this broad scope of review does not require the 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 651–62, 655. Therefore, the appellant bears the burden of convincing the appellate court that the family court committed an error or that the preponderance of the evidence is against the family court's findings. *Id.* at 392, 709 S.E.2d at 655.

LAW/ANALYSIS

I. Custody

Father asserts the family court erred in awarding Mother sole custody of Daughters. We disagree.

The controlling considerations in all child custody controversies are the child's welfare and best interest. *Divine v. Robbins*, 385 S.C. 23, 32, 683 S.E.2d 286, 291 (Ct. App. 2009); *see also* S.C. Code Ann. § 63-15-230(A) (Supp. 2020) ("The

court shall make the final custody determination in the best interest of the child based upon the evidence presented."). "[A] determination of the best interest of the children is an inherently case-specific and fact-specific inquiry." *McComb v. Conard*, 394 S.C. 416, 423, 715 S.E.2d 662, 665 (Ct. App. 2011) (alteration in original) (quoting *Rice v. Rice*, 335 S.C. 449, 458, 517 S.E.2d 220, 225 (Ct. App. 1999)). It is also appropriate to consider the opinions of third parties, including the GAL and expert witnesses. *Brown v. Brown*, 412 S.C. 225, 239, 771 S.E.2d 649, 656 (Ct. App. 2015).

Determination of the child's best interest requires consideration of the "character, fitness, attitude, and inclinations on the part of each parent as they impact the child" as well as the "psychological, physical, environmental, spiritual, educational, medical, family, emotional[,] and recreational aspects of the child's life." *Woodall v. Woodall*, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996). Subsection 63-15-240(B) of the South Carolina Code (Supp. 2020) provides additional factors to consider.

"When a party seeks to alter a joint custody arrangement, the party has the burden of establishing a material change of circumstances substantially affecting the child's welfare." *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 359 (Ct. App. 1999). "Such a change in circumstances simply means that sufficient facts have been shown to conclude that the best interests of the child would be served by the change." *Id.*

Cases involving the relocation of a custodial parent are some "of the most challenging problems our family courts encounter." *See Latimer v. Farmer*, 360 S.C. 375, 380, 602 S.E.2d 32, 34 (2004). "The effect of relocation on the child's best interest is highly fact specific. It should not be assumed that merely relocating and potentially burdening the non-custodial parent's visitation rights always negatively affects the child's best interests." *Id.* at 382, 602 S.E.2d at 35. "Relocation is one factor in considering a change in circumstances, but is not alone a sufficient change in circumstances." *Walrath v. Pope*, 384 S.C. 101, 106, 681 S.E.2d 602, 605 (Ct. App. 2009) (quoting *Latimer*, 360 S.C. at 382, 602 S.E.2d at 35).

Our supreme court, without endorsing or enumerating a specific test, has highlighted relevant factors other states consider when confronted with parental relocation. *Latimer*, 360 S.C. at 382–83, 602 S.E.2d at 35–36. These factors are:

(1) the economic, emotional, and educational advantages of the move; (2) the child's relationship with both parents and the impact of the move on the non-custodial parent's relationship with the child; (3) the availability and feasibility of a realistic substitute visitation arrangement, including technology, that will adequately preserve and foster the child's relationship with the non-custodial parent; (4) each parent's motive for seeking or opposing the relocation; and (5) the likelihood the move is not the result of a whim but would substantially improve the quality of life for the custodial parent and child. *See id.*

We agree with the family court that Father's and Mother's respective relocations, and inability to communicate and make joint decisions have necessitated Mother having sole custody.

We have concerns regarding Father's failure to foster a positive relationship between Mother and Daughters if Father were awarded custody. The record indicates Daughters' communication with Mother is negatively impacted when they are in Father's custody. For example, there were multiple instances during Father's visitation when he failed to inform Mother of Daughters' whereabouts. Further, in response to Mother's inquiries and questions regarding Daughters, Father would either provide nonresponsive answers, including telling Mother to ask Daughters directly, or would not respond at all. The GAL also expressed concern based on her observations that Father would not encourage Daughters' relationship with Mother. On the other hand, Mother has continuously made appropriate efforts and encouraged the relationship between Father and Daughters. *See* § 63-15-240(B)(6) ("In issuing or modifying a custody order, the court must consider the best interest of the child, which may include, but is not limited to: . . . the actions of each parent to encourage the continuing parent-child relationship between the child and the other parent . . . .").

We also share the family court's concern regarding Father's ability to personally provide for Daughters. *See Housand v. Housand*, 333 S.C. 397, 400–02, 509 S.E.2d 827, 829–30 (Ct. App. 1998) (considering each parents' financial status and ability to provide for the children at the time of the divorce and at the time of trial in a change of custody action). Father testified he was an entrepreneur but was extremely vague regarding his employment and income. The record contains no evidence of Father's earnings from his work and reveals his stated monthly income of $3,000 was provided by his parents (Grandparents). Grandparents also wrote

the checks for Father's child support, and the evidence indicates they financially provide for Daughters when they are in Father's care.

We find the record supports the family court's award of sole custody to Mother and shows Daughters were happy, healthy, and well-adjusted to their home and school in Florida. § 63-15-240(B)(10) ("In issuing or modifying a custody order, the court must consider the best interest of the child, which may include, but is not limited to: . . . the child's adjustment to his or her home, school, and community environments . . . ."). Mother's relocation to Gainesville and Father's decision to move from Atlanta to Cincinnati impacted the parties' relationship with Daughters. However, we find the family court's visitation schedule as modified below gives ample opportunity to foster the relationship between Father and Daughters. *See Latimer*, 360 S.C. at 385–86, 602 S.E.2d at 37 (discussing availability and feasibility of a realistic substitute arrangement that will adequately preserve and foster the child's relationship with the non-custodial parent, including technology); *McComb*, 394 S.C. at 424, 715 S.E.2d at 666 (noting the availability of phone calls and video chatting to help maintain the child's relationship with non-custodial parent).

Based on the foregoing, we find Mother has shown a significant change of circumstances and that it would be in the best interest of Daughters that Mother be awarded sole custody. *Dixon*, 336 S.C. at 263, 519 S.E.2d at 359 ("When a party seeks to alter a joint custody arrangement, the party has the burden of establishing a material change of circumstances substantially affecting the child's welfare."). Accordingly, we affirm the family court.

II. The Parenting Plan and Visitation Schedule

On appeal, Father raises several challenges to the Parenting Plan and visitation schedule.

"As with child custody, the welfare and best interests of the child are the primary considerations in determining visitation." *Buist v. Buist*, 399 S.C. 110, 122, 730 S.E.2d 879, 885 (Ct. App. 2012), *aff'd as modified on other grounds,* 410 S.C. 569, 766 S.E.2d 381 (2014). When determining visitation in a relocation case, the family court should attempt to alleviate the hardships associated with parents living in separate states as much as possible. *Walrath*, 384 S.C. at 108, 681 S.E.2d at 606 (noting the family court acknowledged the hardships related to parents living in

Kansas City and South Carolina and attempted to provide the children with continuous, meaningful contact with their father).

A. Unnecessary Communication and Failure to Set Specific Dates

Father argues the family court erred in establishing a visitation schedule and parenting plan that necessitates communication and negotiation between Parents by requiring them to "confirm visitation" through OFW. Specifically, Father asserts that the family court's failure to set specific dates for all of his visitation will require Parents to negotiate visitation periods. Father contends this gives Mother the ability to prevent Father from exercising his visitation. Because of these defects, Father argues the current visitation schedule and parenting plan are not in Daughters' best interest.

Under the visitation schedule, Father has visitation during Daughters' Christmas break, Thanksgiving break, spring break, and summer break. During the school year, Father has visitation for one long weekend in September, January, and May (Long Weekend Visitation). The Long Weekend Visitation corresponds with Labor Day, Martin Luther King, Jr. Day, and Memorial Day. He also has one unspecified weekend in October, February, and April, which he is required to exercise in Daughters' hometown (Short Weekend Visitation). Additionally, the visitation schedule requires Father to ensure Daughters attend all previously scheduled activities during his Short Weekend Visitation. These activities include, but are not limited to, "extracurricular events, educational activities, church activities, sports practices or games, social obligations, or medical appointments."

The visitation schedule and Parenting Plan require Parents to confirm visitation periods through OFW. Parents are prohibited from scheduling, or allowing others to schedule, elective activities for Daughters during the other parent's time with Daughters unless the other parent provides written permission or the enrolling parent informs Daughters that they will miss any such event, except for Father's Short Weekend Visitation. The Parenting Plan also requires Parents to notify each other through OFW of any important school or extracurricular events[4] and expressly allows Parents to attend regardless of who has placement of Daughters at the time of the event.

---

[4] Defined as, but not limited to, "baptisms, bar mitzvahs, sporting events, dance recitals, [and] school plays."

We agree the visitation schedule and Parenting Plan in their current form present issues for these parties who are unable to cooperate and communicate effectively with each other. Therefore, we modify by adding additional specifics to portions of the visitation schedule and Parenting Plan. Under the Parenting Plan, Mother is required to advise Father of Daughters' "school enrollment for the following year by March 1 on OFW." Upon publication of the school calendar, Mother shall timely provide Father with the school calendar within ten days. Following the receipt of the school calendar, Father shall notify Mother on OFW of the weekends he intends to exercise his Short Weekend Visitation by May 1. In the event Father chooses not to exercise his Short Weekend Visitation, or any other visitation, he shall notify Mother no later than seven days prior to the visitation period. In addition, we modify the visitation schedule and Parenting Plan to instruct that Father's Long Weekend Visitation shall begin at 6:00 P.M. on the last day Daughters attend school prior to the weekend and will end at 2:00 P.M. on the day prior to the Daughters returning to school. Father's Short Weekend visitation will begin at 6:00 P.M. on Friday and will end at 6:00 P.M. on Sunday.

B. Weekend Visitation

Father asserts the family court erred in ordering that he ensure Daughters attend all scheduled activities during his Short Weekend Visitation. Father also contends that because the Parenting Plan allows both parents to attend such activities, Mother can effectively eliminate Father's personal time with Daughters by scheduling and attending activities. He also argues this will create situations in which the Parenting Plan's restraining order will be violated.

We find it is in Daughters' best interest to require Father to ensure their attendance of all previously scheduled extracurricular activities and events during his Short Weekend Visitation. The record shows Daughters enjoy participating in dance, drama, and sports, and Mother only enrolls them in activities in which they are interested. By taking Daughters to these events, Father attends to Daughters' "psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational" needs. *See Woodall*, 322 S.C. at 11, 471 S.E.2d at 157. However, we modify the Parenting Plan to require Mother to notify Father on OFW of "important school or extracurricular events" that are known when Father selects his weekend visitation. If Mother learns of an event after Father selects his weekend, Mother must provide notice of the event within twenty-four hours. In

the event Father chooses not to exercise his visitation rights, he shall notify Mother on OFW no later than seven days prior to the visitation period, or within twenty-four hours after Mother notifies him of an event. As to the Parenting Plan's restraining order, attendance and observation of Daughters' activities does not necessitate Parents coming within fifteen feet of each other.

Next, Father asserts the family court erred in setting his Short Weekend Visitation for regular weekends instead of holiday or teacher workdays in October, February, and April. He also argues the family court erred in requiring him to exercise those visitation weekends in Daughters' hometown. We agree in part.

Considering the distance between Parents' homes, we agree with the family court that a standard visitation schedule would be impractical. The family court found it was in Daughters' best interest to have less frequent exchanges to allow sufficient time to recuperate between visits and to have some visitations with Father locally. Therefore, the court required Father to exercise his Short Weekend Visitation in Daughters' hometown. We find this requirement appropriate when balancing the importance of stability with fostering Daughters' relationship with Father. Further, the record supports this finding as Mother and the GAL expressed concern with the effect traveling to Cincinnati for a weekend every month would have on Daughters. *See Woodall*, 322 S.C. at 11, 471 S.E.2d at 157 (stating a child's best interest is determined by considering, among others, the educational, psychological, physical, and emotional aspects of the child's life). Thus, we find the family court properly considered Daughters' best interest when it restricted Father's Short Weekend Visitation to Daughters' hometown, and we affirm.

However, we agree with Father that the family court erred in limiting his Short Weekend Visitation to two days. Based on our de novo review, the blanket restriction of Father's Short Weekend Visitation in October, February, and April to two days was improper because Father may choose a weekend coinciding with a school holiday or a teacher workday. Accordingly, we modify the visitation schedule and Parenting Plan to provide that if Father chooses such a weekend, he shall receive the additional day as part of his Short Weekend Visitation. A Short Weekend Visitation extended in this manner is still subject to limitations imposed by Daughters' extracurricular activities and events.

Father also argues he should be allowed to drop Daughters off at school at the conclusion of his Short Weekend Visitation instead of exchanging Daughters with

Mother on the last night of the weekend. We disagree. By returning to Mother the night before school, Daughters return to a familiar environment and can recuperate and resume their routine prior to the start of the school week. *See Woodall*, 322 S.C. at 11, 471 S.E.2d at 157 (stating a child's best interest is determined by considering, among others, the educational, psychological, physical, environmental, and emotional aspects of the child's life). Thus, we find it is in Daughters' best interest that Father's Short Weekend Visitation end at 6:00 P.M. on Sunday.

C. Summer Visitation

Father asserts the family court erred in modifying his summer visitation to allow Mother additional time. He argues this modification was not in Daughters' best interest because the family court also reduced his school year and Christmas visitation.

Father's summer visitation originally consisted of the entirety of summer break, except the seven days preceding the start of the school year. However, following Mother's motion for reconsideration, the family court decreased Father's visitation by awarding Mother six additional days in the summer. The court gave Mother the discretion to exercise this time as a week in July or one weekend in June, July, and August, limited similarly to Father's Short Weekend Visitation.

We find the family court's decision to modify Father's summer visitation was proper. The record demonstrates Mother had very little contact with Daughters during previous summer breaks and Father routinely deflected or failed to answer Mother's questions regarding Daughters' location and well-being. The paramount consideration is the best interest of Daughters. Considering Parents' inability to communicate with each other, it is not in Daughters' best interest to go for a long period without spending time with Mother.

We acknowledge the family court's efforts but find the need for additional modifications to promote Daughters' welfare and alleviate conflicts between the parties. Accordingly, the visitation schedule and Parenting Plan are modified as follows. Daughters shall spend the first seven days of summer break with Mother. In addition to this seven-day-period, Mother shall have an additional weekend with Daughters during the summer break beginning at 6:00 P.M. on Friday and ending at 6:00 P.M. on Sunday. Mother shall notify Father on OFW of the dates for her

summer weekend by May 1. Additionally, similar to Father's Short Weekend Visitation, Mother must ensure Daughters attend all previously scheduled activities, such as educational activities, church activities, and sports practices or games, during her summer weekend. Father has a similar duty to notify Mother on OFW of any events when Mother selects her weekend or within twenty-four hours of learning of the event. In the event Mother chooses not to exercise her summer weekend, Mother shall notify Father seven days prior to the weekend or within twenty-four hours for Father notifying her of an event. Father's summer visitation shall begin at 2:00 P.M. on the eighth day of summer break and end at 6:00 P.M. seven days prior to the first day of school. We find these changes allow Daughters time to adjust to the beginning and end of summer break and alleviate unnecessary stressors, such as bringing luggage to school before the break begins. Therefore, Father's summer visitation is accordingly modified.

D. Holiday Visitation

Father asserts the family court erred in setting his Christmas visitation. We agree. Under the current visitation schedule, Father receives every Thanksgiving holiday, and his Christmas visitation begins at dismissal on the last day of school and ends on December 23. Under that arrangement, there will be years when Father has possibly only one day or less with Daughters for his Christmas visitation. It is in Daughters' best interest to continue to spend time with both parents during the Christmas holiday. Therefore, the visitation schedule is modified as follows. Father will continue to have every Thanksgiving holiday. Father's Christmas visitation will begin on December 26 at 2:00 P.M. and end on January 1 at 6:00 P.M.

Based on the foregoing, we affirm the family court's visitation schedule and Parenting Plan as modified.

III. Contempt

Father argues the family court erred in finding him in contempt for willfully violating the Divorce Decree and the Evaluation Order. We disagree.

"An adult who wi[l]lfully violates, neglects, or refuses to obey or perform a lawful order of the court" may be charged with contempt. S.C. Code Ann. § 63-3-620 (Supp. 2020). "Once a moving party makes out a prima facie case of contempt by pleading the order and showing its noncompliance, the burden shifts to the

respondent to establish his defense and inability to comply." *S.C. Dep't of Soc. Servs. v. Johnson*, 386 S.C. 426, 435, 688 S.E.2d 588, 592 (Ct. App. 2009). "To find one in contempt of court, the record must clearly reflect contemptuous conduct." *Sweeney v. Sweeney*, 420 S.C. 69, 82, 800 S.E.2d 148, 155 (Ct. App. 2017); *Eaddy v. Oliver*, 345 S.C. 39, 43, 545 S.E.2d 830, 833–34 (Ct. App. 2001) (finding the father's testimony established a prima facie showing of contempt and the family court correspondingly erred in not finding the mother in contempt after she presented no evidence to defend or explain her noncompliance). The burden of proof for civil contempt is clear and convincing evidence, and the burden for criminal contempt is beyond a reasonable doubt. *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998). Civil contempt is remedial in nature and aims to benefit the complainant, but criminal contempt is punitive and aims to vindicate the court's authority. *Id.* at 111, 502 S.E.2d at 88.

A. Violation of the Divorce Decree

Father argues the family court erred in finding him in contempt for violating the Divorce Decree. The Divorce Decree prohibited the parties from "harass[ing] or burden[ing] the other with excessive or abusive telephone calls or any non-productive or harassing communication." Specifically, Father asserts the family court failed to cite the communications that violated the provision. Father contends some of the emails Mother presented as evidence were the subject of a previous contempt action against Father in July 2013 and by failing to cite the contemptuous communications, it is unclear whether the family court relied on this older evidence. We disagree.

In its Final Order, the family court noted some of the emails relevant to Mother's testimony were previously litigated and specifically stated those emails were excluded from consideration. As to whether the record supports the family court's finding that Father violated this provision, we find it does. During a visitation exchange in August 2014, Mother was late in getting Daughters to Father. For the next two hours, Father sent Mother an email every fifteen minutes telling her how many minutes she was late and that she was not following the court order. Mother tried to call Father multiple times to try and resolve the issue, but he would not answer despite continuing to send emails. This is clear and convincing evidence of "non-productive or harassing communication." Accordingly, the family court did

not err in finding Father willfully violated the Divorce Decree, and we affirm.[5] *See Poston*, 331 S.C. at 113, 502 S.E.2d at 89 ("Civil contempt must be proven by clear and convincing evidence."); *Sweeney*, 420 S.C. at 82, 800 S.E.2d at 155 ("To find one in contempt of court, the record must clearly reflect contemptuous conduct.").

B. Violation of the Evaluation Order

Father argues the family court erred in finding him in contempt for violating the Evaluation Order because the evaluation was unnecessary and based on false and misleading information. We disagree.

The facts underlying Father's failure to submit to a psychological examination are not in dispute. The family court ordered Father to undergo a psychological evaluation prior to the final hearing, and the GAL scheduled an appointment for Father, but Father did not go to the appointment. The GAL attempted to reschedule with multiple psychologists and informed Father of the potential make-up appointments. Despite scheduling a make-up appointment, Father still failed to meet with a psychologist and complete an evaluation. Although the record indicates Father missed the first appointment because he had a flat tire and was in Tennessee, he offered no explanation for his failure to complete the examination at a later appointment.

We find the record supports the family court's finding of contempt. The family court ordered Father to undergo a psychological evaluation, and he failed to comply. Father did not present any evidence showing he was unable to comply despite a good faith effort, and his objections to the evaluation's necessity and validity, even if in good faith, are not an excuse. *See Sweeney*, 420 S.C. at 82–83, 800 S.E.2d at 155 (affirming the family court's finding of contempt because the husband willfully violated a temporary order despite his argument that he did it

[5] Father also asserts the family court erred in relying on the GAL's testimony concerning Father's harassing and derogatory emails because the GAL did not give specific examples of the objectionable verbiage. Because our finding above is dispositive, we need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

without a "bad purpose"). At the time it was issued, the Evaluation Order bore the judicial authority of the family court and required compliance absent a stay of the order's effect. *See Jennings v. Jennings*, 104 S.C. 242, 245, 88 S.E. 527, 528 (1916) ("The orders of the court, even though erroneous, must be respected and obeyed, until vacated or modified by competent authority."). The only acceptable reasons for not complying with the order would be appealing and obtaining a supersedeas—which Father did not do—or being thwarted from obeying the order despite his good-faith effort to comply—which Father has not shown. *See* Rule 241(c), SCACR ("The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order . . . . ."); *Terry v. Terry*, 400 S.C. 453, 456 & n.2, 734 S.E.2d 646, 648 & n.2 (2012) (providing the method for obtaining relief from a family court's temporary order); *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.2d 754, 760 (Ct. App. 2007) ("Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." (quoting *Smith-Cooper v. Cooper*, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001))). Accordingly, the record supports the family court's finding of contempt regarding the Evaluation Order, and we affirm.

IV. Attorney's Fees

Father appeals the family court's award of attorney's fees, asserting the family court failed to properly consider the relevant factors when deciding whether to award attorney's fees and the amount to award. Mother appeals the family court's order, arguing she should have been awarded the full amount of her attorney's fees.

Section 20-3-130(H) of the South Carolina Code (2014) authorizes the family court to order payment of litigation expenses such as attorney's fees to either party. When determining whether fees should be awarded, the court considers "(1) the party's ability to pay his/her own attorney's fee; (2) [the] beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) [the] effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). Failing to cooperate and prolonging litigation can serve as an additional ground for awarding attorney's fees. *See Bodkin v. Bodkin*, 388 S.C. 203, 223, 694 S.E.2d 230, 241 (Ct. App. 2010). When determining the reasonableness of attorney's fees, the family court considers "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) [the] professional standing of counsel; (4) [the] contingency of compensation; (5) [the] beneficial results obtained; [and] (6) [the]

customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). The family court can also consider a litigant's uncooperative and evasive behavior when determining the reasonableness of the fees. *See Spreeuw v. Barker*, 385 S.C. 45, 72–73, 682 S.E.2d 843, 857 (Ct. App. 2009) (holding although an attorney's fee award representing 40% of the husband's annual income is concerning, the award was not excessive because the family court also considered how the husband's uncooperative conduct during discovery and evasive answers regarding his finances greatly contributed to litigation costs). Appellate courts review a family court's award of attorney's fees de novo. *Stone v. Thompson*, 428 S.C. 79, 92, 833 S.E.2d 266, 272 (2019).

We find the family court considered the appropriate factors in awarding Mother attorney's fees. Mother obtained more beneficial results by prevailing on custody and in her contempt action. *See E.D.M.*, 307 S.C. at 476, 415 S.E.2d at 816 (stating the family court should consider the beneficial results obtained by the attorney). Our above modifications of the visitation schedule and Parenting Plan do not displace Mother's beneficial results. The court noted an attorney's fee award would not severely impact Father's financial condition because he testified he has the freedom to pursue business activities and to take entrepreneurial risks because of family support. *See id.* at 477, 415 S.E.2d at 816 (stating the family court should consider the award's effect on the parties' standard of living). The court noted both parties had the ability to pay their attorney's fees. *See id.* at 476–77, 415 S.E.2d at 816 (stating the family court should consider the parties' financial condition and ability to pay). Father prolonged the litigation by refusing to comply with the psychological evaluation and his conduct during the trial. He was evasive in responding to questions, especially relating to his employment and finances. The family court had to interrupt the proceedings many times to instruct Father to answer the attorney's questions or allow the attorney to ask questions. At one point, the family court instructed Father that he was flirting with contempt. *Fitzwater v. Fitzwater*, 396 S.C. 361, 372, 721 S.E.2d 7, 13 (Ct. App. 2011) (finding an award of partial attorney's fees to a party with a superior financial position was appropriate in light of all the *E.D.M.* factors and because the obligated party was uncooperative and unnecessarily prolonged the case). Based on our de novo review, we find the record supports the family court's findings, and we affirm an award of attorney's fees to Mother.

However, we find the family court erred in setting the amount of Mother's attorney's fee award. The family court awarded Mother $5,400 of her incurred fee

amount of $51,482.50. Custody cases involving relocation are difficult cases, and this trial involved ten witnesses, ninety-one exhibits, and required five days to complete, despite originally being scheduled for one. *See Latimer*, 360 S.C. at 380, 602 S.E.2d at 34 (stating relocation cases are among the most difficult the family court encounters). Further, we find Father's refusal to undergo a psychological evaluation and his conduct and evasiveness on the witness stand increased this case's difficulty and length. *See Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (stating the family court should consider "the nature, extent, and difficulty of the case" when determining the amount of awarded attorney's fees); *Spreeuw*, 385 S.C. 45, 72–73, 682 S.E.2d 843, 857 (considering a party's uncooperative and evasive behavior when determining the attorney's fee amount). Accordingly, we adjust Mother's awarded fees to $10,000.

V. GAL Fees

Father appeals the family court's division of the GAL's fees. However, he does not cite any authority to support his argument. *See 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). Accordingly, we affirm the family court's division of the GAL's fees.

CONCLUSION

Based on the foregoing, the family court's order is

AFFIRMED AS MODIFIED.

HUFF and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Meritage Asset Management, Inc. d/b/a Century Glass Company, Appellant,

v.

Freeland Construction Company, Inc. and South Carolina Military Department, Defendants,

Of which South Carolina Military Department is the Respondent.

Appellate Case No. 2018-000162

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5802
Heard September 14, 2020 – Filed February 10, 2021

AFFIRMED

Everett Augustus Kendall, II, of Murphy & Grantland, P.A., and William Harley Yarborough, Jr., of Cavanaugh & Thickens, LLC, both of Columbia, for Appellant.

Chief Deputy Attorney General W. Jeffrey Young, Deputy Assistant Attorney General Harley Littleton Kirkland, and Assistant Attorney General Leon David Leggett, III, all of Columbia, for Respondent.

WILLIAMS, J.: Meritage Asset Management, Inc., d/b/a Century Glass Company (Meritage), appeals the trial court's order granting South Carolina Military Department (the Department) summary judgment. On appeal, Meritage argues it was entitled to summary judgment because it was undisputed the Department failed to comply with the Subcontractors' and Suppliers' Payment Protection Act (the SPPA).[1] We affirm.

FACTS/PROCEDURAL HISTORY

The facts of this case are not in dispute. In September 2014, the Department executed a contract with Freeland Construction Company, Inc. (Freeland) to perform construction work on the Saluda Armory. Freeland failed to secure a payment bond for the project or submit any proof of adequate bonding in its bid submission to the Department. The Department admitted it failed to require Freeland to obtain a payment bond as required under the SPPA.[2] In January 2016, Freeland subcontracted with Meritage to perform work on the project. Meritage completed the work and submitted a final invoice to Freeland on May 20, 2016. Freeland submitted its final invoice to the Department on June 3, 2016, and was paid in full on June 17, 2016. Freeland never paid Meritage for its work on the project. Meritage notified the Department of Freeland's failure to pay on August 8, 2016.

Meritage brought a breach of contract claim alleging (1) the Department was obligated to compensate Meritage as a third-party beneficiary to the contract between the Department and Freeland and (2) the Department failed to ensure that Freeland was properly bonded pursuant to the SPPA.[3] The Department admitted it failed to comply with the SPPA's payment bond requirement, but it nevertheless moved for summary judgment. The Department argued that under *Sloan Construction Company, Inc. v. Southco Grassing, Inc.*, Meritage was not entitled to any recovery from the Department because there was no outstanding balance owed

[1] S.C. Code Ann. §§ 29-6-210 to -290 (2007 & Supp. 2019).
[2] *See* § 29-6-250.
[3] Meritage also brought a breach of contract claim against Freeland and obtained a default judgment.

to Freeland when the Department received notice of Freeland's nonpayment.[4] Meritage filed a cross motion for summary judgment.

Finding *Sloan* applied, the trial court granted the Department's motion for summary judgment. The court held that under *Sloan*, the Department did not owe Meritage damages because no outstanding balance existed between the Department and Freeland at the time Meritage notified the Department of Freeland's failure to compensate. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in granting summary judgment to the Department?

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP." *Shirley's Iron Works*, 403 S.C. at 567, 743 S.E.2d at 782. "Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.*

LAW/ANALYSIS

Meritage argues the trial court erred in denying its motion for summary judgment and in granting summary judgment to the Department. Meritage asserts the trial court erred in holding *Sloan* applied, arguing this case is distinguishable from *Sloan* because the Department paid Freeland in full before Meritage notified the Department of Freeland's nonpayment. Meritage contends the application of *Sloan*'s limitation is inconsistent with the SPPA's goal of protecting subcontractors and suppliers. We disagree.

---

[4] 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008) ("[T]he government entity's liability [under the SPPA] is *limited to the remaining unpaid balance* on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." (emphasis added)), *holding modified by Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013).

Prior to 2000, subcontractors and suppliers providing labor or materials for public projects had limited payment protection in the event the general contractor became insolvent because mechanics' liens cannot be enforced on public property. *Sloan*, 377 S.C. at 113, 659 S.E.2d at 161; *see also Atl. Coast Lumber Corp. v. Morrison*, 152 S.C. 305, 309, 149 S.E. 243, 245 (1929) (stating a mechanics' lien is not enforceable against public property). The South Carolina General Assembly enacted the SPPA in 2000 to institute a bonding scheme to ensure such entities are compensated for their work on public projects. *Sloan*, 377 S.C. at 114, 659 S.E.2d at 161. Section 29-6-250 provides as follows:

> (1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract.
>
> . . . .
>
> (3) For the purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

In *Sloan*, the government hired a general contractor for a maintenance project on state highways, and the general contractor provided proof of a payment bond. 377 S.C. at 111, 659 S.E.2d at 160. The general contractor hired a subcontractor, but before the subcontractor completed its work, the payment bond was canceled due to the bond issuer's insolvency. *Id.* The government requested proof of a replacement bond, but the general contractor never responded. *Id.* The subcontractor completed its work but did not receive payment from the general contractor, and it notified the government (1) it had not been paid and (2) the general contractor did not obtain a replacement payment bond. *Id.* The general contractor, without paying the subcontractor, subsequently informed the government it made all payments due to subcontractors and requested its final payment, which the government disbursed. *Id.* The subcontractor sued the

government, ultimately raising to our supreme court the issue of whether a subcontractor could recover from the government under the SPPA. *Id.* at 111–12, 659 S.E.2d at 160–61.

The court, noting the SPPA was a remedial statute subject to liberal construction, held section 29-6-250 created a private right of action against the government for failure to ensure the general contractor obtained a payment bond. *Id.* at 117–18, 659 S.E.2d at 163–64. The SPPA does not provide a remedy for the government's failure to comply with section 29-6-250, but the supreme court held its failure to do so does not subject it to open-ended liability. *Id.* at 121, 659 S.E.2d at 165. In determining the government's limits on liability, the court considered the limits set forth in the mechanics' lien statutes. *Id.* Specifically, the court noted "the owner's liability is limited to the remaining unpaid balance on the contract with the general contractor at the time the owner receives notice from the subcontractor of the general contractor's nonpayment." *Id.*; *see* S.C. Code Ann. § 29-5-40 (2007) ("But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made."). Noting the similar purposes between the SPPA and the mechanics' lien statutes, the court held "in a tort or contract action arising under the SPPA, the government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment. 377 S.C. at 121, 659 S.E.2d at 165–66.

The supreme court subsequently modified the holding in *Sloan* in *Shirley's Iron Works*. In that case, a city contracted with a general contractor to improve real property but failed to require the general contractor to obtain a payment bond. 403 S.C. at 564, 743 S.E.2d at 780. The general contractor failed to compensate its subcontractors, who contacted the city to receive payment. *Id.* at 564–65, 743 S.E.2d at 780. The city offered to split the amount remaining on the general contractor's contract, but some subcontractors refused to accept less than they were due, and the city distributed the offered amount to other subcontractors. *Id.* at 565, 743 S.E.2d at 780. While holding the city could be liable to the appellant for failing to comply with section 29-6-250, our supreme court modified *Sloan*'s holding to clarify the government can only be liable under a third-party beneficiary breach of contract action, not tort, for failing to comply with the SPPA. *Id.* at 567, 571–73, 743 S.E.2d at 781–84. However, the court did not modify *Sloan*'s holding that the government's liability is limited to the remaining unpaid balance on its contract with the general contractor, and it remanded the matter to the trial court

for a determination of the government's liability pursuant to *Sloan*'s limitation.[5] *See id.* at 575, 743 S.E.2d at 786.

We find the trial court correctly applied *Sloan* to the facts of this case. Because Meritage alleges the Department violated section 29-6-250 and *Sloan* established the remedy for violations of section 29-6-250, *Sloan*'s limitation on liability applies to this case. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *Freeman v. Freeman*, 323 S.C. 95, 105, 473 S.E.2d 467, 473 (Ct. App. 1996) ("[The court of appeals is] bound by the decisions of the South Carolina Supreme Court."). Accordingly, the Department's liability to Meritage is limited to the amount remaining on its contract with Freeland when Meritage notified it of Freeland's nonpayment.[6] Because it is undisputed that the Department did not learn of Freeland's nonpayment until after it had paid Freeland the remaining amount on the contract, its liability to Meritage is zero as a matter of law. *See Sloan*, 377 S.C. at 121, 659 S.E.2d at 165–66 ("[T]he government entity's liability [under the SPPA] is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment."); *see also Shirley's Iron Works*, 403 S.C. at 567, 743 S.E.2d at 782 ("Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law."). Thus, the trial court did not err in granting summary judgment to the Department and in denying summary judgment to Meritage.

Accordingly, the decision of the trial court is

---

[5] Meritage argues the supreme court was not asked to review the limits of liability in *Sloan*, but whether a subcontractor had a private right of action against the government for noncompliance with section 29-6-250. Any argument that *Sloan*'s limitation is dicta is without merit due to the supreme court's application of the limitation in *Shirley's Iron Works*.

[6] Meritage additionally argues it could not notify the Department of Freeland's nonpayment because payment was not yet overdue. However, neither the SPPA nor *Sloan* impose a requirement that payment be past due before providing notification of nonpayment, and Meritage fails to provide any supporting authority for this assertion.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

Of Which Town of Arcadia Lakes is the Appellant/Respondent,

v.

South Carolina Department of Health and Environmental Control, Respondent, and Roper Pond, LLC, Respondent/Appellant.

Appellate Case No. 2017-001554

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5803
Heard February 3, 2020 – Filed February 10, 2021

REVERSED

Amy Elizabeth Armstrong, of South Carolina Environmental Law Project, of Pawleys Island; Michael Gary Corley, of South Carolina Environmental Law

Project, of Greenville; and Terry E. Richardson, Jr., of Richardson Patrick Westbrook & Brickman, LLC, of Barnwell, for Appellant/Respondent.

Stephen Philip Hightower, of South Carolina Department of Health and Environmental Control, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

Joan Wash Hartley and W. Thomas Lavender, Jr., both of Nexsen Pruet, LLC, of Columbia, for Respondent/Appellant.

HEWITT, J.: The order on appeal is the closing chapter of a contested case about a construction project. The project's Developer—Roper Pond LLC—prevailed in a permitting challenge brought by the Town of Arcadia Lakes (the Town) and several individuals. After the permitting challenge ended, the Administrative Law Court (ALC) ordered the Town to pay the Developer roughly $205,000 in attorney's fees and costs under a statute that applies when a party sues or is sued by the State or one of its political subdivisions. The ALC also sanctioned the Town $200,000 after finding the Town brought the contested case for the purpose of delaying the project.

We reverse the ALC's judgment. As for the award of fees and costs, the statute in question applies to "civil actions," S.C. Code Ann. § 15-77-300(A) (Supp. 2020), but a contested case before the ALC is not a "civil action." The Developer offers many reasons why it believes the statute should apply to cases at the ALC level, but we must be faithful to the statute's plain text, we must read the statute narrowly rather than broadly, and we believe state and federal precedents support this holding.

As for the sanctions, the key part of the rule—SCALC Rule 72—authorizes the ALC to sanction a party who pursues a case "solely for the purposes of delay." We review an award of sanctions de novo, and our review of the extensive record convinces us that the Town did not pursue this case solely for the purpose of delay.

FACTS

This case began more than a decade ago. In 2008, the South Carolina Department of Health and Environmental Control (DHEC) granted the Developer coverage under a general permit and authorized land-disturbing activities on property off Trenholm Road in an unincorporated area of Richland County. At that time, the property was undeveloped. The property's most visible feature was a pond covered with lily pads.

The Developer considered multiple concepts for the property, including a complex of patio homes. The Developer ultimately decided to build—and has since built—an apartment complex on the land. The work included excavating and lowering the lily pad pond and using the pond to manage the development's stormwater.

There was formal opposition to the project before DHEC finished reviewing the permit application. The project is located off of Trenholm Road and across from a lake partly within the Town of Arcadia Lakes, though the lake is privately owned. Several individuals, including the Town's mayor, wrote a letter asking DHEC to reconsider its decision that the project fell within the general permit's coverage.

After DHEC declined to reconsider its decision, the Town and sixteen individual petitioners (collectively, "Petitioners") challenged DHEC's decision by filing a request for a contested case hearing with the ALC.

The grounds for Petitioners' challenge shifted as the case progressed. Petitioners' letter to DHEC claimed a list of defects, including allegations that the permit application relied on incorrect assumptions for the project's engineering. Petitioners' request for a contested case hearing similarly alleged a number of defects in the project's stormwater management plan and in DHEC's review process.

Petitioners' challenge at the contested case hearing was much narrower. Petitioners focused entirely on the Developer's plan to excavate and lower the lily pad pond and abandoned altogether the alleged stormwater management deficiencies. Petitioners argued the Developer was required to get a particular federal permit that the Developer had not secured. Petitioners also argued—notwithstanding the absence of that federal permit—that DHEC was required under state regulations to consider the "overall project," including any effects on upstream or downstream wetlands.

The ALC tried the contested case for two days in September 2009. This was about seven months after Petitioners filed their request for a contested case hearing.

About four months after the contested case hearing, the ALC issued a ruling finding Petitioners lacked standing to challenge DHEC's decision to approve the project. Even after finding a lack of standing, the ALC proceeded to deny Petitioners' claims on the merits. The ALC denied Petitioners' request for reconsideration and to stay the final order. That denial allowed the Developer to move forward with construction.

Petitioners pursued a lengthy appeal. This court affirmed the ALC's judgment. *See Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013). Our supreme court granted a writ to review this court's decision but dismissed the writ because the Developer finished the project while the appeal was pending, rendering moot any dispute about DHEC's permitting decision. *See* S.C. Sup. Ct. Order dated April 9, 2015.

In the time since our supreme court dismissed the case in 2015, the Town and the Developer have been litigating the Developer's request for fees, costs, and sanctions. The Developer filed a petition for this relief with the ALC about two weeks after the ALC refused to stay the project. No action was taken on the petition for fees and sanctions while the appeal of the permitting challenge was pending.

Then, in March 2016, the ALC conducted a hearing to decide whether an award of fees, costs, and sanctions was appropriate. The ALC issued an order in the Developer's favor in September 2016. The ALC's final order, issued in June 2017, awarded the Developer roughly $205,000 in attorney's fees and costs and imposed a $200,000 sanction on the Town.

ISSUES

1. Did the ALC err in ordering the Town to pay the Developer's fees and costs under section 15-77-300, commonly called "the State Action Statute?"

2. Did the ALC err in sanctioning the Town?

STANDARD OF REVIEW

An award of fees and costs under the State Action Statute is generally reviewed for an abuse of discretion, *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990), but deciding a statute's proper construction is a question of law, which we review de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). We also review de novo the ALC's threshold decision to grant sanctions under SCALC Rule 72. *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 221, 845 S.E.2d 481, 492 (2020). If we agreed sanctions were warranted, we would review the amount of sanctions for an abuse of discretion. *See Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 167, 758 S.E.2d 483, 499 (2014).

STATUTORY ATTORNEY'S FEES AND COSTS

The key part of the State Action Statute reads:

> In any *civil action* brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

§ 15-77-300(A) (emphasis added). A later subsection explains the statute does not apply "to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions." S.C. Code Ann. § 15-77-300(C) (Supp. 2020).

We are convinced that the statute does not apply to contested cases while they are pending before the ALC and that the ALC may not award fees or costs under the

statute. The ALC is an administrative body and part of the executive branch. *See* S.C. Code Ann. § 1-23-500 (Supp. 2020) (stating the ALC is "an agency and a court of record within the executive branch"). A plain reading of the words "civil action" does not encompass contested administrative cases; a civil action "is a proceeding in a judicial court, not an administrative court." *W. Watersheds Project v. U.S. Dep't of the Interior*, 677 F.3d 922, 926 (9th Cir. 2012).

This holding is bolstered by the General Assembly's demonstrated ability to specify when it wishes to include administrative cases in this sort of statute. The original Frivolous Civil Proceedings Sanctions Act applied to "[a]ny person who [took] part in . . . any civil proceeding." S.C. Code Ann. § 15-36-10 (2005), *amended by* § 15-36-10 (Supp. 2020). The General Assembly rewrote the Sanctions Act in 2005 and specified it applies to any "civil or administrative action." § 15-36-10 (Supp. 2020). There was no similar revision to the State Action Statute when the General Assembly amended the statute in 2010. *See* Act No. 125, 2010 S.C. Acts 1104.

Indeed, the General Assembly previously considered, but did not pass, an amendment extending the State Action Statute to administrative proceedings and to agencies. H.R. 3383, 112th Leg., 1st Sess. (S.C. 1997). The sole purpose of this unenacted legislation would have been widening the State Action Statute to include administrative proceedings and proceedings involving agencies. This is not conclusive, but the fact that the General Assembly directly confronted this question and chose not to amend the statute supports our view that the statute does not already extend to administrative proceedings.

The distinction between civil and administrative cases is also bolstered by precedent. In *McDowell v. South Carolina Department of Social Services*, our supreme court held the prevailing party in an administrative case against DSS was entitled to fees and costs under the State Action Statute; however, that holding only applied to judicial review of the agency's decision, and it did not apply while the contested case remained an "administrative" case. 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991). Also, in *South Carolina Department of Consumer Affairs v. Foreclosure Specialists, Inc.*, this court found the ALC did not have the power to grant relief under a particular section of the Consumer Protection Code because the Code only authorized that particular relief in a "civil action," not in administrative actions. 390 S.C. 182, 184–87, 700 S.E.2d 468, 469–70 (Ct. App. 2010). This court specifically noted that the ALC did not have the "authority to decide civil matters or to award

monetary damages in cases." *Id.* at 187, 700 S.E.2d at 470 (quoting Randolf R. Lowell, *South Carolina Administrative Practice and Procedure*, 152 (2d ed. 2008)).

Federal courts have drawn the same distinction when construing the State Action Statute's federal counterpart. *See W. Watersheds Project*, 677 F.3d at 928 (citing decisions from the Eleventh, Eighth, and D.C. Circuits). We acknowledge the federal cases are not binding, but we find their reasoning persuasive and additionally note our supreme court has looked to federal law when interpreting the State Action Statute. *See Heath*, 302 S.C. at 182, 394 S.E.2d at 711 (taking guidance from federal law for the standard of review). We also agree that because the State Action Statute is a waiver of sovereign immunity, we must read it narrowly rather than broadly. *Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 137 (1991) (noting the Equal Access to Justice Act—the State Action Statute's federal analog—must be "strictly construed").

We respectfully disagree with the Developer's contention that certain exceptions in the State Action Statute support the view that the State Action Statute applies to administrative cases. Among other carve-outs, the statute says costs and fees may not be taxed in "civil actions relating to the establishment of public utility rates [and] disciplinary actions by state licensing boards." § 15-77-300(C).

Rate cases and licensing decisions have long been subject to the judicial branch's review after the Public Service Commission or licensing board has completed its review. *See, e.g.,* S.C. Code Ann. § 58-5-340 (1976) (a former statute explaining a party could seek judicial review of Public Service Commission decisions by commencing "an action in the court of common pleas for Richland County") (amended 2006); *Carroll v. Gaddy*, 295 S.C. 426, 428, 368 S.E.2d 909, 911 (1988) (noting the circuit court's review of a licensing decision under the Administrative Procedures Act). The ALC's addition to the "administrative" review process does not matter in a way that is relevant here. Under the reasoning in *McDowell*, *Foreclosure Specialists*, and the federal cases we have cited, administrative cases do not become "civil actions" until they leave the executive branch and enter the judicial branch for review.

Finally, we are aware of a small constellation of statutes that reference certain agencies' ability to seek injunctive relief by bringing "a civil action through the

Administrative Law Court."[1] This use is not uniform throughout Title 40 (the title dealing with "Professions and Occupations"), and no part of the Administrative Procedures Act refers to actions in the ALC as "civil actions." As already noted, we believe the phrase "civil action" has an established legal meaning as a case in a judicial court, not an administrative court. We read these statutes as authorizing the ALC to award injunctive relief in certain instances, not as converting administrative cases to judicial cases.

For these reasons, we find the ALC erred in awarding fees and costs under the State Action Statute. Because this issue is dispositive, we decline to address the parties' remaining arguments regarding the award of fees and costs, the amount of fees and costs, and the exclusion of expert witness affidavits. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when resolution of prior issue is dispositive).

SANCTIONS

SCALC Rule 72 allows the ALC to award sanctions if it determines "that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay . . . ." Merriam-Webster Dictionary defines "solely" as (1) "to the exclusion of all else," or (2) "without another." Merriam-Webster Dictionary, *Solely*, https://www.merriam-webster.com/dictionary/solely (last visited February 4, 2021). Apparently no South Carolina appellate court had issued a published opinion interpreting or applying Rule 72 until our supreme court's recent decision in *Preservation Society of Charleston*. *See* 430 S.C. at 200, 845 S.E.2d at 481.

There is no evidence in the record that the Town brought or continued the permitting challenge for the *sole* purpose of delay. Instead, there is an abundance of evidence that the Town was concerned about the project's impact on the local ecosystem, the

---

[1] *See, e.g.,* S.C. Code Ann. § 40-1-210 (2011) (Department of Labor, Licensing, and Regulation), § 40-28-200 (2011) (Board of Landscape Architectural Examiners), § 40-33-210 (2011) (State Board of Nursing), § 40-47-210 (2011) (State Board of Medical Examiners), § 40-60-210 (2011) (South Carolina Real Estate Appraisers Board), § 40-63-210 (2011) (State Board of Social Workers).

water quality of the surrounding lakes, and whether the project might worsen existing flooding problems.

The ALC did not even find the Town brought the case for the *sole* purpose of delay. The ALC quoted the rule, but it variously described delay being the Town's "primary objective" or its "real objective." These are not the standard. Any finding that the Town was solely motivated by delay is hard to square with the fact that the Town continued litigating the case after it was clear the Town's appeal would not delay construction.

The ALC noted this challenge stayed the permit for thirteen months, but that does not diminish the point that it is hard to see how one could sensibly say delay was the Town's sole motivation when the project was completed while the Town's permitting appeal was pending. Of course, the fact that there was only a year of delay could mean a suit aimed at delay was only partially successful. A different record might support that view, but we do not think the record supports it here.

The ALC seemed to examine Rule 72 as though it applied when the litigation was wrong-headed or misguided (as opposed to abusive). Although some might say it only makes sense for developers to be able to recover when litigation makes the cost of development go up, that is neither Rule 72's function nor what it says.

We acknowledge the record contains evidence that delay was a factor in the Town's initial decision making. The Developer and the ALC chiefly relied on emails from the Town's mayor. However, those same emails directly reference concerns about water quality, stormwater management, or discussing the best ways to marshal legitimate substantive arguments against the project. There is no question the Town did not want the project built, would have loved for the Developer to abandon it, and devoted a substantial effort to discovering arguments that would stop the project from going forward. Still, the only conclusion with support in the record is that the Town brought this action at least partially based on concerns about the environment and water quality. There is no evidence the Town brought this contested case *solely* to bog the project down with pointless delay.

Because this issue is dispositive, we decline to address parties' remaining arguments regarding the amount of sanctions. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

CONCLUSION

Based on the foregoing, the ALC's award of attorney's fees and costs pursuant to the State Action Statute and the imposition of sanctions under Rule 72 of the South Carolina Administrative Law Court Rules is

REVERSED.

LOCKEMY, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolina Center Building Corp., Appellant,

v.

Enmark Stations, Inc.; and the Town of Hilton Head Island, Respondents.

Appellate Case No. 2017-001555

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5804
Heard February 12, 2020 – Filed February 10, 2021

AFFIRMED AS MODIFIED

H. Fred Kuhn, Jr., of Moss Kuhn & Fleming, P.A., of Beaufort, for Appellant.

Russell Pierce Patterson and Lauren Patterson Williams, of Russell P. Patterson P.A., of Hilton Head Island, for Respondent Enmark Stations, Inc.

Gregory Milam Alford, of Alford Law Firm, LLC, of Hilton Head Island, for Respondent Town of Hilton Head Island.

WILLIAMS, J.: In this appeal, Carolina Center Building Corporation (Carolina) appeals the master-in-equity's order finding Enmark Stations, Inc. (Enmark) had a prescriptive easement to use a paved roadway (Roadway) situated on Carolina's property. Carolina also appeals the master's refusal to issue a writ of mandamus ordering the Town of Hilton Head (Hilton Head) to enforce Hilton Head's Land Management Ordinance Official's (LMO Official) order that the Roadway be removed. We affirm as modified.

FACTS AND PROCEDURAL HISTORY

Carolina owns property on Greenwood Drive near Sea Pines Circle on Hilton Head Island, and on its property sits multiple buildings (Welcome Center). Enmark operates a gas station (Station) on Palmetto Bay Road adjacent to the Welcome Center. Behind the Station and adjacent to Carolina's property is a restaurant and shopping complex (Shopping Center). The Roadway covers a portion of the Welcome Center's property at its northern border and connects the Station's southern border to the parking lot on the restaurant's and Shopping Center's southern border. The Roadway initially forked around a small vegetative island located on the Shopping Center's property and had two connections to the parking lot, but now only one exists after the Shopping Center removed the island and placed a trash dumpster in its place. The Station's patrons use the Roadway as an alternative entrance and exit for the Station. The general public also uses it to bypass Sea Pines Circle and access the Shopping Center.

The chain of title for the Station is as follows. On March 12, 1974, Chevron Oil Company (Chevron) purchased the real property. On August 1, 1983, Chevron obtained a development permit to build the Station and completed construction on June 1, 1984. In 1985, Chevron leased the Station to Ron Ballenger, who was married to Alice Means. Means and Ballenger divorced in 1989, and Means assumed the lease following the divorce. Sometime before the divorce, Ballenger made repairs to the Roadway due to customer complaints. On August 23, 1993, Means, through her company, ASA, Inc. (ASA), purchased the Station from Chevron. During her ownership, Means also performed maintenance on the Roadway due to complaints. On March 19, 2009, Enmark purchased the Station from ASA.

As to the Welcome Center, State Savings Service Corporation purchased it from Sea Pines Plantation Company on January 29, 1973. On November 26, 1986,

Fogelman Properties purchased the Welcome Center and subsequently sold it to SeP Limited Partnership on March 7, 1990. The Welcome Center was conveyed to Palmetto Federal Savings Bank of South Carolina on January 11, 1994, who then sold it to Sea Pines Company, Inc. on July 21, 1994. On October 31, 1996, Carolina purchased the Welcome Center.

On July 24, 2013, Enmark and Carolina entered a tolling agreement (Tolling Agreement) in which they agreed Carolina would file a complaint seeking a declaratory judgment to determine each party's rights attendant to the Roadway. The Tolling Agreement also provided that the parties would not close or impede travel over the Roadway in any way and any applicable limitation period related to the Roadway would be tolled.

After entering the Tolling Agreement but prior to filing a complaint, Carolina asked Theresa B. Lewis, the LMO Official, who interprets and enforces Hilton Head's Land Management Ordinances (LMO), whether the Roadway violated the LMO. In a letter sent on August 8, 2013 (2013 Letter), the LMO Official notified Carolina that the Roadway violated the LMO and ordered it to remove the Roadway and plant a vegetative buffer. Carolina subsequently forwarded the letter to Enmark. After receiving the 2013 Letter, Enmark contacted the LMO Official and informed her of (1) the Roadway's importance to its business and the public and (2) the Tolling Agreement and its provision providing for a court determination of the parties' rights and obligations attendant to the Roadway. Enmark also informed the LMO Official it believed the Roadway predated the LMO.[1] On September 26, 2013, the LMO Official sent Carolina an email (2013 Email) stating that after discussing the situation with Hilton Head's attorney, the 2013 Letter was premature and she should have advised Carolina that a court would need to address the issue of the Roadway's existence before she could determine whether the Roadway violated the LMO. She also indicated she would formulate a new response and send it to Carolina and Enmark. The LMO Official subsequently decided the Roadway was grandfathered into the LMO. Pursuant to the LMO Official's request, Hilton Head's attorney informed Carolina of the decision and stated Hilton Head would not require the Roadway's removal.

Carolina filed a complaint on August 15, 2013, and subsequently amended it on November 19, 2014. Carolina sought an order (1) finding Enmark did not have an

[1] Hilton Head enacted the first version of the LMO in 1987.

express or prescriptive easement to use the Roadway, (2) ordering Enmark to remove the Roadway and to deter the public from using it, (3) permitting Carolina to make reasonable changes to the Roadway at Enmark's expense should an easement exist, and (4) prohibiting Enmark from using the Roadway. Carolina additionally brought causes of action for slander of title, nuisance, and trespass and also requested a writ of mandamus against Hilton Head to enforce the LMO. Enmark and Hilton Head filed answers seeking dismissal of Carolina's claims, and Enmark filed a counterclaim asserting it had an easement over the Roadway. Carolina moved for summary judgment, and on October 23, 2015, the trial court granted summary judgment in its favor as to the issue of an express easement but denied summary judgment as to all other issues.

The matter was referred to the master on November 30, 2015, and the trial occurred on June 20–21, 2016. On March 30, 2017, the master issued an order finding Enmark established by clear and convincing evidence that it had a prescriptive easement to use the Roadway.

The master denied Carolina's request for a writ of mandamus, finding the LMO Official's 2013 Letter was not a final decision. The master further found a writ was inappropriate because (1) the Roadway did not violate the LMO, (2) Hilton Head had discretion in fashioning a remedy, and (3) Carolina failed to exhaust its administrative remedies.

Finally, the master dismissed Carolina's actions for slander of title, nuisance, and trespass, finding Carolina failed to establish these claims because Enmark possessed a prescriptive easement to use the Roadway.

Carolina filed a Rule 59(e), SCRCP, motion, which the master denied. This appeal followed.

ISSUES ON APPEAL

I. Did the master err in failing to issue a writ of mandamus ordering Hilton Head to enforce the LMO Official's 2013 Letter requiring the removal of the Roadway?

II. Did the master err in finding Enmark satisfied the elements of a prescriptive easement?

LAW AND ANALYSIS

I. Writ of Mandamus

Carolina argues the master erred in failing to issue a writ of mandamus compelling Hilton Head to enforce the LMO Official's decision contained in the 2013 Letter. We affirm.

"Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy." *City of Rock Hill v. Thompson*, 349 S.C. 197, 199, 563 S.E.2d 101, 102 (2002). The master exercises discretion in determining whether to issue a writ of mandamus, and its decision will not be overturned on appeal absent an abuse of that discretion. *Steele v. Benjamin*, 362 S.C. 66, 70, 606 S.E.2d 499, 501 (Ct. App. 2004). An abuse of discretion occurs when the master commits an error of law or bases the order on factual conclusions lacking any evidentiary support. *Id.* "An appellate court will not disturb the factual findings of the [master] on a mandamus petition if the [master]'s findings are supported by any reasonable evidence." *Id.*

Carolina asserts the master erred in finding the 2013 Letter was not a final decision. Carolina contends the 2013 Letter was a final decision because it found the Roadway violated the LMO and prescribed the specific remedy of removing the Roadway and restoring the vegetative buffer. Carolina therefore argues the master erred in declining to issue a writ of mandamus.

We find the master did not abuse its discretion in denying Carolina's petition for a writ of mandamus. The master found that the 2013 Letter was not a final decision because the LMO Official later rescinded it. The record reasonably supports this finding. *See id.* (stating the master's factual findings on a mandamus petition will not be disturbed if supported by reasonable evidence). In the 2013 Email, the LMO Official informed Carolina that the 2013 Letter was premature and that she would formalize a new response for Carolina. Furthermore, the LMO Official testified that even though it did not include the word "rescission," her 2013 Email rescinded the 2013 Letter. The LMO Official testified the 2013 Letter was based on evidence supplied only by Carolina. She stated that when she issues a decision based on information supplied only by one party in a dispute and subsequently learns new information from the other side, her practice is to retract the decision

and issue a new one. We find this evidence supports the master's factual finding that the 2013 Letter was not a final decision. Therefore, the master did not err in refusing to issue a writ of mandamus enforcing the 2013 Letter. *See Thompson*, 349 S.C. at 199, 563 S.E.2d at 102 ("Mandamus is . . . issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy."). Accordingly, we affirm the master on this issue.

II. Enmark's Prescriptive Easement

Carolina argues the master erred in holding Enmark established the elements of a prescriptive easement. We affirm as modified.

"An easement is a right given to a person to use the land of another for a specific purpose." *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 229, 797 S.E.2d 387, 390 (2016) (quoting *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015)). "The determination of the existence of an easement is a question of fact in a law action and subject to [the] any evidence standard of review when tried . . . without a jury." *Kelley v. Snyder*, 396 S.C. 564, 571, 722 S.E.2d 813, 817 (Ct. App. 2012) (quoting *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005)). In an action at law tried without a jury, the master's factual findings will not be reversed on appeal unless the record contains no evidence reasonably supporting the finding. *Id.* Additionally, "questions regarding the credibility and the weight of evidence are exclusively for the [master]." *In re Estate of Anderson*, 381 S.C. 568, 573, 674 S.E.2d 176, 179 (Ct. App. 2009) (quoting *Golini v. Bolton*, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997)).

"[The] party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence." *Bundy*, 412 S.C. at 306, 772 S.E.2d at 170. "To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse[,] or under claim of right."[2] *Id.* at 304, 772 S.E.2d at 169–70. "[W]hen it appears that

[2] Recently, our supreme court clarified the third element of a prescriptive easement, holding "adverse" and "claim of right" are in effect the same thing rather than two alternative ways of satisfying the element. *Simmons*, 419 S.C. at 232, 797 S.E.2d at 392. The court then simplified the elements for a prescriptive easement, stating "the claimant must identify the thing enjoyed, and show his use has been

claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." *Simmons*, 419 S.C. at 229, 797 S.E.2d at 390 (alteration in original) (quoting *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917)). Once the presumption applies, the servient owner bears the burden of rebutting the presumption, which can be done by showing permissive use. *See Kelley*, 396 S.C. at 575–76, 722 S.E.2d at 819; *see also Williamson*, 107 S.C. at 401, 93 S.E. at 16 ("The asking and obtaining of permission[] . . . stamps the character of the use as not having been adverse[] . . . and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription."). To satisfy the twenty-year prescriptive period, the claimant can tack his use to use by prior owners, provided the prior owners' use also satisfies the prescriptive easement elements. *See Bundy*, 412 S.C. at 313, 772 S.E.2d at 174; *see also Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("A party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement.").

A. Identity of the Thing Enjoyed

Carolina argues the master erred in finding Enmark established the identity of the thing enjoyed. We disagree.

The master found Enmark established the identity of the thing enjoyed: the Roadway, which provided a second method of entering and leaving the Station. *See Bundy*, 412 S.C. at 304, 772 S.E.2d at 169 ("To establish a prescriptive easement, one must show: . . . the identity of the thing enjoyed . . . ."). Carolina asserts Enmark failed to prove this element because the Roadway is an "easement to nowhere" because it terminates on another's property instead of a public road. However, Carolina fails to cite supporting authority for this proposition. The Roadway is a right of way, and we find our jurisprudence does not require a right of way to terminate on public property. *See* 12 S.C. Jur. *Easements* § 18 (1992) ("A right of way is simply an easement *across another's land* along a particular line *for a particular purpose, such as for ingress and egress*, utility lines, drainage or other such purposes." (emphases added)); *see also Simmons*, 419 S.C. at 229, 797 S.E.2d at 390 (stating a prescriptive easement is established by identifying the

---

open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years." *Id.* at 233, 797 S.E.2d at 392.

things used or enjoyed and showing it was used or enjoyed adversely, continuously, and uninterrupted for twenty years). Because the record contains reasonable evidentiary support regarding the identity of the easement, we affirm the master as to this element.

B. Continuous and Uninterrupted Use for Twenty Years

Carolina argues the master erred in finding Enmark and its predecessors used the Roadway continuously and uninterrupted for the twenty-year prescriptive period. We affirm as modified.

1. Continuous Use

Because Enmark owned the Station for only three years prior to the Tolling Agreement, it must tack on to the use by its predecessors, Chevron and ASA. *See Bundy*, 412 S.C. at 313, 772 S.E.2d at 174 ("A party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement." (quoting *Morrow*, 328 S.C. at 527, 492 S.E.2d at 423)). We hold the master properly found Enmark was able to tack the use of the Roadway by its predecessors.

The master found the Roadway existed when Chevron opened the Station in 1984 or shortly thereafter and therefore, the prescriptive period began running at that time. The record supports this finding as Means—whom the master found credible—testified she remembered the Roadway being there when the Station opened. *See In re Estate of Anderson*, 381 S.C. at 573, 674 S.E.2d at 179 ("In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the [master]." (quoting *Golini*, 326 S.C. at 342, 482 S.E.2d at 789)). The record also reasonably supports the master's finding that Chevron's, ASA's, and Enmark's use was established by Means's and Ballenger's repairs to the Roadway and the use of the Roadway by the Station's patrons.[3] *See*

[3] Multiple witnesses, including Carolina's president, Kumar Viswanathan, testified the Station's patrons used the Roadway, and Carolina never argued the patrons' use was insufficient to establish Enmark's, ASA's, or Chevron's use. Because the question of whether Enmark and its predecessors could rely on their patrons' use of the Roadway to establish an easement was never raised during trial but assumed by the parties and the master, we make the same assumption for the purpose of this appeal. *See I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526

Kelley, 396 S.C. at 571, 722 S.E.2d at 817 (stating factual findings by the court in an action at law will be overturned only if without reasonable evidentiary support). Accordingly, provided Enmark and its predecessors' use satisfies the remaining prescriptive easement elements, the twenty-year period ended in 2004. We address the remaining elements in turn.

2. Uninterrupted Use

Carolina argues the master erred in concluding Enmark proved this element. First, it asserts the use was interrupted when the Shopping Center placed a trash dumpster on part of the Roadway. Second, Carolina contends it sent three letters containing verbal threats that interrupted the use by Enmark and its predecessors and the master erred in ruling verbal threats were insufficient to interrupt the prescriptive period.

In *Pittman*, our supreme court considered what constituted an interruption of a prescriptive period and elected not to adopt an "effective interruption" standard. 363 S.C. at 50–52, 610 S.E.2d at 480–81. In that case, the servient landowner placed numerous obstacles—posts, cables, and crops—over a road used by the dominant landowner, but the dominant landowner either traversed around the obstacles or pushed them over. *Id.* at 49, 52, 610 S.E.2d at 480–81. The servient landowner replaced the barriers when the dominant landowner moved or destroyed them, and he also notified law enforcement of the dominant landowner's destruction of the barriers. *Id.* In ruling the servient landowner sufficiently interrupted the dominant landowner's use, the court referenced an Oregon Court of Appeals case, quoting the following:

> A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of

---

S.E.2d 716, 724 (2000) ("[The] preservation requirement . . . is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and *arguments*." (emphasis added)); *cf. TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

> acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.

Id. at 51–52, 610 S.E.2d at 481 (omission in original) (quoting *Garrett v. Mueller*, 927 P.2d 612, 617 (Or. Ct. App. 1996)). The *Pittman* court then stated,

> [A]ctions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief. In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period.

Id. at 52, 610 S.E.2d at 481. The court further noted that mandating successful interruption would require additional actions that "would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes." *Id.*

In *Kelley*, this court relied on *Pittman* and held a servient landowner failed to interrupt a dominant landowner's use. 396 S.C. at 573–74, 722 S.E.2d at 818. In that case, the dominant landowners used a road that crossed the servient landowner's property. *Id.* at 569, 722 S.E.2d at 816. The dominant landowners installed a gate on the road, and on two occasions, the servient landowner talked to them about the gate and asked them to move it. *Id.* at 569–70, 722 S.E.2d at 816. The dominant landowners moved the gate, but they did not move it off of the servient landowner's property. *Id.* The dominant landowners offered the servient landowner a key to the gate, but he refused it. *Id.* at 570, 722 S.E.2d at 816. Citing *Pittman*, this court held that merely asking the dominant landowner to move a gate did not convey to the dominant landowner that the servient landowner did not acquiesce to the easement's use, noting the servient landowner never conveyed to the dominant landowners that they could not use the road. *Id.* at 573–74, 722 S.E.2d at 818.

Initially, we find the master erred in ruling verbal threats, without an accompanying physical act, are insufficient to interrupt a claimant's use. The language utilized in *Pittman* expresses a position contrary to this holding. Specifically, we find *Pittman*'s use of the phrases "in addition to" and "also sufficient" indicates that verbal threats are intended to serve as an *alternative method* for interrupting the prescriptive period. *See* 363 S.C. at 52, 610 S.E.2d at 481 ("*In addition to* physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are *also sufficient* to interrupt the prescriptive period." (emphases added)). This court's analysis in *Kelley* regarding the servient landowner's statements to the dominant landowners further supports this interpretation. *See* 396 S.C. at 574, 722 S.E.2d at 818 ("Although [the servient landowner] asked [the dominant landowners] to move the gate, there is no indication that [the servient landowner's] request conveyed to [the dominant landowners] the impression that he did not acquiesce in [the dominant landowners] using the road. . . . Further, [the servient landowner] never told [the dominant landowners] they could not use the road."). Moreover, our supreme court rejected an "effective interruption" standard partly out of a desire to not "encourage wrongful or potentially violent behavior" but rather encourage peaceful resolutions. *See Pittman*, 363 S.C. at 52, 610 S.E.2d at 481. This policy consideration is served by allowing verbal threats to interrupt a prescriptive period.

However, although we find the master erred in holding verbal threats are generally insufficient to interrupt a prescriptive period, we affirm the master's finding that the Roadway's use was uninterrupted. First, the obstructing dumpster did not interrupt the use of the Roadway. Because the Shopping Center, not Carolina, placed the dumpster in the Roadway, Carolina cannot rely upon this action as an interruption. *See Pittman*, 363 S.C. 52, 610 S.E.2d at 481 ("[A]ctions are sufficient to interrupt the prescriptive period *when the servient landowner* engages in overt acts, such as erecting physical barriers . . . ." (emphasis added)). Accordingly, the master did not err in finding the placement of the dumpster did not interrupt the prescriptive period.

Second, we hold the master did not err in finding the letters sent by Carolina failed to interrupt the prescriptive period. Carolina sent three letters: the first on June 15, 1994; the second on September 15, 2008; and the third on October 29, 2012. Carolina sent the 2008 and 2012 letters twenty-four years and twenty-eight years, respectively, after the use of the Roadway by Enmark's predecessors began; thus,

those letters could not interrupt the prescriptive period. *See Matthews v. Dennis*, 365 S.C. 245, 249–50, 616 S.E.2d 437, 439–40 (Ct. App. 2005) (per curiam) (finding the servient landowner's attempt to barricade an easement did not interrupt the prescriptive period because the prescriptive period ended years before the attempt). As to the first letter, Carolina sent it two years before it purchased its property in 1996, and the letter itself states it was from a "prospective purchaser." Because Carolina did not own its property when it sent the letter, it cannot later rely upon it as an interruption to the prescriptive period. *See Pittman*, 363 S.C. at 52, 610 S.E.2d at 481 ("[V]erbal threats which convey to the dominant landowner the impression *the servient landowner* does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period." (emphasis added)). Furthermore, our review of the record failed to reveal any subsequent verbal threats or actions taken by Carolina following its purchase of the property and within the twenty-year prescriptive period.

Based on the foregoing, we hold the master did not err in finding Enmark established continuous and uninterrupted use of the Roadway for twenty years. Accordingly, we affirm the master as to this issue.

C. Adverse Use

After reviewing the evidence, the master found Enmark was entitled to the presumption of adverse use. *See Simmons*, 419 S.C. at 229, 797 S.E.2d at 390 ("[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." (alteration in original) (quoting *Williamson*, 107 S.C. at 400, 93 S.E. at 16)). The master further found Carolina failed to rebut this presumption. *See Kelley*, 396 S.C. at 575–76, 722 S.E.2d at 819 (stating the servient estate's owner bears the burden of rebutting the adverse use presumption).

Carolina raises multiple arguments as to why the master's finding of adverse use was error. However, in its posttrial brief,[4] Carolina conceded that Enmark would be entitled to the presumption "only if use of the [Roadway] during the entire prescriptive period was not interrupted." Carolina argued the Roadway's use was interrupted by the aforementioned letters and obstructive dumpster. Carolina

[4] The parties submitted post-trial briefs in lieu of making closing arguments.

further contended it rebutted any presumption of adverse use by showing (1) the use was permissive and (2) Means's testimony established her use was not adverse. Because these were the only arguments raised to the master, we only address these assertions. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement . . . is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and *arguments*." (emphasis added)); *see also Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment); *TNS Mills*, 331 S.C. at 617, 503 S.E.2d at 474 ("An issue conceded in a lower court may not be argued on appeal."); *Wogan v. Kunze*, 366 S.C. 583, 608–09, 623 S.E.2d 107, 121 (Ct. App. 2005) (stating an appellant cannot argue one ground at trial and another ground on appeal), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008).

As discussed above, the master did not err in finding the Roadway's use was uninterrupted. Therefore, the presumption of adverse use applies, and Carolina must rebut the presumption. *See Kelley*, 396 S.C. at 575–76, 722 S.E.2d at 819 (stating the servient estate's owner bears the burden of rebutting the adverse use presumption). We find the record supports the master's finding that Carolina failed to do so.

As to permissive use, the record contains evidence Enmark's and its predecessors' use was not permissive. *See Ehlke v. Nemec Constr. Co.*, 298 S.C. 477, 481, 381 S.E.2d 508, 510 (Ct. App. 1989) ("[T]he burden of showing error by the [master] is on the appellant."); *see also Williamson*, 107 S.C. at 401, 93 S.E. at 16 ("The asking and obtaining of permission[] . . . stamps the character of the use as not having been adverse[] . . . and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription."). There was conflicting testimony at trial regarding permissive use. Viswanathan testified he gave ASA and Enmark permission to use the Roadway. Conversely, Means, Jim Scott Middleton—Means's son-in-law who was a general manager at the Station while she owned it—and Enmark's Vice President, Robert Houstoun Demere, III, all testified they never received permission. The master, noting the lack of any documentary evidence of permission, found Means's and Middleton's testimonies credible and held the Roadway's use was not permissive. *See In re Estate of Anderson*, 381 S.C. at 573, 674 S.E.2d at 179 ("In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for

the [master]." (quoting *Golini*, 326 S.C. at 342, 482 S.E.2d at 789)). Because the record contains reasonable evidentiary support, we affirm the master's finding. *See Kelley*, 396 S.C. at 571, 722 S.E.2d at 817 (stating factual findings by the court in an action at law will be overturned only if without reasonable evidentiary support).

Carolina also argues ASA's use was not adverse because Means testified she was not attempting to exercise ownership over the Roadway or the property. However, the elements for obtaining a prescriptive easement do not require the dominant landowner to intend to take ownership of that portion of the servient estate. *See Simmons*, 419 S.C. at 229, 797 S.E.2d at 390 (stating a prescriptive easement is established by showing (1) continued and uninterrupted use or enjoyment for twenty years, (2) the identity of the thing used or enjoyed, and (3) the use or enjoyment was adverse). Further, establishing a prescriptive easement does not confer ownership of property; it only confers the right to use that property. *See id.* ("An easement is a right given to a person to use the land of another for a specific purpose." (quoting *Bundy*, 412 S.C. at 304, 772 S.E.2d at 169)). For these reasons, we find Carolina failed to rebut the presumption of adverse use.

Based on the foregoing, we hold the master did not err in finding Enmark established the element of adverse use. Accordingly, we affirm on this issue.

D. Exclusivity

Carolina also argues the master erred in granting a prescriptive easement because Enmark's and its predecessors' use was not exclusive of the general public. However, "there is no requirement of exclusivity of use to establish a prescriptive easement." *Jones v. Daley*, 363 S.C. 310, 317, 609 S.E.2d 597, 600 (Ct. App. 2005), *overruled on other grounds by Simmons*, 419 S.C. at 232, 797 S.E.2d at 392). Although our supreme court discussed exclusivity in *Bundy*, it did not list exclusivity when it recited the elements of a prescriptive easement. *See* 412 S.C. at 304, 311, 772 S.E.2d at 169–70, 173. Additionally, when the court subsequently clarified the test for a prescriptive easement, it did not include an exclusivity requirement in its recitation or its simplification of the elements. *See Simmons*, 419 S.C. at 229, 233, 797 S.E.2d at 390, 392. Accordingly, we affirm the master on this ground.

E. Created as the Result of Wrongful Acts and Potential Violation of Hilton Head Ordinances

Carolina also argues Enmark failed to establish a prescriptive easement because the Roadway was created as the result of wrongful acts and violates Hilton Head's ordinances. However, Carolina provides no authority for the proposition that a prescriptive easement cannot begin by a wrongful act and only cites equitable maxims. *See, e.g.*, *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011) ("In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity."). Because determination of the existence of an easement is an action at law, equitable considerations are irrelevant. *See Kelley*, 396 S.C. at 571, 722 S.E.2d at 817 ("The determination of the existence of an easement is a question of fact in a law action . . . ." (quoting *Pittman*, 363 S.C. at 50, 610 S.E.2d at 480)). Moreover, because the dominant estate's use must be "contrary to" the servient owner's rights, every prescriptive easement begins as a "wrongful act." *See Simmons*, 419 S.C. at 233, 797 S.E.2d at 392 ("In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been . . . *contrary to the true property owner's rights* for a period of twenty years." (emphasis added)). Finally, the elements of a prescriptive easement do not require that the thing used or enjoyed satisfy all local ordinances. *Bundy*, 412 S.C. at 304, 772 S.E.2d at 169–70 ("To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is . . . adverse . . . ."). Based on the foregoing, we affirm the master on this ground.

CONCLUSION

Accordingly, the master's order is

AFFIRMED AS MODIFIED.[5]

---

[5] Carolina also asserts the master erred in failing to issue a judgment in its favor on its claims for slander of title, trespass, and nuisance. Because Carolina's actions under those theories rely on the assertion that no easement exists, our affirmation of the master's finding that Enmark holds a prescriptive easement disposes of these

KONDUROS and HILL, JJ., concur.

issues, and we decline to address them. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).