The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS

In August 2016, the American Bar Association (ABA) adopted amendments to Rule 8.4(g) of the Model Rules of Professional Conduct and the comments to the rule. A copy of the amended version of Rule 8.4 of the Model Rules of Professional Conduct is attached. The resolution adopting the amendments and the accompanying report can be found at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

The ABA wrote to the Supreme Court of South Carolina on September 29, 2016, requesting that the Court review the amendments and consider integrating them within the current version of Rule 8.4 of the South Carolina Rules of Professional Conduct, contained in Rule 407 of the South Carolina Appellate Court Rules. In the meantime, the Professional Responsibility Committee of the South Carolina Bar considered the ABA's amendments and advised the House of Delegates of the South Carolina Bar that it opposed the amendments. A copy of its recommendation and the materials it submitted to the House of Delegates is available at: http://www.sccourts.org/HOD2017/hod_materials_january_2017_extract.pdf.

During the January 2017 South Carolina Bar Convention, the House of Delegates debated the amendments. The House ultimately adopted a proposal "to not approve Rule 8.4(g) as written and to have a public hearing and public comment."

In light of this action, the Court has decided to solicit public comment as to whether the amended version of ABA Model Rule 8.4 should be adopted in South Carolina. Persons desiring to submit written comments should submit their comments to the following email address, rule8.4comments@sccourts.org, on or before March 29, 2017. Comments should be submitted as an attachment to the email as either a Microsoft Word document or an Adobe PDF document.

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment on Rule 8.4

Maintaining The Integrity Of The Profession

Rule 8.4 Misconduct - Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of

antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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The Supreme Court of South Carolina

In the Matter of Megan A. Barnett, Petitioner

Appellate Case No. 2017-000174

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017

The Supreme Court of South Carolina

In the Matter of Stephanie K. Toronto, Petitioner

Appellate Case No. 2017-000131

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017

The Supreme Court of South Carolina

In the Matter of Jill Kaplan Frankel, Petitioner

Appellate Case No. 2017-000150

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017

The Supreme Court of South Carolina

In the Matter of Byron Putnam Roberts, Petitioner

Appellate Case No. 2017-000251

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017

The Supreme Court of South Carolina

In the Matter of Amy Elizabeth Burke, Petitioner

Appellate Case No. 2017-000296

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017

The Supreme Court of South Carolina

In the Matter of Laura J. Lester, Petitioner

Appellate Case No. 2017-000276

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017

The Supreme Court of South Carolina

In the Matter of Garrett John McAvoy, Petitioner

Appellate Case No. 2017-000274

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017

The Supreme Court of South Carolina

In the Matter of Heather Foster Kittredge, Petitioner

Appellate Case No. 2017-000275

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

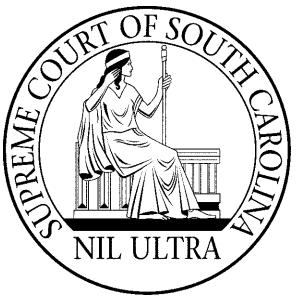
s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 2, 2017



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 8, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Henton T. Clemmons, Jr., Employee, Petitioner,

v.

Lowe's Home Centers, Inc.-Harbison, Employer, and Sedgwick Claims Management Services, Inc., Carrier, Respondents.

Appellate Case No. 2015-001350

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 27708
Heard September 21, 2016 – Filed March 8, 2017

REVERSED

Preston F. McDaniel, of McDaniel Law Firm, of Columbia, for Petitioner.

Helen F. Hiser, of Mount Pleasant, and Kelly F. Morrow, of Columbia, of McAngus Goudelock & Courie, for Respondents.

JUSTICE HEARN: In this case we must determine whether a claimant's ability to work can affect his entitlement to disability benefits under the scheduled-member statute of the South Carolina Workers' Compensation Act (the Act). Petitioner Henton T. Clemmons, Jr. injured his back and neck while working at Lowe's Home Center in Columbia. Although all the medical evidence indicated Clemmons had lost more than fifty percent of the use of his back, the Workers' Compensation Commission awarded him only permanent partial disability. The court of appeals affirmed. *Clemmons v. Lowe's Home Ctrs, Inc.-Harbison*, 412 S.C. 366, 772 S.E.2d 517 (Ct. App. 2015). We now reverse and hold evidence of a claimant's ability to hold gainful employment alone cannot preclude a determination of permanent disability under the scheduled-member statute.

FACTUAL/PROCEDURAL BACKGROUND

In September 2010, Clemmons was assisting a customer at Lowe's when he slipped and fell, severely injuring his back. Clemmons visited neurological specialist, Dr. Randall Drye, and was diagnosed with a herniated disc which caused severe spinal cord compression and necessitated immediate surgery. Dr. Drye removed Clemmons' herniated disc and fused his C5 and C7 vertebrae by screwing a rod into his spine. After surgery, Clemmons underwent extensive inpatient and outpatient physical rehabilitation; however, he continued to experience pain in his neck and back, as well as difficulty balancing and walking.

Clemmons filed a workers' compensation claim to recover medical expenses and temporary total disability benefits. Lowe's admitted Clemmons had suffered an accepted, compensable injury in the course of his employment and agreed to pay temporary total disability benefits until Clemmons reached maximum medical improvement (MMI) or returned to work.

In June 2011, Dr. Drye determined Clemmons had reached MMI and, per the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (*AMA Guides*), assigned Clemmons a whole-person impairment rating of twenty-five percent based on his cervical spine injury, which converts to a seventy-one percent regional impairment to his spine. Dr. Drye also determined Clemmons could

return to work at Lowe's subject to certain permanent restrictions.[1] A few months later, Lowe's agreed to accommodate Clemmons' restrictions and permitted him to return as a cashier.

In June 2012, Dr. Drye conducted a follow-up evaluation and reached the same conclusion he had a year earlier—that Clemmons had reached MMI and required the same permanent work restrictions. Thereafter, Lowe's requested a hearing before the Commission to determine whether Clemmons was owed any permanent disability benefits.

Prior to the hearing, Clemmons visited a number of medical professionals for additional opinions regarding his condition. Physical therapist Tracy Hill evaluated Clemmons and, pursuant to the *AMA Guides*, assigned him a thirty-six percent whole-person impairment rating and a ninety-one percent regional impairment rating with respect to his back. Dr. Leonard Forrest of the Southeastern Spine Institute also evaluated Clemmons and assigned him a whole-person impairment rating of forty percent, which translates to a ninety-nine percent regional impairment to his back. In addition to the *AMA Guides* impairment ratings, Clemmons presented medical testimony from general practitioner Dr. Gal Margalit, who opined to a reasonable degree of medical certainty that Clemmons had lost more than fifty percent of the functional capacity of his back.

At the hearing, based on the consensus among all the medical experts who examined him, Clemmons argued he was entitled to permanent total disability based on his loss of more than fifty percent of the use of his back. Lowe's, on the other hand, argued Dr. Drye's twenty-five percent whole-person rating and Clemmons' return to work indicated Clemmons had not lost more than fifty percent of the use of his back, and thus Clemmons was only entitled to permanent partial disability.

The Single Commissioner determined Clemmons was not permanently and totally disabled, finding Clemmons sustained only a forty-eight percent injury to his back and was thereby limited to an award of permanent partial disability. The full Commission adopted and affirmed the Commissioner's order in its entirety.

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[1] Clemmons' work restrictions prohibit him from standing or walking for more than an hour at a time, stair-climbing, repetitively reaching overhead, and lifting more than thirty pounds.

The court of appeals also affirmed, holding the Commission's findings of fact were supported by substantial evidence. We issued a writ of certiorari to review the court of appeals' decision.

ISSUES PRESENTED

I. Did the court of appeals properly apply the substantial evidence standard to the evidence in this case when affirming the Commission's findings?

II. Did the court of appeals improperly infuse wage loss into and as a consideration for an award made under the scheduled-member statute?[2]

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2015). An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007).

The Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact; however, the Court may reverse or modify a decision of the Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(5). While the findings of an administrative agency are presumed correct, they may be set aside if they are unsupported by substantial evidence. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing *Kearse v. State Health & Hum. Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d

[2] Based on our resolution of the first question it is not necessary for us to reach the merits of this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address additional issues when the disposition of the first issue is dispositive).

124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)).

LAW/ANALYSIS

Clemmons argues the court of appeals erred in finding the Commission's order was supported by substantial evidence. Specifically, Clemmons contends *all* the medical evidence in the record shows he suffered more than a fifty percent loss of use to his back, thus entitling him to an award of permanent *total*, rather than *partial*, disability. We agree.

In pertinent part, the scheduled-member statute reads:

> In cases included in the following schedule, the disability in each case is considered to continue for the period specified and the compensation paid for the injury is as specified: . . .
>
> (21) . . . [I]n cases *where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability* and compensated under Section 42-9-10(B). The presumption set forth in this item is rebuttable[.]

S.C. Code Ann. § 42-9-30 (2015).

Although a claimant's degree of impairment is usually a question of fact for the Commission, if all the evidence points to one conclusion or the Commission's findings "are based on surmise, speculation or conjecture, then the issue becomes one of law for the court . . . ." *Polk v. E.I. duPont de Nemours Co.*, 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968) (citing *Hines v. Pacific Mills*, 214 S.C. 125, 131, 51 S.E.2d 383, 385 (1949)); *see also Randolph v. Fiske-Carter Constr. Co.*, 240 S.C. 182, 189, 125 S.E.2d 267, 270 (1962) (holding where there is absolutely no evidence to support the Commission's findings, the question becomes a question of law).

We find the Commission's conclusion with respect to loss of use is unsupported by the substantial evidence in the record. Specifically, there is *no* evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back. Every doctor and medical professional who assigned an *AMA Guides* impairment rating indicated Clemmons lost more than seventy percent of the use of his back, including Dr. Drye, whom the Commission

particularly relied on in making its findings. Indeed, there is nothing in the record to support the Commission's finding of a forty-eight percent impairment rating.

While there is medical evidence that Clemmons' whole person was impaired less than fifty percent, the issue under the scheduled-member statute is not impairment as to the whole body, but rather it is the loss of use of a specific body part—in this case, Clemmons' back. All the medical evidence in the record points to only one conclusion: Clemmons has suffered an impairment to his back greater than fifty percent. Therefore, we hold Clemmons has lost more than fifty percent of the use of his back and is presumptively permanently and totally disabled.

We further hold that based on the record before us, the presumption of permanent and total disability has not been rebutted. While this Court has indicated a claimant's return to work is not probative to an analysis under the scheduled-member statute, we have not squarely addressed whether return to employment may be considered to rebut the presumption of permanent and total disability. S*ee Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 109, 580 S.E.2d 100, 104 (2003) ("In the context of scheduled injuries, South Carolina recognizes a claimant's entitlement to be deemed disabled and to receive compensation for an injury even though the claimant is able to work."); *Stephenson*, 323 S.C. at 118 n.1, 473 S.E.2d at 701 n.1 (recognizing that "even after being adjudged totally disabled, many employees receiving benefits under one of the specific statutory presumptions of total disability continue to work either in the same or in a different field. *An employer may not refuse to pay the total disability benefits simply because the employee retains earning capacity after the accident*." (emphasis added)). Nevertheless, in *Watson v. Xtra Mile Driver Training, Inc.*, the court of appeals held evidence of a claimant's mere ability to return to work within her restrictions was *alone* sufficient to rebut the presumption of total permanent disability under section 42-9-30(21). 399 S.C. 455, 464–65, 732 S.E.2d 190, 195 (Ct. App. 2012). Today, we hold the mere fact a claimant continues to work is insufficient to defeat the presumption of permanent and total disability for loss of use of the back.

The cardinal rule of statutory construction is "the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Allen v. S.C. Pub. Emp. Benefit Auth.*, 411 S.C. 611, 616, 769 S.E.2d 666, 669 (2015) (internal quotations omitted). Each statute must be given its full force and effect, and the

words must be given their plain, ordinary meaning. *In re Hosp. Pricing Litig., King v. AnMed Health*, 377 S.C. 48, 59, 659 S.E.2d 131, 137 (2008); *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). "'A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.'" *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000) (quoting *State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993)).

Under the Act, there are two competing models of workers' compensation. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003). The economic model defines a claimant's disability and incapacity in terms of his loss of earning capacity resulting from the injury, while the medical model bases awards for disability upon the degree of medical impairment to specified body parts. *Id.* (citing *Stephenson*, 323 S.C. 113, 116–17, 473 S.E.2d 699, 700–01). The Act provides two methods of obtaining total disability compensation: (1) total disability under the general disability statute; and (2) scheduled disability under the scheduled-member statute. S.C. Code Ann. §§ 42-9-10 and -30 (2015). While the general disability statute is premised on the economic model, the scheduled-member statute clearly relies upon the medical model, incorporating a presumption of lost earning capacity. *Wigfall*, 354 S.C. at 105, 580 S.E.2d at 102; *see also Fields v. Owens Corning Fiberglas*, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990) ("It is well-settled that an award under [section 42-9-10] must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing."). We emphasize that under the medical model the claimant is being compensated, not only for any lost wages, but for the impact that loss of use of a body part has on the claimant's life. *See Jewell v. R.B. Pond Co.*, 198 S.C. 86, 15 S.E.2d 684, 686 (1941) (noting the Act is meant to indemnify claimants for injuries which the legislature has specifically identified in the scheduled member statute).

To allow a claimant's ability to work alone to rebut the presumption of total and permanent disability undermines the established principle that the scheduled-member statute is separate and distinct from the general disability statute. *See Wigfall*, 354 S.C. at 105, 580 S.E.2d at 102 (explaining section 42-9-10 is "premised on the economic model, in most instances, while [section 42-9-30] conclusively relies upon the medical model with its presumption of lost earning capacity"). Separating wage loss from the analysis in establishing the presumption, only to allow earning capacity to come in after the fact and conclusively rebut it,

renders the presumption meaningless.

As a policy matter, to allow a claimant's ability to work to rebut the presumption of total and permanent disability would have the undesirable effect of discouraging claimants from returning to the workforce. Moreover, we note it is a misnomer to say Clemmons fully "returned to work" in this case. While it is true he returned to the same job as a cashier, his duties were significantly reduced in light of his condition. We believe a claimant wanting to work and being willing to accept a less demanding position in order to do so is something to be commended, rather than to be used to deny him benefits. Therefore, we hold evidence of subsequent employment is insufficient by itself to rebut the presumption of permanent and total disability under section 42-9-30(21), and the holding in *Watson* is overruled.

Aside from Clemmons' return to work, the only other relevant evidence Lowe's presented was Dr. Drye's reports which, as previously discussed, indicated Clemmons suffered a seventy-one percent loss of use of his back. Thus, Lowe's failed to provide any evidence Clemmons lost less than fifty percent of his back, and the presumption that Clemmons is permanently and totally disabled due to a loss of more than fifty percent of the use of his back prevails. Therefore, Clemmons is entitled to permanent total disability benefits under section 42-9-30(21).

CONCLUSION

For the foregoing reasons, we conclude the Commission's findings were not supported by substantial evidence and we reverse the court of appeals. We hold Clemmons is entitled to permanent total disability and remand to the Commission for entry of an award of under section 42-9-30(21).[3]

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[3] The dissent posits that, upon remand, Respondents should have an opportunity to rebut the presumption of Clemmons' total and permanent disability. We disagree. At the hearing below, both parties had the opportunity to present evidence on the issue of whether Clemmons was entitled to the presumption of total and permanent disability because he lost more than fifty percent use of his back and, if so, whether the presumption had been rebutted. It would be inequitable and contrary to our precedent to afford Respondents a second opportunity to litigate this issue. *See, e.g.*, *Parker v. S.C. Pub. Serv. Comm'n*, 288 S.C. 304, 307, 342 S.E.2d 403, 405

BEATTY, C.J., and Acting Justice James E. Moore, concur. Kittredge, J., concurring in result only. Acting Justice Costa M. Pleicones, concurring in part and dissenting in part in a separate opinion.

(1986) (holding an administrative agency may not consider additional evidence upon remand unless this Court explicitly allows it because to do so affords the parties a second bite at the apple).

ACTING JUSTICE PLEICONES: I concur in part and dissent in part, and would reverse and remand.

I write separately to emphasize that in this case the only evidence of impairment was offered by experts, and therefore the majority rightfully focuses on that type of evidence in determining whether petitioner met his burden of proof. I caution against a reading of the majority opinion, however, as holding that in every case only expert testimony is relevant to the loss of use determination under the scheduled member section. *See, e.g., Tiller v. Nat'l Health Center of Sumter*, 334 S.C. 333, 513 S. E.2d 843 (1999) (expert evidence not conclusive on issue of fact where other evidence exists). I agree with the majority that the Court of Appeals erred in affirming the Commission's finding that petitioner had failed to prove he suffered at least a fifty percent loss of use of his back.

I dissent, however, from the majority's decision to remand this matter without affording the respondents the opportunity to rebut the statutory presumption that this loss of use of the back has resulted in petitioner's total and permanent disability. S. C. Code Ann. § 42-9-30(21) (2015); *Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012). It is axiomatic that, as the majority explains, that there are two different compensation models in workers compensation. The novel issue before the Court at this juncture is what evidence is relevant to rebut the presumption of total and permanent disability when there is a finding of loss of 50 per cent or more use of the back under the scheduled member statute. The back is the only scheduled member where the disability presumption is "rebuttable," a statutory change made in 2007.[4] *See* 2007 Act No. 111, Pt. 1, § 18. I disagree with the majority that by holding that evidence of "gainful employment" is insufficient, and by refusing to identify what type of

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[4] I note that both *Wigfall v. Tidelands Utils., Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003) and *Stephenson v. Rice Services, Inc.*, 323 S.C. 113, 473 S.E.2d 699 (1996) were decided before the rebuttable presumption was added, while *Watson* was decided under the current version of the statute. For this reason, unlike the majority, I find *Wigfall's* statement that a claimant who is disabled under the scheduled member statute is entitled to compensation even if able to work, and *Stephenson's* statement that "An employer may not refuse to pay the total disability benefits simply because the employee retains earning capacity," to be unhelpful in resolving the issue of the type of evidence that rebuts the total disability presumption now found in § 43-9-30(21).

evidence would be germane, we may deny the respondents the opportunity on remand to present rebuttal evidence.[5] Moreover, as explained below, I conclude that evidence the injured person has not suffered wage loss is the relevant rebuttal evidence.

"Disability" is defined for purposes of Workers' Compensation as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120 (2015). In my opinion, given this statutory definition, the appropriate evidence by which an employer may rebut the presumption of "total disability" is by showing that the employee retains earning capacity, either total or partial. As noted above, the majority does not explain what evidence would be relevant to rebut the statutory presumption created by § 42-9-30(21) and instead argues it would be undesirable from a policy standpoint to allow evidence of earning capacity to rebut it. Whatever the desirability from a policy standpoint of allowing earning capacity to rebut the presumption, I read the Act as a whole as mandating that this type of evidence is dispositive. *E.g., Brittingham v. Williams Sign Erectors, Inc.*, 299 S.C. 259, 263, 384 S.E.2d 319, 321 (Ct. App. 1989) ("All sections of the Workers' Compensation Act must be read together to determine legislative intent").

For the reasons given above, I would reverse the decision of the Court of Appeals and remand for further proceedings.

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[5] The majority asserts that affording respondents the opportunity to rebut the presumption on remand would be "inequitable" and wrongfully allow them "a second opportunity to litigate this issue." In my opinion, fundamental fairness requires that they be afforded this right. When this case was before the Commission, *Watson* was the controlling precedent, and therefore respondents' evidence that petitioner had returned to work was, in the words of the majority, "*alone* sufficient to rebut the presumption of total permanent disability under section 42-9-30(21)." Now that the majority has overruled this holding, and announced that such evidence is now "insufficient to defeat the presumption of permanent and total disability for loss of use of the back," respondents are entitled to know what other type of evidence the majority deems relevant to a rebuttal, and the opportunity to present that additional evidence on remand.

The Supreme Court of South Carolina

Re: Amendment to Rule 420, South Carolina Appellate Court Rules

Appellate Case No. 2017-000241

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 420(c)(4), SCACR, is amended to provide as follows:

> **(4)** To ensure the presence of a professionalism component in the Essentials Series Programs;

The amendment is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
March 8, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

and

Sherry Powers, Edward Anthony Dalsing and Tammy Gaye Causey Dalsing, Intervenors,

v.

Erica Smith and Andrew Jack Myers, Defendants,

Of whom Edward Anthony Dalsing, Tammy Gaye Causey Dalsing, and Erica Smith are Respondents,

and

Andrew Jack Myers is the Appellant.

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

Appellate Case No. 2015-002045

Appeal From Union County
Rochelle Y. Conits, Family Court Judge

Opinion No. 5472
Heard October 19, 2016 – Filed December 15, 2016
Withdrawn, Substituted and Refiled March 1, 2017

VACATED IN PART, REVERSED IN PART, AND REMANDED

Melinda Inman Butler, of The Butler Law Firm, of Union; and Nathan James Sheldon, of The Law Office of Nathan J. Sheldon, LLC, of Rock Hill, for Appellant.

James Fletcher Thompson, of James Fletcher Thompson, LLC, of Spartanburg; and Larry Dale Dove, of Dove Law Group, LLC, of Rock Hill, for Respondents Edward A. Dalsing and Tammy G. Dalsing.

David E. Simpson, of South Carolina Department of Social Services, of Rock Hill, for Respondent South Carolina Department of Social Services.

Debra A. Matthews, of Debra A. Matthews, Attorney at Law, LLC, of Winnsboro, for Respondent Erica Smith.

Lindsey Ann McCallister, of Foster Care Review Board, of Columbia, for Respondent Foster Care Review Board.

Brenda L. Gorski, of South Carolina Guardian ad Litem Program, of Columbia, for the Guardian ad Litem.

Erick Matthew Barbare, of The Barbare Law Firm, of Greenville, for Intervenor Sherry Powers.

PER CURIAM: Appellant Andrew Jack Myers (Father) appeals a family court order terminating his parental rights to his minor daughter (Child) and granting an adoption of Child to Respondents Edward and Tammy Dalsing (Foster Parents). On appeal, Father argues the family court erred by (1) finding his consent was not required for Child's adoption, (2) terminating his parental rights, (3) granting adoption to Foster Parents while finding they lacked standing to file an adoption

petition, (4) allowing Foster Parents to be parties to this action, and (5) finding Child's permanent plan should be termination of parental rights (TPR) and adoption.[1] We vacate in part, reverse in part, and remand for a new permanency planning hearing.

On appeal from the family court, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *see also Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore 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. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651–52.

Initially, we find the issue of Foster Parents' intervention in the removal action brought by the Department of Social Services (DSS) is not properly before this court. The October 8, 2014 order allowing Foster Parents to intervene in the DSS action was by agreement; having consented to the intervention, Father cannot now challenge it on appeal. *See Hooper v. Rockwell*, 334 S.C. 281, 290, 513 S.E.2d 358, 363 (1999) (providing a party "may not appeal [a] consent order because such orders are not appealable").

Next, we find the family court erred by considering adoption once it determined Foster Parents did not have standing to file an adoption action.[2] Once the family

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[1] The family court also terminated the parental rights of Erica Smith (Mother), but she has not appealed.

[2] Foster Parents did not appeal the family court's finding that they lacked standing to file an adoption petition; thus, this unappealed ruling is the law of the case. *See Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 653–54 (2006) (stating an "unappealed ruling is the law of the case and requires affirmance"). Further, under the rationale of *Youngblood v. South Carolina Department of Social Services*, the family court properly found Foster Parents did not have standing to file an adoption petition. *See* 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) ("Standing, a fundamental prerequisite to instituting an action, may exist by statute, through the principles of constitutional standing, or through the public importance exception."); *id*. at 318, 741 S.E.2d at 518 ("[W]hile section 63-9-60(A) [of the South Carolina Code (2010)] broadly grants standing [to file an adoption petition]

court determined Foster Parents did not have standing to file an adoption petition, the issue of adoption was not before the family court, and the family court did not have the authority to consider it. *See Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518 (noting standing is "a fundamental prerequisite to instituting an action"); Rule 2(a), SCRFC (limiting the applicability of Rule 54(c), SCRCP, in family court actions "to the extent it permits the court to grant relief not requested in the pleadings"); *Bass v. Bass*, 272 S.C. 177, 179–80, 249 S.E.2d 905, 906 (1978) (finding the family court erred as a matter of law in awarding the wife business compensation when she did not assert a claim for compensation in the pleadings); *id*. at 180, 249 S.E.2d at 906 ("While it is true that pleadings in the family court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings." (footnote omitted)). We acknowledge that in certain instances, the family court may award relief not requested in pleadings. For example, Rule 17(a), SCRFC, permits a defaulting defendant to "be heard at the merits hearing on issues of custody of children, visitation, alimony, support, equitable distribution, and counsel fees." However, we find this rule does not extend to permit the family court to sua sponte consider adoption when the party requesting it does not have standing to make such a request. Because adoption is contrary to common law, our supreme court mandates that statutes authorizing adoption must be strictly construed. *See Hucks v. Dolan*, 288 S.C. 468, 470, 343 S.E.2d 613, 614 (1986) ("The adoption of a child was a proceeding unknown to the common law. Adoption exists in this state only by virtue of statutory authority which expressly prescribes the conditions under which an adoption may legally be effected. Since the right of adoption in South Carolina is not a natural right but wholly statutory, it must be strictly construed." (citation omitted)). Thus, the family court erred in granting the adoption of Child to Foster Parents once it determined they did not have standing to file the adoption petition. Further, because the issue of Father's consent to the adoption was tied to the adoption, we find it was not properly before the family court. Therefore, we

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to 'any South Carolina resident,' section 63-9-60(B) makes that grant of standing inapplicable to a child placed for adoption by DSS." (quoting § 63-9-60(A))); *id*. at 322, 741 S.E.2d at 520 ("[T]he foster parent relationship, absent statutory law to the contrary, is insufficient to create a legally protected interest in a child and therefore, does not create standing to petition to adopt.").

vacate the family court's finding that Father's consent was not required for the adoption and the family court's order granting Foster Parents adoption of Child.

Additionally, we agree with Father that the family court erred by terminating his parental rights with regard to Child because Foster Parents failed to prove by clear and convincing evidence that a statutory ground for TPR existed.[3] The family court may terminate parental rights only when a statutory ground for TPR exists and TPR is in the child's best interest. S.C. Code Ann. § 63-7-2570 (Supp. 2016). Under our statutory framework, for the family court to order TPR, it must find a statutory ground for TPR; it is not enough to find only that TPR is in the child's best interest. *Charleston Cty. Dep't of Soc. Servs. v. Jackson*, 368 S.C. 87, 97, 627 S.E.2d 765, 771 (Ct. App. 2006); *see also Loe v. Mother, Father, & Berkeley Cty. Dep't of Soc. Servs.*, 382 S.C. 457, 471, 675 S.E.2d 807, 815 (Ct. App. 2009) ("The [twelve] statutory grounds serve as a safety net that protects a fit and willing parent's fundamental right to raise his or her child. Even if the [f]oster [p]arents are perhaps better situated than [the parent] to offer advantages to [the children], we believe the fundamental right of a fit parent to raise his or her child must be vigorously protected."). Indeed, the Supreme Court of the United States has strongly indicated any attempt by a state to terminate parental rights based solely upon a showing of the child's best interest would be a Constitutional violation. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" (alteration in original) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977))).

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[3] Although the family court properly determined Foster Parents lacked standing to file an adoption petition, the statutes governing TPR allow for foster parents to file TPR petitions. *See* S.C. Code Ann. § 63-7-2530(A) (Supp. 2016) (providing "any interested party" may file a TPR petition); S.C. Code Ann. § 63-7-20(17) (Supp. 2016) (providing "[p]arty in interest" includes a foster parent); *Dep't of Soc. Servs. v. Pritchett*, 296 S.C. 517, 520–21, 374 S.E.2d 500, 501–02 (Ct. App. 1988) (finding the Children's Code indicates foster parents have standing as interested parties to file TPR petitions).

Also, to terminate parental rights, the family court must find clear and convincing evidence proves the existence of a statutory ground. *S.C. Dep't of Soc. Servs. v. Parker*, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999). Our supreme court has long recognized and required clear and convincing evidence to terminate a parent's rights in his or her child. *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 335, 741 S.E.2d 739, 745 (2013). Moreover, the Supreme Court of the United States has held a state may not completely and irrevocably sever the rights of parents in their natural child unless the allegations against those parents are proven by at least clear and convincing evidence. *Id*. (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982)). Understanding the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," the *Santosky* court explained the clear and convincing standard of proof was required "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" 455 U.S. at 753, 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). The *Santosky* court noted further that such a level of certainty is "necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Id*. at 756 (quoting *Addington*, 441 U.S. at 425–26).

Indeed, the fundamental liberty interest at issue in an action for TPR is a highly cherished right. *See id*. at 758–59 (declaring it "plain beyond the need for multiple citation" that a parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is a fundamental interest "far more precious than any property right" (quoting *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 27 (1981))). Consideration of an action for TPR is all the more perilous considering the irreversible nature of TPR. *See id*. at 759 ("When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it."). Thus, as noted in *Santosky*, "[f]ew forms of state action are both so severe and so irreversible." *Id*.

Moreover, the public policy of South Carolina, as declared by the legislature and DSS, is for the reunification of biological families. *See* S.C. Code Ann. § 63-1-20(D) (2010) ("It is the policy of this State to reunite the child with his family in a timely manner, whether or not the child has been placed in the care of the State voluntarily."). Additionally, our appellate courts have repeatedly held incarceration alone does not justify terminating parental rights. *See Jackson*, 368

S.C. at 97, 627 S.E.2d at 771 ("Incarceration alone is insufficient to justify TPR."); *S.C. Dep't of Soc. Servs. v. Ledford*, 357 S.C. 371, 376, 593 S.E.2d 175, 177 (Ct. App. 2004) (recognizing incarceration alone does not justify TPR).

In this case, the family court determined Foster Parents proved, by clear and convincing evidence, three statutory grounds for TPR: abandonment, willful failure to visit, and willful failure to support. After a thorough review of the record, we find the family court erred because Foster Parents failed to show the existence of any statutory ground by clear and convincing evidence.

The record did not contain clear and convincing evidence showing Father willfully abandoned Child. A statutory ground for TPR is met when the parent abandons his child. S.C. Code Ann. § 63-7-2570(7) (Supp. 2016). "'Abandonment of a child' means a parent or guardian [willfully] deserts a child or [willfully] surrenders physical possession of a child without making adequate arrangements for the child's needs or the continuing care of the child." S.C. Code Ann. § 63-7-20(1) (2010). Willful conduct is that which "evinces a settled purpose to forego parental duties." *S.C. Dep't of Soc. Servs. v. Headden*, 354 S.C. 602, 610, 582 S.E.2d 419, 423 (2003). "Willfulness is a question of intent to be determined by the facts and circumstances of each case." *Ledford*, 357 S.C. at 375, 593 S.E.2d at 177 (quoting *S.C. Dep't of Soc. Servs. v. Wilson*, 344 S.C. 332, 336, 543 S.E.2d 580, 582 (Ct. App. 2001)).

In this case, when Father learned Mother was pregnant with Child, he had outstanding warrants, and he voluntarily surrendered to the police. Both Mother and Father's mother, Sherry Powers (Grandmother), testified Father surrendered so he could begin his sentence and be released as soon after Child's birth as possible and avoid having outstanding warrants hanging over his head after Child's birth. This uncontradicted evidence alone is significant evidence showing Father's intent to be a parent to Child and weighs against a finding that Father evinced a settled purpose to forego parental duties by abandoning Child. *See Headden*, 354 S.C. at 610, 582 S.E.2d at 423 (explaining willful conduct is that which "evinces a settled purpose to forego parental duties").

However, Father also engaged in other activity while serving his sentence that reveals an intent to be a parent to Child and suggests any abandonment was not willful. Shortly after Child's birth, Father voluntarily signed a paternity

acknowledgment. Father also obtained a DNA test to prove paternity even though DSS failed to coordinate the test. Father and Grandmother were forced to obtain the DNA test with no assistance from DSS even though Father was incarcerated. According to Grandmother, Father wanted to proceed quickly with the DNA test without waiting for DSS's assistance and stated, "I don't want my daughter living in foster care the rest of her life."

At some point during this process, Father sent a letter to Child's guardian ad litem, Stephanie Kitchens (GAL), stating his desire to have a relationship with Child. The GAL could not recall the date she received this letter. Also, the GAL sent Father a questionnaire "a couple of months" prior to the final hearing, and Father "responded with[in] a week's time" with answers to the GAL's questions.

Additionally, and significantly, Father sent DSS a letter in which he expressed a desire to visit Child. He acknowledged he was unable to visit while incarcerated but stated multiple times he would be able to visit if and when Child was placed with Grandmother. Father stated he "hope[d] and pray[ed]" DSS would place Child with Grandmother "soon" to allow him to visit Child. The letter also explained Father asked Grandmother to cease sending him $50 per month for food and to "use it for [Child's] needs." Moreover, Father requested Foster Parents' telephone number so that he could contact Child. However, there is no evidence in record showing DSS ever provided Father with Foster Parents' contact information. Furthermore, Father sent Child a birthday card through his attorney, and he sent his attorney at least one letter asking for an update on the case.

In sum, Father (1) voluntarily started his prison term early so he could complete the sentence as soon as possible, (2) sent a letter to the DSS caseworker expressing his desire to visit Child, (3) asked for Foster Parents' telephone number so he could call Child, (4) asked Grandmother to use $50 per month to support Child instead of sending it to Father in prison, (5) sent a letter to his attorney asking for an update on the case, (6) voluntarily signed an affidavit acknowledging paternity, (7) obtained a DNA test proving paternity even though DSS failed to assist with the test, (8) sent a letter to the GAL seeking to pursue a relationship with Child, (9) completed and returned a questionnaire from the GAL within one week, and (10) sent Child a birthday card expressing his love for Child. Under these facts and circumstances, clear and convincing evidence does not exist to show Father willfully abandoned Child by evincing an intent or settled purpose to forego

parental duties. Thus, the family court erred by finding a statutory ground for TPR existed based on willful abandonment.

Furthermore, the record did not contain clear and convincing evidence showing Father willfully failed to visit Child. A statutory ground for TPR is met when

> [t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has [willfully] failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.

S.C. Code Ann. § 63-7-2570(3) (Supp. 2016). "Whether a parent's failure to visit or support a child is [willful] is a question of intent to be determined by the facts and circumstances of each case." *Wilson*, 344 S.C. at 336, 543 S.E.2d at 582. "Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992). Willfulness "means that the parent must not have visited due to her own decisions, rather than being prevented from doing so by someone else." *Broom v. Jennifer J.*, 403 S.C. 96, 114, 742 S.E.2d 382, 391 (2013).

"To determine whether a parent's failure to support or visit during the time of incarceration evinces a settled purpose to forego parental responsibilities requires a comprehensive analysis of all of the facts and circumstances." *Wilson*, 344 S.C. at 339, 543 S.E.2d at 584. "The voluntary pursuit of lawless behavior is one factor which may be considered, but generally is not determinative." *Id.* at 340, 543 S.E.2d at 584. The family court is not limited to considering the months immediately preceding TPR when determining whether a parent willfully failed to visit. *Headden*, 354 S.C. at 611, 582 S.E.2d at 424. Rather, the family court should consider all relevant conduct by the parent. *Id*.

Here, as noted above, Father (1) voluntarily started his prison term early so he could complete the sentence as soon as possible, (2) sent a letter to the DSS caseworker expressing his desire to visit Child, (3) asked for Foster Parents' telephone number so he could call Child, (4) sent a letter to his attorney asking for an update on the case, (5) voluntarily signed an affidavit acknowledging paternity, (6) obtained a DNA test proving paternity even though DSS failed to assist with the test, (7) sent a letter to the GAL asserting he would like to pursue a relationship with Child, (8) completed and returned a questionnaire from the GAL within one week, and (9) sent Child a birthday card expressing his love for Child.

Additionally, Stacie Eison, one of the DSS caseworkers on Child's case, testified DSS would not allow Child to visit Father because he was in prison in another state. Eison confirmed DSS's policy also prohibited Foster Parents from taking Child to visit Father in another state. *See* § 63-7-2570(3) (stating "it must be shown that the parent was not prevented from visiting by the party having custody"). Furthermore, although Father requested Foster Parents' telephone number from DSS, there was no evidence DSS ever provided Father with that information.

Moreover, Father repeatedly expressed his desire for Child to be placed with Grandmother throughout this process because placement with Grandmother would have facilitated visitation and communication with Child. *See Charleston Cty. Dep't of Soc. Servs. v. Marccuci*, 396 S.C. 218, 226, 721 S.E.2d 768, 773 (2011) (noting a parent's attempts to obtain placement with a relative to facilitate visitation weighed against finding a settled purpose to forego parental duties). Father claimed his motivation for placement with Grandmother was, in part, because it would allow him to have visitation with Child. Multiple witnesses testified to the difficulties Grandmother encountered, which were out of her and Father's control, during her attempts to obtain temporary custody of Child. Grandmother complied with multiple home studies during 2014 and 2015, and all of them were positive. Grandmother obtained at least one study at her expense in an effort to expedite the process. Eison testified Grandmother contacted DSS multiple times per month regarding placement. Eison admitted the delay was DSS's fault because she needed help with the paperwork.

Furthermore, Eison testified she believed Child should be placed with Grandmother, and in October 2014, she sent Foster Parents a letter informing them

DSS would remove Child from their home and place her with Grandmother. *See* S.C. Code Ann. § 63-7-1680(E)(1) (Supp. 2016) ("In the absence of good cause to the contrary, preference must be given to placement with a relative or other person who is known to the child and who has a constructive and caring relationship with the child . . . ."). Multiple witnesses testified regarding Grandmother's frequent visitation and the strong bond between Grandmother and Child. In response to DSS's letter, Foster Parents filed an administrative appeal challenging Child's removal from their home. Had it not been for Foster Parents' administrative appeal, DSS could have placed Child with Grandmother in November 2014, which would have facilitated visitation and communication between Father and Child. As a result, Foster Parents' zealous pursuit of this litigation prevented, at least to some degree, Father's ability to visit and communicate with Child. *See* § 63-7-2570(3) (stating "it must be shown that the parent was not prevented from visiting by the party having custody"); *Jennifer J.*, 403 S.C. at 114, 742 S.E.2d at 391 (explaining willful failure to visit "means that the parent must not have visited due to her own decisions, rather than being prevented from doing so by someone else").

Although we recognize the valuable contribution foster parents make to this state, it does not weaken Father's fundamental right to raise Child or allow us to lessen Foster Parents' burden of proving the existence of a statutory ground for TPR by clear and convincing evidence. Our judicial system will not extirpate Father's fundamental right to custody, care, and companionship with Child simply because he has not been a model parent. *See Santosky*, 455 U.S. at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

Accordingly, Father expressed his desire to visit Child to multiple people throughout this process and requested a telephone number he could use to contact Child. Considering Father's expressed desire to visit or, at a minimum, contact Child along with the other facts and circumstances noted above, we cannot say clear and convincing evidence existed to show Father's failure to visit was willful or evinced a settled purpose to forego parental duties. *See Headden*, 354 S.C. at 610, 582 S.E.2d at 423 (explaining willful conduct is that which "evinces a settled purpose to forego parental duties").

To the extent Father's incarceration was the result of his own lawless conduct, Father committed his criminal actions prior to Mother becoming pregnant with Child, and he surrendered after learning of the pregnancy so that he could begin his sentence immediately. *See Wilson*, 344 S.C. at 340, 543 S.E.2d at 584 ("The voluntary pursuit of lawless behavior is one factor which may be considered, but generally is not determinative."). As a result, Father's lawless conduct in this case was not highly probative of willfulness. Therefore, after reviewing all of the facts and circumstances in the record, we find the family court erred by determining a statutory ground for TPR existed based on a willful failure to visit.

Finally, the record did not contain clear and convincing evidence showing Father willfully failed to support Child. A statutory ground for TPR is met when

> [t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has [willfully] failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has [willfully] failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

S.C. Code Ann. § 63-7-2570(4) (Supp. 2016).

Although section 63-7-2570(4) references a six month period, a party seeking TPR under this statutory ground may not merely point to any six month period in which a parent willfully failed to support. Under our case law, "[a] parent's earlier failure to support may be cured by the parent's subsequent repentant conduct. Once conduct constituting a failure to support is shown to have existed, the court must then determine whether the parent's subsequent conduct was of a sufficient nature to be curative." *S.C. Dep't of Soc. Servs. v. Cummings*, 345 S.C. 288, 296, 547

S.E.2d 506, 510 (Ct. App. 2001) (citation omitted). Importantly, the most relevant inquiry remains whether the parent's failure to support, after reviewing all of the facts and circumstances, was willful or evinced a settled purpose to forego parental duties. *See Headden*, 354 S.C. at 610, 582 S.E.2d at 423 (explaining willful conduct is that which "evinces a settled purpose to forego parental duties"); *Cummings*, 345 S.C. at 296, 547 S.E.2d at 511 (focusing on repentant conduct and noting it "must be considered together with all [of] the relevant facts and circumstances").

Here, the family court may have been warranted in finding Father willfully failed to support Child from her birth in May 2013 until approximately April 2014. During this time, Father had access to a total of $1,841 in his prison account but did not send any of those funds to Child. However, even if Father willfully failed to support Child between May 2013 and April 2014, his repentant conduct after April 2014 cured his earlier failure to provide support for Child.

Father's letter to DSS stated he told Grandmother to stop sending $50 per month to his prison account and instead use it to support Child. Grandmother also testified that Father asked her to use the $50 per month to support Child, and there was no evidence in the record to clearly dispute this allegation. Grandmother testified she provided Child with clothes, shoes, diapers, and wipes in addition to toys, a purse, a glasses case, and an Easter basket. She asserted she spent approximately $40-50 each month she visited Child. Although Foster Parents implied Grandmother failed to spend a full $50 per month to support Child, they admitted Grandmother provided items such as diapers. The final hearing was not held until July 2015, which meant, if Father's and Grandmother's claims were true, Father effectively spent $40-50 per month to support Child for over one year. We find no case law in this state prohibiting the family court from considering a parent's support made through a third party as part of all of the facts and circumstances that could provide insight on the issue of willfulness.

These actions by Father and Grandmother showed a strong desire by Father to support Child and, at a minimum, refuted any assertion that Father's conduct evinced a settled purpose to forego his parental duties. This conduct was sufficient to cure any earlier willful failure to support by Father. *See id.* at 296, 547 S.E.2d at 510 ("Once conduct constituting a failure to support is shown to have existed, the court must then determine whether the parent's subsequent conduct was of a

sufficient nature to be curative."). Additionally, Father was not under a court order to provide support, and the foster parents never requested any support from Father. *See* § 63-7-2570(4) ("The court may consider all relevant circumstances in determining whether or not the parent has [willfully] failed to support the child, including requests for support by the custodian and the ability of the parent to provide support."). Combining Father's repentant conduct with the other facts and circumstances discussed in the previous sections, we cannot say clear and convincing evidence showed Father willfully failed to support Child. Thus, the family court erred by finding a statutory ground for TPR existed based on a willful failure to support.

Based on the foregoing, we vacate in part, reverse in part, and remand for a new permanency planning hearing pursuant to section 63-7-1700 of the South Carolina Code (Supp. 2016). A permanency planning hearing will allow all parties and the GAL an opportunity to update the family court on what has occurred since the TPR hearing. We urge the family court to conduct a hearing as expeditiously as possible, including presentation of a new GAL report and an updated home evaluation. If necessary, the family court may, inter alia, change custody, modify visitation, and approve a treatment plan offering services to Father.

VACATED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.