The Supreme Court of South Carolina

Re: Formatting and Additional Copies in Appellate Matters
Under Rule 267(f), SCACR

Appellate Case No. 2022-001647

ORDER

(a) Purpose. Rule 267(f) of the South Carolina Appellate Court Rules (SCACR) provides that, unless otherwise ordered or requested by the Supreme Court or the Court of Appeals ("appellate courts"), a document filed with an appellate court need not be accompanied by additional copies.[1] However, the rule provides an appellate court may request additional copies of documents, and any requirements concerning formatting or the providing of additional copies by the parties may be specified in an order of the Supreme Court. This order implements this provision.

(b) Paper and Electronic Filings; Covers. If submitted in paper, the document shall be submitted unbound and unstapled. A document filed by an electronic method of filing, other than by facsimile, must be in Adobe Acrobat portable document format (.pdf). *Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 30, 2024)*, S.C. Sup. Ct. Order dated April 30, 2024. Further, except in cases where additional copies are requested under (d) below, the covers of all briefs, whether submitted in paper or electronically, may be white.

[1] Paragraph (f) was amended effective April 30, 2024, to reflect changes that have been made to other Appellate Court Rules to eliminate requirements that parties submit more than one copy of a document at the time of filing, unless otherwise ordered or requested by the appellate court.

(c) Filing of the Appendix under Rule 242, SCACR. In cases seeking review of a decision of the Court of Appeals, Rule 242(e), SCACR, requires the petitioner to file the Appendix with the Clerk of the Supreme Court. This requirement is suspended. Instead, the necessary documents to comprise the Appendix will be obtained by the Clerk of the Supreme Court from the electronic records of the case before the Court of Appeals.

(d) Request for Additional Copies. In the event the appellate court determines that additional copies are needed, they will be requested from the lawyer or party submitting the document(s). These additional copies must comply with any margin, binding, and cover color requirements specified by Rule 267, SCACR.

(e) Prior Order Rescinded. This order rescinds *Re: Reduced Number of Copies Required in Appellate Matters*, S.C. Sup. Ct. Order dated Aug. 25, 2021.

s/ Donald W. Beatty C.J.

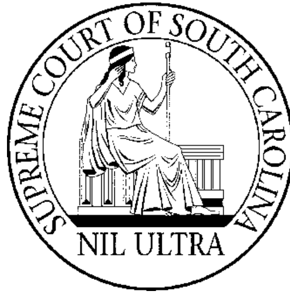
s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
April 30, 2024



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
May 1, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Thomas Griffin, Petitioner.

Appellate Case No. 2021-001228

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
D. Craig Brown, Circuit Court Judge

Opinion No. 28200
Heard April 16, 2024 – Filed May 1, 2024

DISMISSED AS IMPROVIDENTLY GRANTED

Appellate Defender Joanna Katherine Delany, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *In re Care & Treatment of Griffin*, 434 S.C. 338, 863 S.E.2d 346 (Ct. App. 2021). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, C.J., KITTREDGE, FEW, JAMES, JJ., and Acting Justice Jerry D. Vinson, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty, Petitioners,

v.

Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders Group; and South Carolina Association of REALTORS, Respondents.

Appellate Case No. 2022-000134

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Cynthia Graham Howe, Master-in-Equity

Opinion No. 28201
Heard December 12, 2023 – Filed May 1, 2024

REVERSED

Douglas Michael Zayicek and Holly Michelle Lusk, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Petitioners.

Lawrence Sidney Connor, IV, of Kelaher Connell & Connor, PC, of Surfside Beach, for Respondents Michael

Cousins and Founders Five, LLC d/b/a Sperry Van Ness Founders Group.

Marcus Angelo Manos, of Nexsen Pruet, LLC, of Columbia, and Cheryl D. Shoun, of Maynard Nexsen, PC, of Charleston, both for Respondent South Carolina Association of REALTORS.

JUSTICE HILL: Petitioner Andrew Waldo is broker in charge of a realty company that represented the buyers in the purchase of some thirteen golf courses from National Golf Management, LLC (NGM). Respondent Michael Cousins is broker in charge of a realty company that had represented NGM as the seller's agent in an earlier transaction where Waldo's firm represented the same buyers. Although Cousins had no written representation agreement with anyone concerning the thirteen golf course deal, he and his company sued Waldo, Waldo's firm, one of Waldo's agents, NGM, and the buyers of the thirteen golf courses for a commission. Recognizing their membership in a local realtor association required them to arbitrate their professional dispute, Cousins, Waldo, and Waldo's agent agreed to dismiss their part of the circuit court action and transfer it to an arbitration panel. The circuit judge soon granted NGM's motion to dismiss the remaining lawsuit, ruling oral agreements for a commission were unenforceable pursuant to South Carolina statutory law. Nevertheless, the arbitration panel later ruled Cousins was entitled to half of the commission earned on the thirteen golf course sale. Waldo petitioned the circuit court to vacate the award. The petition was referred by consent to the Master-in-Equity, who vacated the award, in part because the arbitration panel ignored statutory law regarding real-estate agency.

The court of appeals reversed the Master, ruling there was a "barely colorable" ground for the arbitration award based on a line of cases upholding oral and implied contracts for real estate commissions that, while in conflict with statutory law, had not been directly overruled. We reverse the court of appeals and vacate the award.

I.

We begin by acknowledging—and reaffirming—the rare and narrow basis upon which we may disturb an arbitration award. S.C. Code Ann. § 15-48-130(a) (2005 & Supp. 2023). When the attack on the award claims the arbitrator failed to follow

controlling law, we may only vacate the award where the arbitrator knew of well-defined, explicit, and clearly applicable controlling law, yet still refused to apply it. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). In such circumstances, we have held the arbitrator exceeded his power by manifestly disregarding or perversely misconstruing the law governing the dispute. *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. This standard is met only when the award is the product of an intentional or reckless flouting of the law, not a mere error in interpreting it. *Id*. This complements the well-known rule that the form of the award need not be accompanied by any reasoning, so long as the award can be reconciled with factual inferences and legal conclusions that are at least "barely colorable." *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 789 (1985) (quoting *In the Matter of Andros Compania Maritima, S.A. and Marc Rich & Co., A.G.*, 579 F.2d 691, 704 (2d. Cir. 1978)).

II.

According to Waldo, the arbitration panel manifestly disregarded several statutes that governed real-estate agency law in awarding Cousins half of the commission for the sale of the golf courses. We agree.

In 1997, the General Assembly passed Act 24 (H.B. 3169), amending the South Carolina Code related to the South Carolina Real Estate Commission and fundamentally changed real-estate licensing. The preamble to Act 24 proclaimed its purpose included "to establish the parameters, duties, and responsibilities for agency relationships in real estate." In 2004, Act 218 (S.B. 949) made further amendments. For the dates relevant to this dispute, Acts 24 and 218 represent the controlling statute, which we will refer to as "the Act" (revisions made later by Act 170 of 2016 (S.B. 1013) were not in effect at the relevant time and consequently are not germane to our decision).

As real estate "licensees," Cousins and Waldo owed numerous duties and obligations imposed by the Act. We quote several of the pertinent ones.

"A licensee shall provide at the first practical opportunity to all buyers and sellers with whom the licensee has substantive contact: (1) a meaningful explanation of agency relationships in real estate transactions that are offered by that brokerage; (2) an agency disclosure form prescribed by the commission." S.C. Code Ann. § 40-57-139(A) (2011). "A licensee who becomes a buyer's agent shall provide an agency

disclosure form to the buyer at the time an agency agreement is signed. Acknowledgement of receipt of the form must be contained in the buyer agency agreement." S.C. Code Ann. § 40-57-139(C) (2011). "[B]efore ratification of the real property sales agreement, the real estate licensee must represent either the buyer or seller in an agency capacity in order to be in compliance with this chapter." S.C. Code Ann. § 40-57-139(E) (2011).

Cousins disputes that these statutory sections bar his right to a commission. He claims his right to a commission arises not from being the seller's or buyer's agent, but as a cooperating broker with the buyer's agent through an implied contract with the buyer's agent.

Only four types of agency are authorized by the Act: a "seller agency," a "buyer agency," a "disclosed dual agency," or a "subagency." S.C. Code Ann. § 40-57-137(A) (2011 & Supp. 2014). A cooperating broker, or "subagent" is defined as "a designated broker and all associated licensees engaged by a broker of another company to act as agent for his client." S.C. Code Ann. § 40-57-137(N) (2011 & Supp. 2014). "A subagent owes the same duties and responsibilities to the client as the client's primary broker pursuant to subsections (C) and (H)." *Id*. Subsection (C) and (H), in turn state a broker "shall" comply with all provisions of the Act. S.C. Code Ann. §§ 40-57-137(C)(4) and (H)(4) (2011 & Supp. 2014). They also require a broker to have a written agency agreement with the buyer or seller. S.C. Code Ann. §§ 40-57-137(C)(1) and (H)(1) (2011 & Supp. 2014). Because Cousins claimed to be a cooperating broker with the buyer's agent, he was still required to have a buyer's agency agreement that "must be in writing and must set forth all material terms of the parties' agency relationship," including "an explanation of how compensation will be divided among participating or cooperating brokers, if applicable." S.C. Code Ann. § 40-57-135(D)(4)(d) (2011). These provisions work in concert with § 40-57-139(G), which confines the creation of real estate agency to written agreements and forbids oral or implied ones:

> For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees exists unless the buyer, seller, landlord, or tenant and the brokerage company and its affiliated licensees agree, in writing, to the agency relationship. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.

S.C. Code Ann. § 40-57-139(G) (2011).

The Act has therefore sewn up the loophole Cousins insists exists for subagents or cooperating brokers.

Cousins' backup argument is that he was entitled to a commission based on a series of cases that recognized a realtor's right to a commission through an oral or implied contract. *United Farm Agency v. Malanuk*, 284 S.C. 382, 384, 325 S.E.2d 544, 545 (1985); *Batten v. Howell*, 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App. 1990); *Hackler v. Earl Wiegand Real Est., Inc.*, 295 S.C. 396, 398, 368 S.E.2d 686, 687 (Ct. App. 1988); *Hilton Head Island Realty, Inc. v. Skull Creek Club*, 287 S.C. 530, 536, 339 S.E.2d 890, 893 (Ct. App. 1986).

But these cases were decided before the Act became the law, and the Act commands "[t]he provisions of this section which are inconsistent with applicable principles of common law supersede the common law." S.C. Code Ann. § 40-57-137(Q) (2011 & Supp. 2014); *see also Singleton v. State*, 313 S.C. 75, 83, 437 S.E.2d 53, 58 (1993) ("The common law remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment.").

The record tells us the arbitrators were not only aware of the Act but had in hand the unappealed circuit court order dismissing similar claims arising from the same transaction on the ground that § 40-57-139(G) had rendered oral and implied contracts for real estate commissions uneforceable. Indeed, during the arbitration hearing, the chairman of the panel announced:

> There has been discussion from [Waldo] about representation, who represents who in the transaction, what was in writing—and I just want to remind all the parties here, including the panel, that we are not at a grievance hearing, we are at an arbitration hearing, and we are here to talk about the money dispute. And I understand the conversation. What we need to focus on is the procuring cause.

This foreshadowed the award of one-half the commission to Cousins. We can glean no legal rationale justifying the award other than the "procuring cause" theory underlying the oral and implied agency recognized by *Malanuk*, *Skull Creek,* and the other common law cases that have now been superseded by statute.

Arbitration rests on consent of the parties, where parties freely exchange the expansive litigation rights court actions provide for the speed, informality, and finality arbitration promises. But when parties calculate the benefits and risks of their exchange, they do not bargain to have their dispute resolved by whim. Arbitration is designed to be the end, not the beginning, of legal wrangling, and our strict manifest disregard standard for vacatur honors this design by ensuring the legal end is not a lawless one. We have progressed from the days, described by the 19th century Scottish judge, when an arbitrator "may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power." Noah Rubins, "*Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 Am. Rev. Int'l Arb. 363, 367 (2001) (quoting *Mitchell v. Cable*, [1848] 10 D. 1297). Courts may now vacate an arbitration award, but only when it is untethered from controlling legal principles known to, but shrugged off by, the arbitrator. This may occur when an arbitrator substitutes his personal policy views in place of a plainly binding legal principle. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 676–77 (2010) ("In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers."). That is what happened here. Whatever the panel's motives, the only legal justification for their award rests on a theory drawn from the "procuring cause" line of cases that upheld oral and implied real estate agency agreements. That line ended with, and was superseded by, the Act's insistence on written agency agreements. The extinction of the line removed any "arguably colorable" basis for the award. An arbitrator cannot revive what has been repealed. As we have held, "manifest disregard is an exacting standard, but it is not insurmountable." *C-Sculptures*, *LLC*, 403 S.C. at 58, 742 S.E.2d at 361.

Because the manifest disregard standard has been met, the arbitration award is vacated, and the court of appeals' opinion is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

United States of America, Plaintiff,

v.

Patrick Fitzgerald Clemons, Defendant.

Appellate Case No. 2022-001378

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

Opinion No. 28202
Heard October 25, 2023 – Filed May 1, 2024

CERTIFIED QUESTIONS ANSWERED

United States Attorney Adair Ford Boroughs, Assistant United States Attorney Kathleen Michelle Stoughton, and Assistant United States Attorney Justin William Holloway, all of Columbia, for Plaintiff.

Elizabeth Franklin-Best, of Columbia, for Defendant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, and Assistant Deputy Attorney General Mark Reynolds Farthing, all of Columbia, for Amicus Curiae State of South Carolina.

JUSTICE HILL: Patrick Clemons pled guilty in federal district court to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). At the time of his conviction, Clemons had two prior South Carolina convictions for Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN), S.C. Code Ann. § 16-25-65, and one prior South Carolina conviction for Assault and Battery Second Degree (AB2d), S.C. Code Ann. § 16-3-600(D). As a result of these prior convictions, Clemons was designated an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and subject to an enhanced, mandatory-minimum sentence of fifteen years' imprisonment. After he was sentenced, Clemons appealed the imposition of his enhanced sentence under the ACCA to the United States Court of Appeals for the Fourth Circuit, arguing one may be convicted of both CDVHAN and AB2d in South Carolina by committing reckless or negligent conduct, and therefore, neither qualifies as a predicate offense for enhanced sentencing under the ACCA's "elements clause." *See* 18 U.S.C. § 924(e)(2)(B)(i) (defining a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another"); *Borden v. United States*, 141 S. Ct. 1817, 1821–22 (2021) (plurality) (holding a crime that requires only a *mens rea* of recklessness cannot qualify as a "violent felony" as defined by the ACCA's elements clause).

Pursuant to Rule 244, SCACR, the Fourth Circuit has certified the following questions to this Court:

1. What mental state is required to commit South Carolina Assault and Battery Second Degree, in violation of S.C. Code § 16-3-600; and

2. What mental state is required to commit South Carolina Criminal Domestic Violence of a High and Aggravated Nature, in violation of S.C. Code § 16-25-65?

Before answering these questions, we note that, in both S.C. Code Ann. § 16-25-65 and S.C. Code Ann. § 16-3-600, the South Carolina Legislature has chosen to proscribe multiple types of criminal conduct. In other words, instead of defining one way of committing the crime, these statutes provide several, disjunctive ways the elements of the offense may be met. As such, there is not a one-size-fits-all *mens rea* required for a conviction under either S.C. Code Ann. § 16-25-65 or S.C. Code Ann. § 16-3-600(D). Rather, the *mens rea* required for culpability under either S.C.

Code Ann. § 16-25-65 or S.C. Code Ann. § 16-3-600(D) depends upon the *actus rea* of the crime being prosecuted as CDVHAN or AB2d. *See United States v. Bailey*, 444 U.S. 394, 402 (1980) (explaining "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand'" (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952))).

Further, as the *Borden* plurality explained, federal courts use the "categorical approach" to determine whether an offense satisfies the elements clause of the ACCA. *Borden*, 141 S. Ct. at 1822; *Johnson v. United States*, 559 U.S. 133, 137, 144 (2010). Under the categorical approach, the facts underlying a conviction are immaterial to whether a conviction will be deemed a "violent felony" under the ACCA. *Borden*, 141 S. Ct. at 1822. Instead, "[i]f any—even the least culpable—of the acts criminalized" by the offense's statute do not meet the requirements of the elements clause of the ACCA, then that conviction cannot serve as an ACCA predicate. *Id*.

The *Borden* plurality explained that, under federal law, there are "four states of mind . . . that may give rise to criminal liability[; t]hose mental states are, in descending order of culpability: purpose, knowledge, recklessness, and negligence." *Id*. at 1823. After a thorough analysis into the legislative intent of the ACCA, specifically the elements clause, the *Borden* plurality held the term "against the person of another" within the elements clause requires "the perpetrator direct his action at, or target, another individual." *Id*. at 1825. The *Borden* plurality reasoned the elements clause of the ACCA excludes reckless conduct, which is not "aimed in that prescribed manner" and to hold otherwise would contravene the purpose of the ACCA, stating: "The treatment of reckless offenses as 'violent felonies' would impose large sentencing enhancements on individuals (for example, reckless drivers) far afield from the 'armed career criminals' ACCA addresses—the kind of offenders who, when armed, could well 'use [the] gun deliberately to harm a victim.'" *Id*. (quoting *Begay v. United States*, 553 U.S., 137 145 (2008)). The *Borden* plurality defined the *mens rea* of recklessness by stating: "[a] person acts recklessly, in the most common formulation, when he 'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards." *Id*. at 1824 (quoting Model Penal Code § 2.02(2)(c)).

South Carolina has not wholescale adopted the federal hierarchy of mental states, nor does South Carolina verbatim employ the definitions of purpose, knowledge, recklessness, or negligence found in *Borden*. Nevertheless, for the purposes of

answering the Fourth Circuit's inquiry, we rephrase the two certified questions as follows:

1. May a defendant be convicted of the offense of South Carolina Assault and Battery Second Degree, in violation of S.C. Code Ann. § 16-3-600, with a *mens rea* of recklessness as defined by the Model Penal Code?

2. May a defendant be convicted of the offense of South Carolina Criminal Domestic Violence of a High and Aggravated Nature, in violation of S.C. Code Ann. § 16-25-65, with a *mens rea* of recklessness as defined by the Model Penal Code?

We hold the answer to both of these questions is "yes."

I. Assault and Battery in the Second Degree

South Carolina's general assault and battery crimes are codified by degrees in S.C. Code Ann. § 16-3-600 (2015 & Supp. 2023). AB2d is found in § 16-3-600(D), which states, in relevant part:

> (D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:
>
> > (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or
> >
> > (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.
>
> (2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than two thousand five hundred dollars, or imprisoned for not more than three years, or both.

AB2d was enacted as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished or repealed all common law assault and battery offenses and all prior statutory assault and battery offenses and, in place of these

offenses, codified attempted murder in S.C. Code Ann. § 16-3-29 (2015), and four degrees of assault and battery, stratified by level of injury and other aggravating factors, in § 16-3-600. *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

In South Carolina, what *mens rea* is required for conviction of a statutory offense is a question of legislative intent. *State v. Ferguson*, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990). When a criminal statute is silent as to the intent necessary for a conviction, we consider the common law and the development of the statute to decide whether the Legislature intended the crime to require criminal intent and, if so, what level of intent. *State v. Jefferies*, 316 S.C. 13, 19, 446 S.E.2d 427, 430–31 (1994). In criminal statutes where the Legislature has not precisely set forth the level of intent required for conviction, we have been reluctant to fix the level at a high setting, unless there is evidence that such a level accords with legislative intent. To do otherwise would upset the separation of powers, as it would carry the risk that we have narrowed the prosecutorial reach of a statute the Legislature designed to widely sweep. *See State v. Morris*, 376 S.C. 189, 201–02, 656 S.E.2d 359, 366 (2008) (holding Court would not "weaken" securities fraud statute by requiring proof of scienter rather than recklessness where there was no evidence legislature intended higher level of intent of scienter for conviction).

The Model Penal Code defines the mental state of recklessness in the following way:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Model Penal Code § 2.02(2)(c).

We find some of the criminal acts proscribed by § 16-3-600(D) may be committed with general criminal intent, including the mental state of recklessness as defined by

Model Penal Code § 2.02(2)(c). *See Ferguson*, 302 S.C. at 272, 395 S.E.2d at 183 ("In offenses at common law, and under statutes which do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by a criminal intent, or by such . . . indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent." (quoting *State v. Am. Agric. Chem. Co.*, 118 S.C. 333, 337, 110 S.E. 800 (1922)); 6A C.J.S. Assault § 86 (2023) ("Wanton and reckless conduct may substitute for the intentional conduct element necessary for a battery."). To be sure, the subsections of § 16-3-600(D) dealing with attempt may require specific intent. *See, e.g.*, *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) ("In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose."); *see also State v. King*, 422 S.C. 47, 55–56, 810 S.E.2d 18, 22 (2017) (reaffirming *Sutton*'s definition of "specific intent" for an attempted crime).

Today, we hold only that, under some circumstances, a person may be convicted of AB2d with a *mens rea* of recklessness.

II. Criminal Domestic Violence of a High and Aggravated Nature

CDVHAN is codified in S.C. Code Ann § 16-25-65 (2015 & Supp. 2023), and states, in relevant part:

> (A) A person who violates Section 16-25-20(A) is guilty of the offense of domestic violence of a high and aggravated nature when one of the following occurs. The person:
>
> (1) commits the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;
>
> (2) commits the offense, with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person

> to fear imminent great bodily injury or death; or
>
> (3) violates a protection order and, in the process of violating the order, commits domestic violence in the first degree.

South Carolina's current version of CDVHAN, along with its general criminal domestic violence statute, S.C. Code Ann § 16-25-20 (2015 & Supp. 2023), was enacted in 2015 as part of the Domestic Violence Reform Act. To be guilty of any degree of domestic violence under either S.C. Code Ann § 16-25-65 or S.C. Code Ann § 16-25-20, the perpetrator must satisfy the elements of S.C. Code Ann § 16-25-20(A). Section 16-25-20(A) of the South Carolina Code states:

> It is unlawful to:
>
> (1) cause physical harm or injury to a person's own household member; or
>
> (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

As in AB2d, in S.C. Code Ann § 16-25-20(A), the Legislature has chosen to criminalize battery and attempted battery. Likewise, we therefore hold some of the criminal acts proscribed in CDVHAN may be committed with general criminal intent, including a mental state of recklessness as defined by Model Penal Code § 2.02(2)(c). It is also possible the sections dealing with attempt may require specific intent.

Today, we hold only that, under some circumstances, a person may be convicted of CDVHAN with a *mens rea* of recklessness.

III. <u>Conclusion</u>

In South Carolina, it is possible for a defendant to be found guilty of both AB2d and CDVHAN with a *mens rea* of recklessness as defined by the Model Penal Code. The Fourth Circuit's certified questions are

ANSWERED.

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

The Supreme Court of South Carolina

Re: Rule Amendments

Appellate Case Nos. 2022-001184; 2022-001647; and 2023-001063

ORDER

On January 31, 2024, the following orders were submitted to the General Assembly pursuant to Article V, §4A of the South Carolina Constitution:

(1) An order amending Rule 3 of the South Carolina Rules of Civil Procedure.

(2) An order amending the South Carolina Appellate Court Rules.

(3) An order amending Rule 26 of the South Carolina Rules of Civil Procedure.

Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
April 30, 2024

The Supreme Court of South Carolina

Re: Amendment to Rule 3 of the South Carolina Rules of Civil Procedure

Appellate Case No. 2022-001184

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, Rule 3(b)(1) of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
January 31, 2024

Rule 3 of the South Carolina Rules of Civil Procedure is amended to add the following language to paragraph (b)(1), and the following Note to the Rule.

In determining whether the plaintiff is unable to pay the fee required to file the action, all factors concerning the plaintiff's financial condition should be considered including income, debts, assets, and family situation. A presumption that the plaintiff is unable to pay the fee required to file the action shall be created if the plaintiff's net household income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions allowed by law.

Note to 2024 Amendment:

This amendment added language to subsection (b) to provide guidance and create uniformity regarding who may proceed in forma pauperis. The language tracks that used for determining indigency in Rule 602, SCACR, and Rule 608, SCACR.

The Supreme Court of South Carolina

Re: Amendments to South Carolina Appellate Court Rules

Appellate Case No. 2022-001647

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
January 31, 2024

1. Rule 203(e)(1)(B) and (e)(2)(B), SCACR, are amended to provide:

(e)(1)(B) The docket number of the case in the lower court. If the appellant has knowledge of a related appeal, the docket number or appellate case number of any related appeals that are pending.

. . .

(e)(2)(B) The docket number of the case before the administrative law court, or if the appeal is from an agency, the docket number before the agency. If the appellant has knowledge of a related appeal, the docket number or appellate case number of any related appeals that are pending.

2. Rule 209(c), SCACR, is amended to provide:

RULE 209
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

. . .

(c) Certification. The Designation shall be signed. The signature constitutes a certificate that the Designation contains no matter which is irrelevant to the appeal.

3. Rule 210(a), (b), (c), and (g), SCACR, are amended to provide:

RULE 210
RECORD ON APPEAL

(a) Time for Service. Within thirty (30) days after service of the last brief, the appellant shall serve a copy of the Record on Appeal on each party who has served a brief. Proof of service of the Record shall be immediately filed with the clerk of the appellate court. Whenever a paper copy of the Record is served on another party, the Record shall

be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party.

(b) Time for Filing. The appellant must file the Record on Appeal with the clerk of the appellate court no later than the date his brief(s) are due under Rule 211. As provided by Rule 267(d), one copy filed with the appellate court shall be filed unbound or filed by electronic means. The appellate court may require an appellant to file additional copies of the Record on Appeal.

(c) Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal. Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, and exhibits and other materials or documents. . . .

. . .

(g) Certificate of Counsel. The act of filing the Record on Appeal constitutes a certificate that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

4. Rule 211(a), SCACR, is amended to provide:

RULE 211
FINAL BRIEFS

(a) Time to Serve and File. Within twenty (20) days after the service of the Record on Appeal, each party shall serve a copy of the party's final brief(s) on every other party to the appeal, and file the final brief(s) with the clerk of the appellate court. As provided by Rule 267(d), one copy filed with the appellate court shall be filed unbound. The final brief(s) shall be signed. The signature constitutes a

certificate that the final brief(s) complies with Rule 211(b). The appellate court may require a party to file additional copies of its brief(s).

5. Rule 212(c), SCACR, is amended to provide:

(c) Appendix. Supplemental materials filed under Rule 212(b) shall be included in an Appendix to the Record on Appeal. Unless otherwise agreed by the parties or ordered by the Court, the Appendix shall be compiled, served and filed by the party initially proposing it. Whenever a paper copy of the Appendix to the Record on Appeal is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party.

6. Rule 221(a), SCACR, is amended to provide:

RULE 221
REHEARING AND REMITTITUR

(a) Rehearing. Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. No return to a petition for rehearing may be filed unless requested by the appellate court. Ordinarily, however, rehearing will not be granted in the absence of such a request. No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR, declining to entertain a matter under Rule 245, SCACR, or denying a motion to reinstate under Rule 260, SCACR. A petition for rehearing shall not exceed fifteen (15) pages.

7. Rule 240(d), (e), and (f), SCACR, are amended to provide:

(d) Filing of Motions and Petitions. The motion or petition shall be

filed with the clerk of the appellate court, and a copy shall be served upon each party. The motion or petition filed with the appellate court shall be accompanied by the filing fee set by order of the Supreme Court. This filing fee shall not be required for motions or petitions in criminal appeals; petitions for writs of certiorari under Rules 242, 243, and 247; certified questions under Rule 244; petitions to invoke the original jurisdiction of the Supreme Court under Rule 245; or motions or petitions filed by the State of South Carolina or its departments or agencies. In extraordinary cases, the appellate court may relieve a party from paying the filing fee.

(e) Return to Motion. Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file a return with the clerk and serve on all parties a copy of the return; provided, however, that a return to a petition for rehearing may only be filed if permitted under Rule 221(a). The court may in its discretion enlarge or limit the time for filing the return. The provisions of Rule 240(c) shall apply to a return. Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.

(f) Reply. The moving party shall have five (5) days from the date of service of a return to file a reply with the clerk and serve on all parties a copy of the reply. The provisions of Rule 240(c) apply to a reply.

8. Rule 241(d)(2) and (d)(5), SCACR, are amended to provide:

(d) Procedure for Obtaining Lift of Stay or Supersedeas.

. . .

(2) After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending for review of this order. An individual judge or justice may grant or deny the relief on a temporary basis, and refer the matter to the full appellate court to hear and determine the matter, or he or she may issue a final order. Upon the issuance

of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision.

. . .

(5) The petition and accompanying documents shall be served on the opposing party(ies) and filed with the clerk of the appellate court together with proof of service.

9. Rule 242(d), SCACR, is amended to delete current paragraph (d)(1) and renumber the remaining paragraphs accordingly.

10. Rule 242(c), (e), (f), (g), and (i), SCACR, are amended to provide:

RULE 242
CERTIORARI TO THE COURT OF APPEALS

. . .

(c) Time for Petitioning and Filing Fee. A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals. A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals. The petition filed with the Supreme Court shall be accompanied by the filing fee set by order of the Supreme Court. No filing fee shall be required in criminal cases or petitions filed by the State of South Carolina or its agencies or departments.

. . .

(e) Appendix. At the same time the petition is filed, the petitioner

shall also file the Appendix with the Clerk of the Supreme Court. As provided by Rule 267(d), the Appendix filed with the Supreme Court shall be filed unbound or filed by electronic means. Whenever a paper copy of the Appendix is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. The Appendix shall include the following:

. . .

(f) Return to Petition. Within thirty (30) days after service of the petition, respondent shall serve a copy of the return on opposing counsel, and shall file with the Clerk of the Supreme Court the return and proof of service showing that the return has been served. The return shall include an argument on each question and may include a counter-statement of the case and of the questions presented for review. The total length of a return shall not exceed twenty-five (25) pages. If review is being sought regarding a post-conviction relief case, the respondent need not file a return unless requested by the Supreme Court.

(g) Reply. The petitioner shall have ten (10) days from the date of service of the return to file with the Clerk of the Supreme Court a reply and proof of service showing that the reply has been served. The total length of the reply shall not exceed fifteen (15) pages.

. . .

(i) Consideration by the Supreme Court. The petition will be considered by the Supreme Court without oral argument. The petition may be granted or denied on any question presented. If the petition is granted, the Clerk shall notify each party or each party's attorney specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve a copy of his brief and the Appendix on all parties to the appeal, and file the brief and the Appendix with the Clerk of the Supreme Court, along with proof of service. Whenever a paper copy of the Appendix is

served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. Within thirty (30) days after service of petitioner's brief, respondent shall serve a copy of his brief on all parties to the appeal, and file the brief with the Clerk of the Supreme Court, along with proof of service. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve a copy of the reply brief on all parties to the appeal and file the reply brief with the Clerk of the Supreme Court, along with proof of service. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be permitted unless ordered by the Supreme Court.

. . . .

11. Rule 243(d), (g), (h), and (j), SCACR, are amended to provide:

RULE 243
CERTIORARI TO REVIEW POST-CONVICTION RELIEF ACTIONS

. . .

(d) Service and Filing of Petition and Appendix. Within thirty (30) days of receipt of the transcript, petitioner shall serve a copy of the Appendix and petition for writ of certiorari on opposing counsel and shall file the Appendix and petition and proof of service showing the Appendix and petition have been served with the Clerk of the Supreme. Whenever a paper copy of the Appendix is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. As provided by Rule 267(d), the Appendix filed with the Supreme Court shall be filed unbound or filed by electronic means.

. . .

(g) Return of Respondent. Within thirty (30) days after service of the

petition and Appendix, respondent shall serve a copy of his return on opposing counsel, and shall file the return and proof of service showing the return has been served with the Clerk of the Supreme Court. The return may rephrase the questions, offer additional sustaining grounds, and present a concise counter-statement. The total length of a return shall not exceed twenty-five (25) pages.

(h) Reply. The petitioner shall have ten (10) days from the date of service of the return to file a reply and proof of service showing the reply has been served with the Clerk of the Supreme Court. The total length of the reply shall not exceed fifteen (15) pages.

. . .

(j) Procedure Upon Grant of Certiorari. Upon the concurrence of any two justices, the petition may be granted on any question presented. The petition will be considered by the Supreme Court without oral argument. If the petition is granted, the Clerk shall notify each party or each party's attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve a copy of his brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the Supreme Court. Within thirty (30) days after service of petitioner's brief, respondent shall serve a copy of his brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the Supreme Court. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve a copy of his reply brief on all parties to the appeal and file the reply brief and proof of service with the Clerk of the Supreme Court. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be permitted unless ordered by the Supreme Court.

12. Rule 245(c), SCACR, is amended to provide:

RULE 245

ORIGINAL JURISDICTION OF THE SUPREME COURT

(c) Actions. A party seeking to have the Supreme Court entertain an action in its original jurisdiction (petitioner) shall serve on all other parties (respondents) a petition for original jurisdiction, a complaint setting forth the claim for relief in the manner specified by Rule 8, SCRCP, and a notice advising each respondent he has twenty (20) days from the date of service to serve and file a return to the petition. Service shall be in the same manner as required for summons and complaints in Rule 4, SCRCP. The petitioner shall file the petition, notice and complaint with the Clerk of the Supreme Court, along with proof of service on each respondent. Any party opposing the petition shall have twenty (20) days from the date of service to file a return with the Clerk of the Supreme Court and serve on all parties a copy of the return. Failure of a party to timely file a return may be deemed a consent by that party to the matter being heard in the original jurisdiction. Unless otherwise ordered by the Supreme Court, the petition shall be decided without oral argument. If the petition is granted, the respondent shall have thirty (30) days to serve and file an answer to the complaint. The Supreme Court may provide for discovery, fact finding and/or a briefing schedule as necessary.

13. Rule 247(c), (f), (g), and (h), SCACR, are amended to provided:

RULE 247
CERTIORARI TO REVIEW DNA TESTING DECISIONS

. . .

(c) Service and Filing of Petition and Appendix. Within thirty (30) days of receipt of the transcript, petitioner shall serve a copy of the Appendix and petition for a writ of certiorari on opposing counsel and shall file the Appendix and petition together with proof of service showing the Appendix and petition have been served with the Clerk of the appellate court in which the matter is pending. Whenever a paper copy of the Appendix is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. As provided by Rule 267(d), one copy of the Appendix filed with the appellate court shall be filed unbound or filed by electronic means.

. . .

(f) Return of Respondent. Within thirty (30) days after service of the petition and Appendix, respondent shall serve a copy of a return on opposing counsel, and shall file the return and proof of service showing the return has been served with the Clerk of the appellate court in which the matter is pending. The return may rephrase the questions, offer additional sustaining grounds, and present a concise counter-statement. The total length of a return shall not exceed twenty-five (25) pages.

(g) Reply. The petitioner shall have ten (10) days from the date of service of the return to file a reply and proof of service showing the reply has been served with the Clerk of the appellate court in which the matter is pending. The total length of the reply shall not exceed fifteen (15) pages.

(h) Procedure Upon Grant of Certiorari. Upon the concurrence of any two justices of the Supreme Court or one judge of a three-judge panel of the Court of Appeals, the petition may be granted on any question presented. The petition will be considered by the appellate court without oral argument. If the petition is granted, the Clerk shall notify each party or each party's attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve a copy of a brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the appellate court. Within thirty (30) days after service of petitioner's brief, respondent shall serve a copy of a brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the appellate court. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve a copy of the reply brief on all parties to the appeal and file the reply brief and proof of service with the Clerk of the appellate court. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be permitted unless ordered by the appellate court.

14. Rule 267(d) and (f), SCACR, are amended to provide:

RULE 267
FORM OF PAPERS

. . .

(d) Margins and Bindings. Typewritten papers or reproductions must have a blank margin of one inch on all sides. If more than two sheets are used, they shall be securely fastened on the left margin. While petitions or motions need not be bound, Records on Appeal, Appendices in post-conviction relief matters and briefs must be bound in volumes not exceeding 250 sheets each. If staples or clasps are used to bind the volumes, the spines of the volumes shall be bound with heavy tape. One copy of every Final Brief, Record on Appeal, Supplemental Record, or Appendix filed with the appellate court shall be filed unbound or filed by electronic means pursuant to any order of the Supreme Court issued pursuant to Rule 262(a)(3).

. . .

(f) Number of Copies. Unless otherwise ordered or requested by the Appellate Court, a document filed with an Appellate Court need not be accompanied by any additional copies. However, the appellate courts may request additional copies from the lawyer or party submitting the document. Any additional requirements with respect to formatting and additional copies may be specified in an order of the Supreme Court.

The Supreme Court of South Carolina

Re: Amendment to Rule 26, South Carolina Rules of Civil Procedure

Appellate Case No. 2023-001063

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, Rule 26 of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, §4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
January 31, 2024

Rule 26(b)(4) of the South Carolina Rules of Civil Procedure is amended to provide:

RULE 26
GENERAL PROVISIONS GOVERNING DISCOVERY

. . .

(b)(4)(A) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses, and subdivision (b)(4)(D).

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

(C) Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a party retaining an expert who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rule 26(b)(3) and Rule 26(b)(4)(A) protect communications between the party's attorney and any witness designated as an expert, regardless of the form of the communications, including draft reports, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Note to 2024 Amendment:

The amendment adding new paragraph (b)(4)(D) incorporates portions of the 2010 changes to Federal Rule 26(b)(4)(C), which provide additional protection for communications between lawyers and expert witnesses. The amendment will allow a freer exchange of information with an expert in the process of developing her thoughts and opinions and allow the consideration of the mental impressions of a lawyer without having to disclose those. These protections do not apply to the extent the lawyer and the expert communicate about matters that fall within the three exceptions in subdivisions (b)(4)(D)(i), (ii) and (iii).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Khalil Abbas-Ghaleb, Appellant-Respondent,

v.

Anna Ghaleb, Respondent-Appellant.

Appellate Case No. 2022-000505

Appeal From Aiken County
Vicki J. Snelgrove, Family Court Judge

Opinion No. 6057
Heard October 10, 2023 – Filed April 29, 2024

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Matthew B. Robins, of Strom Law Firm, LLC, of Columbia, and Gary Hudson Smith, III, of Smith, Massey, Brodie, Guynn & Mayes, LLC, of Aiken, both for Appellant-Respondent.

Gregory S. Forman, of Gregory S. Forman, P.C., of Charleston, for Respondent-Appellant.

MCDONALD, J.: In this contentious marital litigation, Khalil Abbas Ghaleb (Husband) appeals the family court's final orders, arguing the court erred in (1) awarding Anna Ghaleb (Wife) primary custody of the parties' young daughter; (2) granting Wife decision-making authority, other than as to medical decisions; (3)

allowing Wife to claim Daughter as a dependent for tax purposes; (4) equitably apportioning the marital estate; (5) precluding Husband from taking Daughter to Lebanon; and (6) ordering Husband to pay $40,000 of Wife's attorney's fees. In her cross-appeal, Wife challenges: (1) the equitable distribution; (2) the visitation and medical decision-making authority awards; and (3) the denial of her request for post-trial attorney's fees. We affirm in part, reverse in part, and remand to the family court to revalue and reapportion certain financial accounts.

Factual and Procedural Background

Husband and Wife met in October 2013 while Wife was stationed at Fort Gordon in Georgia; they married on June 25, 2017. Throughout the majority of their brief marriage, the parties lived separately.[1] Husband lived in Aiken and worked as an advisory scientist designing nuclear processes for the Savannah River Site MOX Project; Wife lived in the Washington, D.C. area where she worked for the United States Air Force at Fort Belvoir as a linguist and translator with top secret security clearance. While living apart, the parties did not merge their funds or accounts.

According to Wife, the parties' marital disputes began on their wedding night and Husband "talked about divorce for the first time" on their honeymoon. Despite this, Wife became pregnant, left the military, and moved to Aiken to live with Husband and stay home with the baby.[2] Shortly thereafter, Husband learned he might lose his job due to the termination of the MOX Project and told Wife he was considering a position in Washington state. Wife recalled Charlotte, Tennessee, and Cape Canaveral were also options.

Husband helped Wife pack and move to Aiken; however, when Wife arrived, she became upset because Husband put most of her belongings in the attic and would not let her sleep in his bedroom. Wife then left and went to stay with her mother (Grandmother) in Florida without telling Husband. On August 30, 2018, Husband sent Wife the following WhatsApp message:

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[1] Although Wife sponsored Husband's 2018 green card, the parties lived together for only seven months while married.

[2] Husband suggested Wife should remain in D.C. and continue working for the Air Force. He claims the parties' problems began "immediately upon cohabitation."

> 1. First option: You are to come live as my wife with me. I provide and protect you and I work like I do now from morning to evening to provide [for] you and the child and you on the other hand follow my rules. My rules are a guide for you and the children on the right path. Having order in our life, eat on time, have a clean house, talk respectfully to older people etc[. are] the examples and the teaching that I want to give to my children. If my children don't learn this from me and see me and their mom follow these rules and they don't follow these rules they are not my children and I don't want them. [If my wife and children don't live with me, I am not to provide for them. If my sister gets married she is to live with her husband and it's the case of your sister and any woman. Jesus and St Paul asked men to not divorce their women because they know that the women will suffer by themselves. But if the women wants to leave that's her fault.][3]
>
> 2. Second option: You continue living with your mom. I don't provide anything to you nor the baby. You go find a job and work to raise him, and don't ask me for anything. I might not even be in the US to even ask me. I will have nothing to do with you.[4]

Wife returned to Aiken two weeks later, but the parties kept separate bedrooms. Husband later invited Grandmother to stay and help with the baby; he also paid for her plane ticket. The parties' marital problems escalated following Grandmother's arrival and Daughter's birth in November 2018.

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[3] Husband included the third set of brackets in the message.

[4] The family court order references this communication as the "Prebirth Message." Husband offered no testimony addressing the message at the final hearing.

Although Wife's water broke between 6:00 and 7:00 a.m. on the day Daughter was born, she declined to go to the hospital immediately. Husband testified he "begged her for three hours to go to the hospital" before ultimately threatening to call the police. Wife eventually agreed to go, and Daughter was born at the hospital that evening. Before the baby's hospital discharge, however, the parties disagreed over whether she should receive the recommended Vitamin K shot and neonatal prophylactic eye treatment—Wife ultimately refused both. The parties agreed to delay the recommended Hepatitis B vaccine because Daughter "was at low risk for acquiring this disease."

Once Daughter came home from the hospital, the parties had a litany of disagreements regarding her health and wellbeing, including: how Wife should breastfeed; whether Husband should use video monitors to watch the bassinet and crib while he was away; when and how to bathe the baby; baby's proper bath temperature; the proper temperature of the home; the frequency of diaper changes; the tightness of swaddles; whether Wife could leave the house with the baby while Husband was at work; whether and where Wife was permitted to travel with the baby; what type of clothing the baby should wear; whether the baby could use certain comfort items, including but not limited to how much pacifier time she was allotted; whether to keep a clock in the nursery; whether the baby should be given probiotics, Tylenol, or other medication; whether the baby should receive treatment from chiropractor Chris Walker;[5] how and where she would be baptized;[6] and how to address the baby's struggle to gain weight.

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[5] When Wife ultimately took Daughter to chiropractor Walker while Husband was at work, he called the police. Husband threatened various medical providers with law enforcement and litigation on more than one occasion.

[6] Wife is a devout member of the Russian Orthodox Church, and Husband is a Maronite Catholic. Before they married, the couple signed a document indicating their children would be baptized in the Maronite Catholic Church in exchange for the couple's marrying in the Russian Orthodox Church. Husband testified he did not attend church at all between Daughter's birth and the time the parties separated. After the separation, Wife expressed her preference to baptize Daughter in the Russian Orthodox Church, however, Husband had the child baptized in the Maronite Catholic Church without Wife's knowledge or consent.

The parties further disagreed about which vaccinations Daughter should receive (as well as when she should receive them). Husband wanted Daughter to receive the vaccinations recommended by pediatrician Paula Luther, but Wife again refused to consent. Wife explained she initially objected for religious reasons based on her belief that some vaccines contained fetal cell tissue. Although Wife later acknowledged this misgiving was misguided, she still sought to have Daughter receive certain vaccines on a delayed schedule. Husband took Daughter to the pediatrician for her first vaccinations without Wife's knowledge on March 8, 2019.

As early as November 2018, Dr. Luther noted Daughter was having issues gaining weight.[7] Thus, she referred the family to a speech therapist to determine whether a problem with the baby's mouth was affecting her ability to breastfeed; Dr. Luther further recommended supplementing the baby's diet with formula. According to Husband, Wife refused to supplement with formula and insisted upon "my milk or no milk." Wife supplemented Daughter with bottled breastmilk and testified Daughter's weight struggles were related to her latching problems. Daughter was seen by a lactation consultant;[8] speech therapist; ear, nose, and throat specialist William Wells; and pediatric dentist Adam Hahn. At a December 19 visit, Dr. Wells found the baby had an enlarged superior labial frenulum and lip-tie and noted he "[s]pent the majority of the visit discussing treatment options to include a frenectomy." Although Wife wanted Daughter to have the frenectomy, Husband preferred to wait and see if the baby would gain weight on her own before subjecting her to the procedure. The parties ultimately agreed to wait.

Nevertheless, in March 2019 while Husband was on a business trip in Salt Lake City, Wife took Daughter by Uber to Dr. Hahn's Columbia office for an evaluation. Dr. Hahn diagnosed Daughter with a Grade 4 lip and tongue-tie, and Wife consented to a frenectomy.[9] When Husband discovered where they were, likely from the automated Uber receipt, he called Dr. Hahn's office and threatened a

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[7] In the four months following her birth, Daughter's weight percentile dropped from sixty-fifth to three.

[8] The lactation consultant's notes from a December 3, 2018 visit indicate "a high narrow palate and difficulty with the top lip clanging out during feeding."

[9] Daughter's weight improved slightly following the frenectomy. Between March and July 2019, her weight percentile went from three to nineteen percent.

lawsuit. Husband later called Wife and asked to see the baby through FaceTime; Wife refused. After Wife also refused Husband's request to fix the baby monitor over Daughter's crib, Husband sought to return home early from his business trip.

During a phone call later that day, Husband told Wife, "You can't understand how happy I am to be free from you. . . . And you take care of [Daughter] because I cannot take care of her. You know. So, I am so glad. And again, I hope you are not expecting any financial [inaudible], right?" Wife responded that Husband still needed to repay her the $25,000 she loaned him to purchase his Jaguar—less $5,000 he paid for Wife to get her master's degree—so she could properly care for Daughter; however, Husband told her that he no longer owed her anything because she had harmed Daughter by taking her to get the frenectomy.[10] Husband also texted Grandmother and told her he wanted her to leave his house. Wife texted Husband inquiring, "Just so I understood you right when we talked earlier you want me, my mom and [Daughter] to leave." Husband responded, "It's not true. Your text is suggesting that I want [Daughter] to leave. [Daughter] is in my [heart] whatever you do. It's not true that I want her to leave." Wife noted she could not go anywhere without Daughter and told Husband they were leaving for Grandmother's house. Husband recommended Wife "start looking for a job in Florida" because he intended to close their shared bank account.

Upon his return around midnight on March 16, Husband found Wife and Grandmother packing to leave for Florida. Husband blocked Wife's car in the driveway, locked Daughter's car seat in his car, removed Daughter from her crib, and locked her in his bedroom. As the parties argued, Husband accused Wife of being an inattentive mother and noted he had vaccinated Daughter, replaced her probiotics, and secretly supplemented her diet. When Wife expressed her concern that Husband had been feeding the four-month-old solid food, Husband responded, "You know what I'm worried about? Is that a man can be with you and can rape her without you knowing. That's how a mother doesn't know anything." Husband repeated this comment later when Wife referenced the cameras he had placed in

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[10] At trial, Husband testified Wife did not loan him the money to buy the Jaguar and claimed she gave it to him. On cross-examination, Husband refused to agree that "car loan" was on the memo line of the check and alleged someone must have added the notation after the fact. When asked whether he paid Wife back for "any of this loan," Husband responded, "I paid for her tuition at the University."

the home. Wife eventually called the police, who directed Husband to allow Wife to leave with the baby. Although Husband was initially noncompliant, he eventually allowed the officers to retrieve the car keys from his safe and unblock Wife's vehicle. The officers explained Wife could temporarily take Daughter to Florida but would have to return for a judge to consider custody.

At daybreak, Wife and Grandmother took Daughter to a hotel in Augusta. Following multiple unsuccessful attempts to contact Wife, Husband was able to track her because the parties shared location data. He then drove to the Augusta hotel and called the police, reporting he wanted to speak to Wife and see Daughter. Wife declined, and law enforcement instructed Husband to leave.

While Wife and Daughter were staying with Grandmother in Florida, Husband contacted Wife through email, WhatsApp messaging, and video calls. Wife testified many such communications pertained to finances and taxes but noted she participated in two video calls per week to allow Husband to see and interact with the baby. However, Husband claimed Wife refused to allow him to communicate with Daughter and often responded to his messages with financial demands or the occasional picture or video. Husband claims he was precluded from seeing Daughter between March 16 and April 21, 2019, when the record contains proof that the parties began video visitation.

Wife subsequently invited Husband to her May 2019 graduation in Washington D.C., where she allowed him two hours of supervised visitation per day. While there, Husband gave Wife a note indicating he wanted to see Daughter in person at least once a month and have at least two thirty-minute video visits each week. Husband claims Wife denied him in-person visitation with Daughter, allowed him only three-and-a-half hours of video visitation between Easter and mid-July, and insisted Husband's mother not participate in the video contacts.

After returning to Florida, Daughter fell from her stroller onto Grandmother's brick driveway and suffered a minor head injury. Wife did not inform Husband of this and when he emailed the following day to ask about Daughter, Wife told him she was fine. Husband did not learn of the accident until three weeks later when he received an explanation of insurance benefits. When Husband asked about the accident, Wife claimed Daughter had fallen from a bed onto something soft and the injury was not significant. Husband testified that when he again asked how Daughter was injured and why Wife lied about how she fell, Wife responded,

"Why don't you call CPS and find out." On June 7, Husband made a report to the Florida Department of Children and Families because Wife would not allow him to see Daughter and he wanted someone to check on the baby.

On June 18, Husband asked to visit Daughter in Florida; Wife declined because she had friends coming to town to celebrate Wife's birthday. On June 20, Husband filed a complaint seeking custody and Daughter's return to Aiken;[11] Wife filed her own complaint seeking custody and child support the next day. Following an expedited hearing, the family court consolidated the two actions, granted temporary joint custody, ordered the parties to follow the recommendations of Daughter's pediatrician, precluded Daughter's removal from South Carolina without the other parent's written consent, awarded Husband physical custody immediately following the July 9 hearing through August 2, and appointed a guardian ad litem (GAL).[12]

The parties continued to disagree about vaccinations, and this dispute came to a head at the baby's July 19 pediatrician appointment. Dr. Luther recommended standard vaccinations but refused to administer them without both parents' written consent. Husband consented to all three recommended vaccines but after two hours, Wife would consent to only one.[13] The following day, Husband filed a rule to show cause over Wife's failure to comply with the pediatrician recommendation provision in the first temporary order, and Wife was ordered to appear for a September hearing. In the interim, the court issued a second temporary order requiring that Daughter be vaccinated in accordance with Dr. Luther's recommendations; the parties subsequently entered a consent order holding Husband's rule to show cause in abeyance conditioned upon Wife's compliance.

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[11] Despite his knowledge that Wife has been a United States citizen since before they were married, Husband's complaint stated Wife "is a Russian Citizen and owns a home in Russia and [Husband] is concerned that she might flee the United States with their Daughter." When questioned about this during his deposition, Husband testified he was in a hurry to bring Daughter back to South Carolina and filing an inaccurate complaint is "not a big deal."

[12] At this point, Daughter's weight had fallen to the ninth percentile, she was behind on vaccinations, and she had a slight delay in gross motor development.

[13] The parties dispute what actually happened at the appointment, but Dr. Luther's medical record notes, "Immunization not carried out because of caregiver refusal."

By consent order, licensed psychologist Marc Harari was selected to serve as custodial evaluator. In her interviews with both Dr. Harari and GAL Jessica Brilhante, Wife raised concerns about Husband's family and noted Husband's comments regarding Wife's lack of knowledge about what might happen while Daughter was in Husband's bedroom. Although Wife recognized she had insinuated Husband was sexually inappropriate, she later admitted she did not believe Husband molested Daughter or behaved inappropriately with his mother or sister. Still, she was disturbed by Husband's inferences and earlier statements suggesting Daughter could be raped without Wife's knowledge.

In the ensuing months, the parties continued to disagree about visitation, traveling, childcare, and healthcare. Following a February 10, 2021 hearing, the family court addressed several issues by February 26 order. The order set a week-to-week parenting schedule with the parties to exchange Daughter on Fridays at 4:00 p.m.; provided for daily contact during the other party's parenting time; and gave each parent the right of first refusal regarding childcare during the workday. The family court further permitted Wife to take Daughter to Florida during her parenting time, required the parties to follow the CDC's Covid-19 guidelines, and found Wife had not met her burden of proof with respect to her request for a rule to show cause addressing Husband's alleged failure to inform Wife of a doctor's appointment.

The parties' final hearing was held in late September 2021. Wife asserted the frenectomy caused the breakdown of the marriage and noted Husband's constant monitoring of Wife and Daughter as one of the reasons she left the marital home.[14] Wife discussed her plan to remain in the North Augusta or Aiken County area, noted she had enrolled Daughter in extracurricular activities in Augusta, and requested physical custody and a traditional visitation schedule for Husband. Wife also testified she preferred to remove Daughter from Husband's private insurance and put her on Medicaid so Husband's insurance payments would not be considered in the child support calculation.

[14] In addition to the video monitoring, there is evidence in the record that around the time of their March 2019 separation, Wife discovered Husband had been signed into her Gmail account since April 4, 2015.

Husband alleged finances caused the breakdown of the marriage. He admitted he violated the February order by enrolling Daughter in daycare without providing Wife the right of first refusal; he further failed to list Wife's legal name or contact information on the daycare paperwork. Husband requested physical custody and 50/50 parenting time.

Neutral observers—Dr. Harari, the GAL, and retired family court judge and co-parenting counselor Donna Strom—testified both parents love Daughter, but their inability to co-parent remains problematic. According to the GAL, the parties' issues include "how they communicate, how they respect each other as a parent, how they respect each other's opinions and beliefs." Judge Strom testified Husband was unwilling to compromise, angry, and controlling, while Wife was "firm and willing to compromise."[15] The family court judge concluded the hearing by describing the Prebirth Message as a most "unbelievable piece of evidence" and noted its concern with the number of firearms Husband had in the house.

Following the final hearing, Wife moved with Daughter to Augusta and the parties again had a dispute over the child's medical well-being. Husband sent Wife an Our Family Wizard (OFW) message on December 6, asking if Daughter still had a cough and runny nose. After confirming Daughter was still symptomatic, he sent Wife an OFW message informing her of Daughter's December 8 appointment with Dr. Luther. When Wife cancelled the appointment, Husband sent her another OFW message indicating he had rescheduled the appointment because Daughter had been sick for two weeks. Although Dr. Luther diagnosed Daughter with a bilateral ear infection and prescribed antibiotics, Wife declined to fill the prescription. Husband was understandably concerned, and Dr. Luther reluctantly suggested the parties could wait two to three days to see if the infection would

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[15] Wife's doula, Ashley Brio; sister, Dr. Yekaterina Lyon; Grandmother; Dr. Luther; Dr. Harari; and Husband's friend Soren McMillian all described Husband as "controlling" or "exhibiting controlling tendencies." According to Brio, "[w]hile [Husband] was hands-off with respect to [Daughter], he was highly controlling of [Wife] and how she should parent and behave." Although Brio personally disagreed with some of Wife's choices regarding vaccinations, she "did not observe [Wife] to engage in any neglectful or problematic parenting practices. Instead, it was evident that both parents had major disagreements which appeared to contribute to their conflict."

clear naturally before revisiting the need for antibiotics. The parties had yet another disagreement over whether to wait, the infection did not clear, and Daughter ultimately started the necessary antibiotics.

The family court granted the parties a divorce on December 28, 2021. In its January 25, 2022 final order, the family court explained the division of assets was atypical because the parties only cohabitated briefly and had generally been responsible for their own expenses. Consistent with its statements at the end of the final hearing, the family court concluded Husband's words in the Prebirth Message showed "complete inflexibility and a total lack of an emotional connection with [Daughter]." The court referenced the custody award as "joint custody,"[16] with Wife to have primary custody and "final decision making authority except as to medical decisions" and Husband to have medical decision making authority.[17] The family court also warned Husband "of the consequences of abusing this authority" in light of his history of "demanding control even to the point of using it solely to get at the mother." Additionally, the court precluded the parties from taking Daughter to Lebanon, found Wife could claim her as a tax dependent, ordered Husband to return or replace Wife's engagement ring, apportioned other assets, ordered Husband to pay $40,000 of Wife's attorney's fees, and emphasized the parties' obligations to inform each other of decisions involving Daughter. Both parties filed motions to reconsider, which the family court denied.

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[16] Specifically, the court stated, "The parties shall have joint custody of the minor child to the point of telling and informing each other of decisions regarding [Daughter], but not to the point of a discussion that must reach an agreement. The requirement is to inform, not discuss."

[17] Regarding visitation, the family court ordered that during the school year, Husband "will have the child every other weekend from Thursday at 6:00 pm until the following Monday when he takes [her] to school or daycare at 9:00 (or when the school day requires as she ages)" and "[e]very other Monday night from 6:00 until return to school or daycare the next morning no later than 9:00 (certainly earlier if his job requires it). This Monday is to be on the Monday following mom's full weekend." The court granted alternating weeks during summers (with each party to have a two-week summer increment), provided specifics for various holiday periods, and specified the number and length of phone calls and video chats each party is entitled to have when Daughter is with the other parent.

Standard of Review

"Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019). However, this broad scope of review does not require the appellate court to disregard the fact that the family court saw and heard the witnesses and was in a better position to evaluate their credibility. *Lewis v. Lewis*, 392 S.C. 381, 385-86, 709 S.E.2d 650, 651-52 (2011). "Moreover, consistent with our constitutional authority for *de novo* review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact." *Id*. at 392, 709 S.E.2d at 655.

I. Custody, Visitation, and Decision-Making Authority

Husband argues the family court erred in granting Wife primary custody and general decision-making authority, while Wife argues the court erred in setting Husband's visitation and in awarding him medical decision-making authority. We find no error, and we affirm the family court's awards of custody, visitation, and assigned categories of parental decision making.

The family court has exclusive jurisdiction "to order joint or divided custody where the court finds it is in the best interests of the child." S.C. Code Ann. § 63-3-530 (A)(42) (2010). Section 63-15-230 of the South Carolina Code (Supp. 2023) mandates the following regarding a final custody determination:

> (A) The court shall make the final custody determination in the best interest of the child based upon the evidence presented.
>
> (B) The court may award joint custody to both parents or sole custody to either parent.
>
> (C) If custody is contested or if either parent seeks an award of joint custody, the court shall consider all custody options, including, but not limited to, joint custody, and, in its final order, the court shall state its

determination as to custody and shall state its reasoning for that decision.

(D) Notwithstanding the custody determination, the court may allocate parenting time in the best interest of the child.

"In a child custody case, the welfare of the child and what is in the child's best interest is the primary, paramount, and controlling consideration of the court." *Klein v. Barrett*, 427 S.C. 74, 80, 828 S.E.2d 773, 776 (Ct. App. 2019) (quoting *McComb v. Conard*, 394 S.C. 416, 422, 715 S.E.2d 662, 665 (Ct. App. 2011)). "In determining a child's best interest in a custody dispute, the family court should consider several factors, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties, including the guardian ad litem, expert witnesses, and the children; and the age, health, and gender of the children." *Simcox-Adams v. Adams*, 408 S.C. 252, 260, 758 S.E.2d 206, 210 (Ct. App. 2014); *see also* S.C. Code Ann. § 63-15-240(B) (Supp. 2023) (providing a non-exhaustive list of factors a family court order "issuing or modifying" custody may include). "While numerous prior decisions set forth criteria that are helpful in such a determination, there exist no hard and fast rules and the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." *Clark v. Clark*, 423 S.C. 596, 605, 815 S.E.2d 772, 777 (Ct. App. 2018) (quoting *Davenport v. Davenport*, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975)).

Here, we agree with the family court that the parties "are not compatible enough to be in a marriage, much less rear a child together," and that "[t]he record is replete with arguments, conversations, communications between these parties wherein [Daughter] is the trophy to be won and the war is a 'take no hostages' battle." We further understand the family court's belief that "[i]n [Husband's] words, he shows complete inflexibility and a total lack of emotional connection with [Daughter]." But our review of the record leads us to believe Husband's words were—and are—generally designed to hurt Wife. While he may have lacked the referenced emotional connection with the baby at the time of the Prebirth Message, both Wife and Grandmother acknowledged at the final hearing that Husband indeed has an emotional connection with Daughter. We do, however, agree with the family court's concern that Husband "was enmeshed to the point of obsession regarding the day-in day-out routine habits of [Daughter]'s care while he was working." We also agree that a "disturbing trend of these parents is the obtaining of medical

treatment without agreement and knowledge of the other. They could have endangered this child's life by not telling the other of procedures or vaccinations." And, the record supports the family court's impression that while Wife acts out of "fear and control," Husband acts out of "extremely poor insight as to how his behavior will affect his relationship with [Daughter]."

In his custody evaluation report, Dr. Harari stated:

> Looking to the future, [Husband]'s rigidity and anxious tendencies could create conflict in the father-daughter relationship, especially as [Daughter] becomes an adolescent and develops a need for autonomy. Specifically, such tendencies may contribute to an authoritarian parenting style, in which a parent maintains high expectations and lacks warmth. (Baumrind, 1991). It is well established in the literature that an authoritarian parenting style is associated with concurrent and future psychological distress for children (Gould and Martindale, 2007). While [Husband] exhibited appropriate parental warmth with [Daughter] during the course of this evaluation, she is young and fully compliant with her father's directives. He can be perceived as argumentative and angry when individuals disagree with him. Therefore, [Husband]'s warmth may be conditional upon him obtaining his way. As his Daughter becomes an adolescent, she will naturally seek independence and disagree with or disobey him at times.

Although Dr. Harari's report "solely addressed abuse and neglect of the child rather than the domestic violence history described by each parent," he recognized the evidence of Husband's controlling behavior toward Wife. While Dr. Harari agreed Husband's various behaviors were a form of coercive control, he declined to label Husband as a "coercive controlling violent person" or a "physical batterer."

Dr. Harari's report also offered options regarding custody, and he testified in his deposition that "this is a case where probably one parent has to have final decision-making [authority]." Dr. Harari noted Husband considers Wife "essentially incompetent and unfit to parent" and this attitude affects the

co-parenting relationship.[18] He further observed that although Wife respects Husband's role as a father, she nevertheless "maintains vast mistrust of [his] future motives." As for Wife's behavior while in Florida, Dr. Harari agreed some of her gatekeeping could be described as protective rather than restrictive. He further opined Wife had not engaged in such gatekeeping behavior since returning to South Carolina.

We find the parties' toxic relationship presents a potential, if not imminent, risk of harm to Daughter's mental health. We further find the family court, which was in a better position to evaluate the witnesses' credibility and assign comparative weight to their testimonies, properly awarded Wife primary custody. While the family court did not specifically address all factors applicable to its custody decision, our review of the record and consideration of the pertinent statutory factors supports the family court's custody award. Although we decline to rehash all facts pertaining to every factor supporting the family court's custody determination, we note the following circumstances support the award: Wife moved to Aiken with Husband to become a stay-at-home mom and has been Daughter's primary caretaker; despite their atrocious conduct toward one another, Wife—although misguided regarding medical care and treatment—generally sought to act in Daughter's best interests while Husband did not always act in her best interests; Dr. Harari's opinions regarding Husband's parenting style and psychological functioning are concerning; and other neutral observers opined that while both parents love Daughter, they are unable to effectively co-parent. Although there is no definitive evidence of domestic abuse, Husband's controlling behavior and his "my way or no way" tendency—acknowledged by his friends and colleagues and specifically noted by at least one of the law enforcement witnesses—is of great concern to this court from a custody standpoint. Accordingly, we find the family court properly awarded Wife primary custody.

Regarding visitation, this court presumed Husband and Wife had been rotating Daughter's placement according to the January 2022 final order without further involvement from the family court or law enforcement. However, we learned at oral argument that the parties have had additional visitation issues since the final hearing. Still, despite Wife's domestic violence insinuations, Grandmother's testimony regarding threats, and testimony from numerous witnesses that Husband

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[18] Despite his impression of Wife's parenting abilities, Husband testified the best physical custody arrangement would be to continue the 50/50 split.

is controlling, there is no evidence of *physical* abuse in the record. Although Dr. Harari acknowledged "coercive control is a form of domestic violence," he declined to label Husband as a "coercive controlling violent person" or a "physical batterer." Thus, we find the family court did not err in setting Husband's visitation.

Although Husband and Wife both love Daughter, throughout this case they have created conflict over even the smallest decisions. Dr. Harari, the GAL, Judge Strom, and Dr. Luther all agreed these parties are unable to effectively co-parent. In light of the neutral observers' opinions, the parties' inability to agree on almost anything, and the history of one parent unilaterally making medical and major life decisions for Daughter without consulting (or even informing) the other, the family court's delineation of categories of responsibility for decisions affecting Daughter's life and care was critical here. *See, e.g.*, *Greene v. Greene*, 439 S.C. 427, 444, 887 S.E.2d 157, 166-67 (Ct. App. 2023) (noting to the extent mother and father disagreed when making decisions for their child, "the record support[ed] the family court's assignment of the decision-making categories for Child's parenting.").

As for medical decisions, although it concerns us that Husband was reluctant to even consider the frenectomy recommendation in light of the baby's difficulties breastfeeding and maintaining a healthy weight, there is greater problematic evidence regarding Wife's approach to Daughter's medical care. Wife's "history of withholding care that is recommended by [Daughter's] physicians" includes failing to supplement her diet, refusing to vaccinate her despite medical recommendations and at least one court order requiring her to do so, and declining to fill a prescription for antibiotics after the baby suffered several days of fever and illness. These are just a few of the examples in the record supporting the family court's award of medical decision-making authority to Husband.

The family court's well-reasoned order granting Wife all remaining decision-making authority is not only the best way to relieve some of the conflict between these parties while serving Daughter's best interests, it is the logical choice in this unfortunate situation. We applaud the efforts of the family court to sort through this voluminous record and effectively address a difficult custody situation.

II. Dependent Tax Deduction

Husband argues the family court erred in allowing Wife to claim Daughter as a tax dependent because Wife was unemployed at the time of the final hearing and Husband is responsible for a greater share of child support. Our review of the record reveals that at trial, Husband did not make this argument or request the dependent tax deduction should Wife be awarded primary physical custody. Instead, he first raised this argument in his motion to reconsider, and the family court appropriately declined to consider it. *See Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009) ("[A] party cannot use a Rule 59(e) motion to present to the family court an issue the party could have raised prior to judgment but did not."). Under such circumstances, this question is unpreserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (reiterating that "[a] party may not argue one ground at trial and an alternate ground on appeal").

III. Equitable Distribution

Husband and Wife argue the family court erred in its equitable distribution of the marital estate. We agree in part.

"The term 'marital property' as used in this article means all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation." S.C. Code Ann. § 20-3-630 (2014). "However, '[p]roperty acquired prior to the marriage is generally considered nonmarital.'" *Pittman v. Pittman*, 407 S.C. 141, 148, 754 S.E.2d 501, 505 (2014) (quoting *Pirri v. Pirri*, 369 S.C. 258, 269, 631 S.E.2d 279, 285 (Ct. App. 2006)). "Nevertheless, '[p]roperty that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property.'" *Id.* at 148, 754 S.E.2d at 505 (alteration in original) (quoting *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013)). Although "marital property subject to equitable distribution is generally valued at the divorce filing date[,] . . . . the parties may be entitled to share in any appreciation or depreciation in marital assets occurring after a separation but before divorce." *Burch v. Burch*, 395 S.C. 318, 325, 717 S.E.2d 757, 761 (2011); *see also Fuller v. Fuller*, 370 S.C. 538, 546, 636 S.E.2d 636, 640 (Ct. App. 2006) (finding no error when the family court valued IRA and its passive increase at date of final hearing rather than divorce filing date); *Bowman v. Bowman*, 357 S.C. 146,

159, 591 S.E.2d 654, 660 (Ct. App. 2004) (holding when the husband actively and intentionally depleted his retirement account, the account should be valued as of the filing date); *Dixon v. Dixon*, 334 S.C. 222, 233-34, 512 S.E.2d 539, 544-45 (Ct. App. 1999) (finding proper valuation date for business was filing date where the husband actively set out to destroy the business during the marital litigation); *Mallett v. Mallett*, 323 S.C. 141, 151, 473 S.E.2d 804, 810 (Ct. App. 1996) (holding when the husband's insurance business decreased passively due to market forces, "it would be grossly unfair to value this asset" at date of filing); *McDavid v. McDavid*, 333 S.C. 490, 496-97, 511 S.E.2d 365, 368-69 (1999) (finding that because increase in marital home equity from time of filing to time of trial stemmed from mortgage payments made solely by the wife, the husband was not entitled to share in the increased equity and valuation date should be date of filing).

"Although statutory factors provide guidance, there is no formulaic approach for determining an equitable apportionment of marital property." *Lewis*, 392 S.C. at 391, 709 S.E.2d at 655; *see also* S.C. Code § 20-3-620 (B) (2014) (setting out fifteen statutory factors for the family court to consider in apportioning marital property). "In the absence of contrary evidence, the court should accept the value the parties assign to a marital asset." *Pirri*, 369 S.C. at 264, 631 S.E.2d at 283 (quoting *Noll v. Noll*, 297 S.C. 190, 194, 375 S.E.2d 338, 340-41 (Ct. App. 1988)). "A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." *Pirri*, 369 S.C. at 264, 631 S.E.2d at 283.

A. Engagement Ring

Husband argues the family court exceeded its jurisdiction in ordering him to return or replace Wife's engagement ring. Husband further asserts Wife was not a credible witness. We disagree.

Although we recognize unpublished opinions lack precedential weight, we are persuaded by this court's analysis addressing engagement rings in *Moring v. Moring*, Op. No. 2004-UP-605 (S.C. Ct. App. filed Dec. 3, 2004). There, the court disagreed with the husband's argument that the family court erred in ordering him to transfer the engagement ring in his possession back to the wife because it was properly considered nonmarital property. *Id.* at *7. While acknowledging the husband was correct in asserting the family court lacked jurisdiction to apportion nonmarital property, the court reiterated that the family court indeed had

jurisdiction to determine what was and was not marital. *Id.* at *8. Thus, "the [family] court did not 'apportion' the non-marital property, but merely determined it was in fact non-marital and belonged to [the wife]." Accordingly, "the family court properly determined Wife was entitled to possession and ownership of the [engagement] ring." *Id.*; *see also Frank v. Frank*, 311 S.C. 454, 457, 429 S.E.2d 823, 825 (Ct. App. 1993) ("An antenuptial gift of an engagement ring is the recipient's separate property.").

At the final hearing here, Wife testified Husband kept all of her rings in a locked safe in his own bedroom and that when she vacated the marital home, she did not take her heart-shaped diamond engagement ring. When Husband was asked to identify all nonmarital property in Wife's possession, he did not list the engagement ring despite listing other jewelry. On August 14, 2019, Husband had Wife sign a list of the items she was taking from the marital home, and the engagement ring is not on that list. In fact, Wife made a handwritten note on the list indicating she "[d]id not take valuable Jewelry + rings." And, Husband created two documents that support Wife's contention that she did not have the ring. Given the evidence in the record, we find the family court properly ordered Husband to either return the ring, a premarital gift, or pay Wife $5,000 to replace it.[19]

B. Accounts

In its final order, the family court noted Husband and Wife were married for just twenty-one months before they separated and twenty-four months before Husband filed his complaint. The court further found the parties lived together for only seven months. Due to this brief period of cohabitation, the family court substantially deviated from a 50/50 split of marital assets.

In dividing the marital assets, the family court considered several individual accounts belonging to Husband and Wife, only some of which are at issue on appeal. It equally divided Husband's Vanguard account, setting the value at $28,076, and valued one of Husband's Areva accounts of €18,596 at $21,570, finding Wife was entitled to ten percent of this Areva account's value ($2,157) "as some marital funds were deposited into this account, but minimal as to [the] total account." The family court valued Husband's other Areva account of €6,998 at

[19] Wife's presented evidence that the ring had previously been appraised at $5,400.

$8,117 and found Wife was entitled to ten percent ($812). Husband's Bank of America (BOA) account ending in 6752 was valued at $34,101, and the family court found Wife was entitled to twenty percent ($6,820) of this.

Additionally, the family court valued Wife's Thrift Savings Plan (TSP) account at $115,743, and awarded Husband twenty percent ($23,148) "as some marital funds were deposited into this account, but minimal as to [the] total account." The court noted Wife's financial declaration reflected she deposited funds into this account during the marriage and there was growth in these funds. Finally, the family court valued Wife's Edward Jones account at $42,938, and determined Husband was entitled to ten percent of the value of this account ($4,294) because Wife deposited $5,500 into the account during the marriage. The court concluded Husband owed Wife $9,789 from his accounts and Wife owed Husband $27,452[20] from her accounts—a net of $17,663 due to Husband. Combined with the initial equitable distribution, the family court found Husband owed Wife $11,528.00.

1. Husband's Vanguard Account

Wife argues the family court erred in failing to account for post-filing growth and a pendente lite withdrawal Husband took from his Vanguard account. We agree.

During his deposition, Husband testified he and his employer deposited funds into the Vanguard account during the parties' marriage. He acknowledged the funds deposited into this account were marital funds, and he presented no evidence that he opened this account prior to the marriage. At the final hearing, Husband recognized his equitable distribution valuations used date-of-filing values while his financial declaration used current values. And, although Husband's September 20, 2021 financial declaration set the value of his 401k at $27,080.31, this valuation failed to account for a $21,985.18 withdrawal Husband took during the second quarter of 2020.

While the family court valued Husband's Vanguard account at $28,076 and divided it equally, our review of the record reveals this value came from Husband's June 30, 2019 valuation and failed to account for two years of passive increase. *Cf.*

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[20] This includes Husband's award of $10 from Wife's State Employees Federal Credit Union (SEFCU) account, which is not at issue.

Fuller, 370 S.C. at 546, 636 S.E.2d at 640 (finding no error when the family court valued IRA with passive increase at date of final hearing rather than divorce filing date). We further find the family court erred in failing to include Husband's sizable post-filing withdrawal in its valuation and apportionment. *See Bowman*, 357 S.C. at 159, 591 S.E.2d at 660 (finding when husband actively and intentionally depleted his retirement account, the account should be valued at the filing date). Because we can find no evidence in this record as to the value of the Vanguard account as of the date of the final hearing, we reverse and remand this question to the family court with instructions to review the statements and other necessary documentation for the Vanguard account, add the withdrawn $21,985.18 to the account value, and revalue the Vanguard account as of the date of the final hearing in order to fairly compensate Wife. The family court should equally divide the Vanguard account between the parties once this valuation is made.

2. Husband's Areva Amundi and Credit Mutuel Accounts

Husband argues the family court erred in dividing his "Areva account" twice, while Wife argues the family court erred in both the valuation and distribution of Husband's first Areva account.[21] Initially, we note Husband's Areva Amundi and Areva Credit Mutual statements are in French. While both parties speak French, we can only speculate about some of the account statements' information as we admittedly do not speak French well enough to feel comfortable declaring their contents. We also note neither party offered any testimony regarding Husband's Amundi account at the final hearing.

At his deposition, Husband confirmed that between June and December 2017, Areva deposited a total of €21,494.44 into one of his French accounts, although he did not specify which one. He also testified that in January 2018, Areva deposited €20,898.61 into his Credit Mutual account to compensate him for unused vacation days under his French contract when he moved to the American contract. However, we see no documentation relating to the alleged compensation for unused vacation days and the only Credit Mutual statement in the record, dated July 8, 2019, shows a checking account ending in 1401 with a balance of €6,993.91 and a savings account ending in 1405 with a balance of €22,667.45. Although Husband admitted to depositing at least some portion of his salary into

[21] After obtaining his post-doctorate degree, Husband was hired as an advisory scientist for Orano (formerly Areva) in Paris; he was transferred to Aiken in 2012.

his Credit Mutuel accounts during his deposition, he declined to answer whether any money from these accounts was used in support of the marriage. At the final hearing, Husband acknowledged he had two separate accounts with Credit Mutuel into which Areva deposited funds during the marriage, but he failed to provide the family court with necessary documentation as to those account values.

It appears from the documents Husband did provide that he had a least three French accounts into which Areva was depositing funds: one with Amundi and two with Credit Mutuel. Although the family court's order discusses two "Areva accounts," it is logical to conclude that the court was referring to Husband's two accounts with Credit Mutuel. Because there is some evidence in the record that both Credit Mutuel accounts were marital or transmuted, we find the family court did not err in dividing them between the parties. However, given the amount of money Husband deposited into the Credit Mutuel accounts after the parties' marriage, we disagree with the family court's finding that "minimal" contributions were made into these accounts during the marriage. Because this court is unable to ascertain the value of either Husband's Amundi account or his Credit Mutuel accounts as of the date of the final hearing, we reverse and remand these questions to the family court. The court should review the bank statements or other necessary documentation for *all* of Husband's Areva (Amundi, Credit Mutuel, or otherwise) accounts held during the marriage and revalue and reapportion them. Husband shall pay for a translator should one be necessary to aid the family court's review because his evasive testimony and movement of funds among the various accounts (along with his steadfast refusal to candidly acknowledge the marital nature of certain transferred funds or even admit the existence of certain accounts) has caused much of the confusion here.

3. Husband's BOA Accounts

Wife argues the family court erred in awarding her only twenty percent of the value of Husband's BOA account ending in 6752 and in finding "some marital funds were deposited into this account, but [such funds were] minimal as to [the] total account." We agree.

Husband deposited a $25,000 check from Wife's premarital savings into another BOA account ending in 1855 on January 2, 2018, so that he could purchase a Jaguar from account 6752. The following day, Husband transferred $24,500 from account 1855 into account 6752. Then, Husband transferred $43,000 from account

6752 to pay for the Jaguar. Before the parties separated, Wife told Husband he needed to repay her the $25,000 she loaned him to purchase the vehicle—less some $5,000 Husband paid for Wife to obtain her master's degree—to take care of Daughter, but Husband told her he no longer owed her anything because she had harmed Daughter by taking her to get the (medically necessary) frenectomy. At the final hearing, Husband testified Wife did not loan him the money for the Jaguar—he claimed she gave it to him. He then refused to agree that "car loan" appeared on the check's memo line and testified he did not remember seeing it there. When asked whether he paid Wife back any of this loan," Husband responded, "I paid for her tuition at the University." Additionally, Husband testified his salary was deposited into this account, and there is evidence of transfers between BOA accounts 1855 and 6752. In light of Husband's testimony that his salary was deposited into account 1855, the commingling of funds in BOA accounts 1855 and 6752, and the fact that the funds Wife loaned Husband to buy the Jaguar traversed both BOA accounts, we reverse the family court's apportionment of the BOA account ending in 6752 and reapportion it equally between the parties. Thus, we find Wife is entitled $17,060.50, or fifty percent of the value of BOA account 6752.

4. Wife's TSP Account

Husband argues the family court erred in awarding him only twenty percent of Wife's TSP account. Conversely, Wife argues the family court erred in awarding Husband twenty percent of the value of her TSP account because only $28,227 of the $115,743 date of trial value resulted from marital contributions or growth during the marriage. The value of Wife's TSP account as of the date of filing was $76,593.08. Wife's financial declaration lists $28,227 as the "Marital portion growth" of the account. She testified that approximately $18,000 of this amount consisted of contributions she made during the marriage and approximately $10,000 was attributable to growth from premarital contributions. Although Wife offered to provide the family court with account statements supporting her position, the court indicated it did not need this information.

The family court then valued Wife's TSP account at $115,743, awarded Husband twenty percent of the total account value ($23,148), and again noted "some marital funds were deposited into this account, but minimal as to [the] total account." Although the family court correctly valued Wife's TSP account at the time of the final hearing, it erred in disregarding Wife's testimony that approximately $10,000

of this growth resulted from her own premarital contributions. Thus, we reverse and remand for the family court to revalue and reapportion the marital portion of Wife's TSP account. *See Clark v. Clark*, 430 S.C. 167, 183, 843 S.E.2d 498, 507 (2020) (reversing in part due to improper valuation of husband's business). Wife shall provide the statements offered at the hearing to assist the family court with this valuation, and Husband may offer any other relevant documentation pertaining to this account in response to the documentation Wife provides.

5. Wife's Edward Jones Account

Finally, Husband argues the family court erred in awarding him only ten percent ($4,294) of Wife's Edward Jones individual retirement account (IRA) ending in 9716. Conversely, Wife argues that because she only deposited $5,500 into the Edward Jones IRA during the marriage, the family court erred in awarding Husband ten percent ($4,294) of the full account value in the equitable distribution.

Wife's Edward Jones Portfolio shows two separate accounts—an IRA ending in 9716 with a balance of $10,576.12 and a Single Account (SA) ending in 6616 with a balance of $32,362.53 as of the date of filing. Although Wife acknowledged she opened the Edward Jones Portfolio during the marriage and the $5,500 she contributed to her Edward Jones IRA is marital, she testified at the final hearing that some of the cash to fund the portfolio came from premarital funds. However, she listed the "Value of Publicly Held Stocks, Bonds, Securities, Mutual Funds" as "approximately $37,000" under marital property on her July 8, 2019 financial declaration and again listed $37,000 on her October 17, 2020 financial declaration. Thereafter, Wife listed the "Value of Voluntary Retirement Accounts" at $33,727 under marital property and the Edward Jones IRA ending in 9716 with a $5,500 marital contribution under "Voluntary Retirement Accounts and Pension Accounts" on her September 21, 2021 financial declaration. Husband's equitable apportionment worksheet shows Wife's SEFCU account had a balance of $49,529.57 as of the date of the marriage.[22] Additionally, Husband testified at the final hearing that Defendant's Exhibit 38 shows Wife transferred $25,464 from her SEFCU account to her Edward Jones portfolio on September 10, 2018.

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[22] Although we assume Wife transferred the funds from her Edward Jones SA ending in 6616 into her Edwards Jones IRA ending in 9716, we have been unable to find conclusive documentation of such in the record.

In its final order, the family court found, "[Wife]'s Edward Jones account is valued at $42,938. [Husband] is entitled to 10% of the value of this account as $5,500 went into this account during the marriage. [Husband] is entitled to $4,294 to effectuate equitable distribution." In her Rule 59(e) motion, Wife argued the family court failed to distinguish the two Edward Jones accounts. At the hearing on the motions to reconsider, the following exchange took place between the family court and Wife's counsel:

> [Court]: Okay. It looks like on page 281 on that Edward Jones account, and we had a conversation, the attorneys—it's 28—grouped by 28,277 of which 18,000 was growth on the money that she put in during the marriage as Mr. Forman—me saying her paycheck deposited. Mr. Forman, the remainder of the growth is the growth that occurred over years.
>
> [Court]: It's 10,000 growth on the plan and $18,000 contribution, which makes up the 28, is that right?
>
> [Wife]: Yes.
>
> . . . .
>
> [Wife]: As, as I understand, they're actually two Edward Jones accounts on that one statement. There's a[n] investment account and IRA—retirement account and just nod your head yes if I'm correct on that. Just—okay. So, I think part of it is the Court sort of thought there was just one account when there were actually two and she deposited funds into one of those accounts during the marriage but not the other.
>
> [Court]: Okay. Well, I'm denying the motion.

Although there is evidence in the record that the majority of Wife's Edward Jones portfolio was funded with nonmarital property, without more documentation than has been provided for our review, it is difficult to determine the degree to which

these funds may have been transmuted. *See Pittman*, 407 S.C. at 148-49, 754 S.E.2d at 505 (noting nonmarital property "may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property" (quoting *Wilburn*, 403 S.C. at 384, 743 S.E.2d at 740)). We thus reverse and remand the valuation and apportionment of the Edward Jones IRA with instructions that the family court consider Wife's Edward Jones Portfolio in conjunction with other account documentation in the record as may be necessary to calculate marital versus nonmarital percentages. The family court should then equitably apportion only the funds (and fund growth) the court deems marital.

IV. Travel to Lebanon

Husband argues the family court erred in precluding the parties from taking Daughter to Lebanon. We disagree.

At the time of the final hearing, Husband was a citizen and passport holder of both Lebanon and France. He described himself as "a mix of western and very westernized eastern person, because, obviously, Lebanon is very European, but I have lived in the west. I'm very westernized." In her answer and counterclaim, Wife stated her belief that Husband is "capable and emotionally able" to take Daughter out of the country. And, there is evidence in the record that both parties discussed such travel with Judge Strom. When Wife sought to take Daughter to see her grandfather in New York, Husband refused to allow Daughter to go unless Wife allowed the child to travel with him to Lebanon. He then took it upon himself to cancel the plane tickets Wife purchased for the New York trip. Wife testified she had no problem with Daughter traveling with Husband to France but was concerned because Lebanon is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Wife further referenced the State Department's travel advisory for Lebanon.

In his amended Rule 59(e) motion to reconsider, Husband argued:

> Paragraph 27: No travel to Lebanon: The court followed the request of [Wife] and prevented travel to Lebanon. The court did not take into account the looming war between Russia, Ukraine and possibly the NATO alliance

> including the USA. Lebanon is in no conflict with the USA. [Husband] believes that for the protection of the minor child, the court order should include Russia, Ukraine and all other countries that are not members of the Hague Convention in the "no travel ban", taking into consideration the current political and controversial situations in those countries.

Husband makes a different argument on appeal than he made to the family court in that he now asserts "this provision of the order is punitive and only has the effect of intimating to Daughter that she should be ashamed of [Husband]'s home country and her heritage." *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."). We disagree that this is a punitive provision and find the family court's travel restriction to be well-reasoned and in Daughter's best interest. Accordingly, we affirm the order of the family court with respect to Daughter's travel and find it properly precluded the parties from taking her to Lebanon.

V. Attorney's Fees

Both parties challenge the fee award. Husband argues the family court erred in awarding Wife $40,000 in attorney's fees because Wife has the resources to pay her fees, was uncooperative, and spent money on materials not used to present her case. Wife contends the family court should have awarded her fees related to the defense of Husband's motions to reconsider.

When determining whether to award attorney's fees, the family court considers four factors: "(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). In determining the amount of fees to be awarded, the family court considers "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). It is appropriate for the family court to "consider a litigant's uncooperative and evasive

behavior when determining the reasonableness of the fees." *Daily v. Daily*, 432 S.C. 608, 630-31, 854 S.E.2d 856, 868 (Ct. App. 2021).

In awarding a portion of the fees Wife requested, the family court noted most of the findings in the final order "explain the reason for the attorney fee award." The court stated it "did consider the factors in *EDM v. TAM* and *Glasscock*" and "also considered the settlement offers from the Plaintiff to the Defendant." And, the court specifically referenced "the parties' respective financial conditions," including the assets detailed in the equitable distribution analysis and the parties' monthly incomes. We find the family court's award of $40,000—less than half of the total fees Wife requested—was reasonable and appropriate given the circumstances of this case, specifically the complexity of the issues, the parties' respective abilities to pay, the time properly devoted to this contentious case, and the professional standing of counsel. And, we agree with the family court's recognition that "both parties were being represented by excellent attorneys and both attorneys [did] a very competent job representing their clients in this action." We thus affirm the initial award of $40,000 to Wife and note the behavior of the parties and beneficial results Wife obtained further support the award.

However, we reverse the family court's summary denial of Wife's request for a portion of the attorney's fees she incurred in defending Husband's post-trial motions. Although Husband timely filed his initial post-trial motion seeking reconsideration of eleven issues, he then filed an amended motion two-and-a-half weeks later. Some of the new matters raised in the amended motion were untimely under Rule 59(e); others sought redress as to issues not raised at trial. Wife conceded one post-trial matter and successfully defended the others. Accordingly, we find it appropriate to grant Wife the attorney's fees she incurred following Husband's amended filing and award her $4,480.00 of the requested $10,185.00 in fees related to defending Husband's post-trial motions.

Conclusion

We affirm the orders of the family court as to custody, visitation, primary and medical decision-making, the dependent tax deduction, and Wife's engagement ring. We further affirm the family court's initial award to Wife of $40,000 in attorney's fees; however, we reverse the denial of post-trial motion fees and award Wife $4,480.00 in additional fees. We reverse and remand the valuation and apportionment of certain accounts as detailed in Section III.B.

We again commend the family court for its patience and consideration in this difficult case. We urge these parties to prioritize the best interests of their daughter as their paramount concern in seeking to more courteously co-parent her.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

VINSON, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.

Appellate Case No. 2021-000158

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 6058
Heard March 7, 2024 – Filed May 1, 2024

AFFIRMED

Benjamin David Cunningham and Leslie S. Lenhardt, both of S.C. Environmental Law Project, of Pawleys Island, for Appellant.

Tracey Colton Green, of Columbia, and John Joseph Owens and Randolph Russell Lowell, both of Charleston, all of Burr & Forman, LLP, for Respondent DeBordieu Colony Community Association.

Bradley David Churdar, of Charleston, and Sallie Page Phelan, of North Charleston, for Respondent South Carolina Department of Health and Environmental Control.

KONDUROS, J.: The South Carolina Coastal Conservation League (the League) appeals the administrative law court's (ALC's) order affirming the South Carolina Department of Health and Environmental Control's (DHEC's) issuance of a permit to Debordieu Colony Community Association (the Association) for the construction of anti-erosion groins on the beach of Debordieu Colony (Debordieu Beach).[1] The League contends the ALC erred in finding the groins would be placed in a "high erosion" area, erosion threatened existing structures, and the groins would not detrimentally impact the downdrift of sand to other beaches. We affirm.

FACTS/PROCEDURAL BACKGROUND

The Association applied for a permit to execute a renourishment plan and construct three groins[2] in an area of Debordieu Beach designated as Reach 3.[3] DHEC issued the permit. The Belle W. Baruch Foundation[4] (Baruch), the neighboring downdrift

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[1] The ALC reviewed the grant of the permit based on the original application and second amended application; the application was modified slightly based on mediation with another party, Belle W. Baruch Foundation. For our purposes, the difference between the two submissions is not important.

[2] A groin is "a structure designed to stabilize a beach by trapping littoral drift. Groins are usually perpendicular to the shore and extend from the shoreline into the water far enough to accomplish their purpose. Groins are narrow and vary in length from less than one hundred feet to several hundred feet. Groin fields are a series of two or more groins which, because of their proximity to each other, have overlapping areas of influence. Consequently, the entire groin field must be considered as one system in order to accurately analyze beach response." S.C. Code Ann. Reg. 30-1(26)(D) (Supp. 2023).

[3] In the application, Debordieu beach is divided into four Reaches going north to south and numbered sequentially.

[4] Belle W. Baruch Foundation is a non-profit organization and owner of the 17,500-acre wildlife refuge, Hobcaw Barony, preserved for "purposes of teaching

property owner, and the League opposed the issuance of the permit. Baruch negotiated a settlement with the Association, which provided for further assurances that its property would not be negatively impacted by the construction of the groins. The League remained in the suit and the ALC conducted a contested case hearing.

Section 48-39-290(A)(8) of the South Carolina Code (Supp. 2023) provides that for new groins to be erected seaward of the baseline, they must be on beaches:

> that have high erosion rates with erosion threatening existing development or public parks. In addition to these requirements, new groins may be constructed, and existing groins may be reconstructed, only in furtherance of an ongoing beach renourishment effort which meets the criteria set forth in regulations promulgated by the department and in accordance with the following:
>
> (a) The applicant shall institute a monitoring program for the life of the project to measure beach profiles along the groin area and adjacent and downdrift beach areas sufficient to determine erosion/accretion rates. For the first five years of the project, the monitoring program must include, but is not necessarily limited to:
>
> (i) establishment of new monuments;
>
> (ii) determination of the annual volume and transport of sand; and

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and/or research in forestry, marine biology, and the care and propagation of wildlife, flora and fauna" in connection with colleges and universities in the state. https://sc.edu/study/colleges_schools/artsandsciences/baruch_institute/about/index.php

(iii) annual aerial photographs.

Subsequent monitoring requirements must be based on results from the first five-year report.

(b) Groins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas. The applicant shall provide a financially binding commitment, such as a performance bond or letter of credit that is reasonably estimated to cover the cost of reconstructing or removing the groin and/or restoring the affected beach through renourishment pursuant to subitem (c).

At the contested hearing before the ALC, the League presented Matt Slagel, the DHEC/Office of Ocean and Coastal Resource Management's (OCRM's) project manager for the permit at issue, as an adverse witness in its case-in-chief. Slagel stated the OCRM considers anything above about -3 feet per year to be a high erosion rate "based on an analysis of our [almost 500] statewide network of beach monuments." He indicated knowing the range of erosion rates rather than the average was more important in evaluating whether an erosion rate is high. He stated the rate of erosion in the proposed groin field was about -6 feet to -8 feet per year. In examining a report created by OCRM for setback purposes,[5] Slagel agreed some of the relevant area showed a rate of erosion less than -4 feet per year. However, he explained the 2017 data for the report was skewed based on the inclusion of a 2016 renourishment of Debordieu beach. Over time, renourishment will artificially *inflate* the rate of erosion because more sand is there to erode. But in this case, the aerial photograph of the shoreline used to establish the setback was so close in time to the renourishment that it diminished the appearance of the

[5] The OCRM is charged with designating setback lines on all oceanfront properties of the state at a distance forty times the average annual erosion rate. No setback line can be less than twenty feet. This process must happen every seven to ten years. See S.C. Code Ann. § 48-39-280(B)(C) (Supp. 2023); S.C. Code Ann. Reg. 30-1 (C)(6),(D)(47) (Supp. 2023).

shoreline change rate. Slagel also referenced Regulation 30-21, entitled Beachfront Management Plan, in which a subpart discussing beach access describes Debordieu Colony as "a private beach community. Access is controlled by a security gate. The entire beach is developed, and public access is nonexistent. The island is highly erosional in areas."[6] As to threatened structures, Slagel testified the relevant statute does not define the term. He stated DHEC has considered the emergency order regulation in determining this question, noting that the emergency order qualifies a structure as in "imminent danger" if it is twenty feet from erosion.[7] He indicated about eighteen homes in the permit area have a repeated history of being threatened depending on conditions.

Slagel stated the entire application for the permit was around 2,600 pages including comments and letters from the public and other parties and agencies. He indicated OCRM incorporated several recommendations, specifically from the South Carolina Department of Natural Resources. He testified the OCRM reviewed the alternative analysis presented in the permit application but agreed with the permit application that the groin and renourishment was the most feasible plan. He also testified the Association represented in the application it had a reserve fund and a newly established preservation fund that would create $32 million for beach projects including groins and maintenance. Slagel stated DHEC does not have computer software to model the 3-D downdraft impacts included in the application, but it examines the impacts in conjunction with its own data about erosion rates. Additionally, he testified the permit application called for monitoring of the downdrift area and included a mitigation trigger of -8.1 cubic yards per foot per year at which point renourishment or reconfiguration of the groins would be addressed. The amended permit application reduced the trigger rate to -6.0 cubic yards per foot per year.

Dr. Rob Young testified for the League as an expert in coastal geology, coastal processes, and coastal zone management policies. He opined Debordieu Beach did not experience a high erosion rate as required by statute for the issuance of the permit. He stated Debordieu Beach would not be considered a "hot spot." He testified his opinion was based on his decades of work in this field and by examining a report DHEC commissioned from Dr. Chester Jackson entitled Mapping Coastal Erosion Hazards Along Shelter and Coastlines in South Carolina,

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[6] S.C. Code Ann. Reg. 30-21(D)(5)(b) (2011).
[7] S.C. Code Ann. Reg. 30-15(H) (Supp. 2023).

1849 to 2015 (the Jackson Report).[8] Dr. Young testified the Jackson Report found the mean erosion rate of South Carolina beaches is -2.2 meters to -2.4 meters per year or roughly -7 feet to -8 feet per year. In his opinion, the -5.46 feet per year measured by Coastal Science and Engineering (CS&E) at Debordieu Beach would constitute a "moderate" rate of erosion. Dr. Young stated he arrived at his opinion by considering both a qualitative and quantitative approach. Qualitatively, beaches that experience "very rapid high erosion rates" are characterized by "trees falling over in the ocean, the forest dying" or "houses are sitting in the ocean." Quantitatively, Dr. Young testified he would look to reliable measures, like the Jackson Report, find an average erosional rate, and consider anything around that number—in this case "six to seven feet per year"—would be "moderate." Dr. Young opined the shoreline at issue was not "experiencing critical high erosion."

With regard to threatened structures, Dr. Young testified he believed existing structures in the area were not threatened by coastal erosion. He stated that "if your standard is the next big hurricane, well, then every structure on every barrier island in South Carolina is threatened." As to downdrift impacts, Dr. Young testified "the groins themselves will cause a downdrift impact." He stated "the statute doesn't say you can pre-mitigate the harm that a shore perpendicular structure is going to cause"; therefore, he opined that even if a permittee renourishes the upper beach or takes steps to mitigate the impact, the statute is not satisfied. The ALC inquired of Dr. Young whether the Jackson Report considered a median erosion rate.[9] He indicated it did not contain a median and he had not conducted such an analysis. Dr. Young acknowledged South Carolina has a "pretty good span" of erosion rates[10] and conceded to the ALC's question that "ten times the annual erosion rate" would threaten a home.

Dr. Tim Kana, president of CS&E, testified as an expert for DHEC in beach erosion, coastal geomorphology and processes, sediment buckets and transport, beach restoration, planning, design, and implementation, and tidal inlet sediment

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[8] The Jackson Report is not in the record but according to Dr. Young is available on DHEC's website.
[9] The median is the value in the middle of a data set, meaning that 50% of data points have a value smaller or equal to the median and 50% of data points have a value higher or equal to the median.
[10] Dr. Young noted places like Harbor Island, Hunting Island, and Pritchard Island have "dramatically high erosion rates."

dynamics. Dr. Kana testified his company had worked with DeBordieu Colony on a long-term beach management plan and prepared the submission to DHEC. He noted the area of Debordieu Beach at issue has a large gradient in erosion from north to south and the groins are designed to try and offset the resulting sand loss. Dr. Kana explained that the closure of an inlet around the 1930s precipitated the increased erosion in the area. He stated the volumetric loss of sand in an area can be converted to a shoreline change rate or linear measurement by multiplying the former by a ratio of 1.3. Dr. Kana opined the -4.2 cubic yards per foot per year or -5.8 to -6.0 feet-per-year linear rate constituted a moderate to high erosional rate. He clarified that the south end of Debordieu Beach is eroding at a much greater rate. He indicated he does not have a "hard and fast rule as to what is defined in terms of statute as high, medium, [or] low," because it would depend on the "context of the setting." He indicated the erosion rate at south DeBordieu Beach is "definitely" high.

Dr. Haiquing Kaczkowski, a registered professional engineer at CS&E, was qualified as an expert in modeling studies and evaluations of coastal engineering projects and in design and engineering of erosion control structures. She indicated CS&E used two models to evaluate the downdrift impact of the groin installation: a three-dimensional model and a one-dimensional model. Dr. Kaczkowski stated the modeling showed the downdrift impact on Debordieu Beach would be limited to a 1500-foot zone immediately on the other side of the southern-most groin. She explained this is how the volume of sand needed in renourishment was determined and proposed. She indicated that overall, the downdrift area should experience a positive impact. On cross-examination Dr. Kaczkowski acknowledged she had previously stated during her deposition that -5 cubic yards per foot per year was a magic number impacting whether you may be able to consider a soft solution, like renourishment alone, or something else. However, she further indicated the solution depended on where the project was located. She opined the erosion rate at the project area was high and Debordieu Beach was currently in an "unhealthy" state. She testified the community needed to act quickly to try and contain the situation before it worsened.

William Eiser testified he is currently the president of Eiser Coastal Consulting but previously worked for the OCRM from 1989 through 2015. Part of his work with OCRM consisted of determining long-term erosion rates for purposes of evaluating setback lines. Eiser also evaluated permit applications. He was qualified as an expert in coastal processes and coastal zone management. Eiser testified that in his

opinion, the permit area in question had a high erosion rate. He explained anything higher than -3 feet per year was high and the area in question historically had erosion rates of -8 to -12 feet per year. The -3-feet figure was based on his professional experience working with beach erosion in South Carolina and other reports evaluating the erosion rate. Eiser alluded to a 1977 paper by Hubbard, Haze, and Brown[11] indicating erosion rates are typically -1 to -3 feet per year and a report by Dr. Kana from 1988 indicating that out of 88 miles of shoreline, 26 miles were eroding at more than -1 foot per year. Eiser then testified regarding notes he made from a 2009 report he prepared containing erosion rates for all the islands and beaches in South Carolina. He indicated some areas represented miles of coastline, like Myrtle Beach, while others represented a very small coastline, like Harbor Island. He believed, based on that data, -3 feet per year represents a relatively high erosion rate, meaning existing structures, unless they are set back many hundreds of feet, could potentially be impacted by the ongoing threat of erosion. Eiser stated he did not think the groins would create detrimental impact to the downdrift area because "the trapping capacity of the groins will be greatly exceeded by the volume of sand that will be placed on the beach at the time the groins are constructed. And because there is an ongoing commitment for future beach renourishment projects for the life of the groins."

DHEC recalled Slagel who testified the erosion rate at the southern end of Reach 3 was higher than Reaches 1 and 2 and even the upper side of Reach 3. With regard to Dr. Young's testimony, Slagel testified Dr. Young relied on an erosion rate that excluded many of the State's shorelines because they do not all erode. Some accrete and some remain relatively stable. According to Slagel, the Jackson Report indicated the average overall shoreline change was -.14 meters or -.46 feet per year.[12] Slagel also testified he had done additional computations based on data the OCRM had collected as part of establishing setback lines and this calculation produced an average erosion rate of approximately -1.46 feet per year. Slagel testified a median number of the data would be -.11 feet per year.

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[11] This paper was not included in the record.

[12] In *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 181 n.5, 886 S.E.2d 674, 680 n.5 (2023), the supreme court cited to the Jackson Report in a footnote and stated "the average annual erosion rate for beaches in South Carolina is 1.8 feet per year." The issue in that case was whether the change in the setback line would warrant a taking of the plaintiff's property, so no discussion of the exact derivation of this figure was included in the opinion.

The ALC affirmed the issuance of the permit, explaining it found Dr. Kana's testimony to be the most credible and that the consideration of all rates of erosion for beaches in South Carolina was not arbitrary or unreasonable. It stated

> examining erosion rates in the context of shorelines change rates as a whole provides a broader picture of how certain erosional rates fall within the spectrum of the [s]tate's rates as a whole. Overall, whether I follow [DHEC]'s interpretation or that of Dr. Kana, I conclude that the uncontested erosion rate of - 4. 2 cy/ft/yr or - 5. 5 ft/yr is a high erosion rate under section 48-39-290(A)(8).

As to threatened structures, the ALC concluded:

> In this case, by any reasonable definition, several structures behind the southern portion of the bulkhead and adjacent to it are threatened by erosion. The photographic and video evidence from multiple site visits showed water encroaching within feet of several of the homes and overtopping the bulkhead, which is causing erosion and scour behind the bulkhead in addition to allowing water to flow toward the lower level of homes directly behind the bulkhead. Some of this evidence was procured while a storm passed by South Carolina, but some was not. Water does not necessarily overtop the bulkhead on a daily basis, but the bulkhead is exposed to wave action on a daily basis and lacks the protection and cover of a dry sand beach in front of it. Thus, erosion is not only threatening the structures behind the bulkhead but the structure of the bulkhead itself. It is imminently clear that erosion is threatening existing structures and this requirement of section 48-39-290(A)(8) has been fulfilled.

With regard to detrimental downdrift impacts, the ALC found "if the statute only allowed for groins that did not require mitigation or were placed so as not to create

a detrimental effect as the League suggests, then the statute would have no reason to include monitoring, mitigation, and notice provisions for downdrift property owners." This appeal followed.

STANDARD OF REVIEW[13]

This [c]ourt will affirm a decision by the [ALC] unless the findings or conclusions are:

> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B)(a)(f)(2023).

"The ALC is the finder of fact in contested case hearings related to DHEC certifications and permits." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 434 S.C. 1, 10, 862 S.E.2d 72, 77 (2021). "In determining whether substantial evidence supports the ALC's decision, the [c]ourt must find 'looking at the entire record on appeal, evidence from which reasonable minds

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[13]As with all cases involving our state's exceptional coastline, we recognize the General Assembly's desire to minimize alterations to tidelands except in limited circumstances. *See* S.C. Code Ann. § 48-39-20(F) (2008) (noting the need to "give high priority to natural systems in the coastal zone").

could reach the same conclusion that the AL[C] reached.'" *Id.* (quoting *Hill* v. *S.C. Dep't of Health & Env't Control*, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010)).[14]

LAW/ANALYSIS

I. High Erosion Rate

The League contends the ALC erred in finding the permit was for an area with a high erosion rate as required by statute because the area in question only experiences moderate erosion when compared to other eroding coastal areas. DHEC and the Association maintain the permit area experiences a high erosion rate based on an examination of all coastal areas including those that actually experience accretion or remain stable. We disagree with the League.

Dr. Kana and Dr. Kazckowski testified the erosion rate in the permit area was high. Dr. Kana acknowledged his deposition testimony indicating the overall rate for Debordieu Beach might be characterized as moderate to high. However, he clarified the specific area of the groins must be considered and the north-south gradient along this area created a high erosion rate. Likewise, Dr. Kazckowski acknowledged her deposition testimony that a rate of less than -5 feet per cubic yard per year might call for soft solutions, but she clarified that position was case dependent. She stated Reach 3 at Debordieu Beach required immediate attention. According to Dr. Eiser, only 22 out of 86 miles of shoreline in South Carolina are eroding at all. Of the list of beaches prepared by Eiser, 22 beaches have a lower erosion rate than Debordieu Beach and seven have a higher rate of erosion.

Dr. Young testified an area with -6.6 feet per year or -8.8 feet per year was not an area experiencing "critical high erosion." He further stated "in a state that has shorelines with 'extremely high erosion rates that are on the order of tens of feet, this—this would be moderate erosion.'" However, the statue does not require "critical high erosion" or "extremely" high erosion rates. Carrying Dr. Young and the League's argument that the mean of negative-only erosion rates dictates what is high erosion to its conclusion could produce an absurd result. For example, if

[14] We need not decide whether DHEC's interpretation of -3 feet-per-year as high is appropriate or entitled to deference. Whether the erosion rate of -5.46 feet per year contained in the permit application satisfies the statutory requirement of a high erosion rate is the subject of this controversy.

erosion mitigation techniques are successful at various locales, the mean erosion rate could be reduced, resulting in a lower high rate of erosion. Likewise, if certain locales begin experiencing extreme rates of erosion, then a mean rate of erosion is increased and what was once considered high is now in the moderate range. An approach that focuses on the range of erosion rates, including accreting and stable beaches, as Slagel suggested, brings a more predictable approach to what would be considered high and does not exclude beaches with high erosion rates from the protections of the statute simply because some other beaches have higher rates. While differing sides might reasonably debate what, if any, methods should be employed to prevent erosion, the statute allows the construction of new groins under specified conditions. Based on the record presented, we find the ALC's decision, based on the probative, substantial, and reliable evidence in the record, is not clearly erroneous nor is it arbitrary or capricious.

II. Threats to Existing Structures

The League contends the ALC erred in finding existing structures were threatened as contemplated by the statute. DHEC and the Association argue existing homes are threatened because the erosion of Debordieu Beach places existing homes in danger of flooding and damage in the case of significant weather events. We disagree with the League.

Again, the statute does not define what constitutes a threat to an existing structure. The League suggests a structure must be constantly threatened directly by erosion to warrant groins. It also argues the ALC erred in considering the bulkhead to be a structure. DHEC and the Association maintain a structure is threatened as contemplated by the statute if it is recurrently threatened by the impact of weather events made much more significant by erosion.

While neither interpretation is unreasonable, the League's interpretation is somewhat inconsistent with the principle of permitting *any* new groins in developed areas. This is evidenced by Dr. Young's testimony that all structures on barrier islands are threatened by hurricanes. The statutory requirement of threatened existing structures indicates the preservation of existing structures is important to the legislature. To draw a distinction between stopping a structure from floating away under typical weather conditions and allowing it to be destroyed by incoming storm surge seems to undercut the purpose of saving existing structures by permitting new groins at all. *See Hinton v. S.C. Dep't of*

Prob., Parole & Pardon Servs., 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004) ("A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly."); *see also Ga.-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003) ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.").

According to Slagel, at least eighteen existing structures in the permit area have a "repeated history" of being threatened depending on conditions. Additionally, Slagel testified the OCRM considered Regulation 30-15, which addresses emergency barriers like sandbags and sand scraping efforts when evaluating a permit request. That regulation provides a "structure is considered to be in *imminent danger* when the erosion comes with twenty feet of that structure." Therefore, Slagel reasoned if a structure is in "imminent danger" at twenty feet, a structure could be "threatened" at some point beyond that. Furthermore, the ALC relied on pictures and videos and did not exclusively base its findings on its consideration of the bulkhead as a threatened structure.

Based on the substantial, reliable, and probative evidence in the record, we conclude the ALC's decision was not clearly erroneous, arbitrary, or capricious, and we affirm.

III. Detrimental Effect on Adjacent or Downdrift Areas

Finally, the League argues the ALC erred in affirming DHEC's finding that the installation of the groins would not create a detrimental impact to downdrift beaches. We disagree.

Dr. Young testified the groins would have a detrimental effect on downdrift properties. However, his opinion was essentially based on the fact that groins are designed to trap sand. All of DHEC's experts agreed the groins would trap sand and therefore impact the downdrift beaches. However, Dr. Kaczkowski testified the modeling performed by CS&E predicted the renourishment necessary to maintain downdrift beaches and the permit proposal reflected that information. The statute itself contemplates any party installing a groin will need to maintain downdrift beaches through renourishment and provides that if monitoring indicates unacceptable impact, the groins can be modified or even removed. The statute requires permittees to understand this and requires them to demonstrate financial

responsibility to fund any or all of these efforts. Had the legislature not recognized the inherent impact of groins, it would not have provided for measures to mitigate such. *See Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 127-28 (2008) ("The [c]ourt must presume the [l]egislature intended its statutes to accomplish something and did not intend a futile act."). Consequently, the League's argument is without merit, and substantial evidence in the record supports the ALC's decision.[15]

CONCLUSION

Based on all of the foregoing, the decision of the ALC affirming DHEC's issuance of the permit to the Association is

AFFIRMED.

WILLIAMS, C.J., and MCDONALD, J., concur.

[15] We also note the adjacent downdrift property owner, Baruch, was sufficiently satisfied with the Association's concessions regarding monitoring and renourishment in that it ultimately acquiesced in the issuance of the permit.