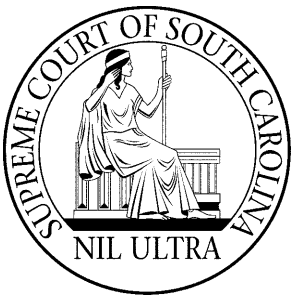

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
June 4, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

27353 - The State v. James A. Giles Pending

27357 - Clarence Robinson v. State Pending

EXTENSION TO FILE PETITION – UNITED STATES SUPREME COURT

27362 - Ann Coleman v. Mariner Health Care Granted until 8/9/2014

PETITIONS FOR REHEARING

27369 - Stevens Aviation v. DynCorp Pending

27370 - Dr. Cynthia Holmes v. East Cooper Community Hospital Pending

27380 - Sarah Dawkins v. Union County Hospital Pending

2014-MO-010 - Amy Davidson v. City of Beaufort Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5219-Moorhead Construction Inc. et al. v. Pendleton Station et al.	Pending
5224-State v. Alex Robinson	Pending
5225-State v. Matthew Ryan Hendricks	Pending
5226-State v. Cody Roy Gordon	Pending
5227-State v. Frankie Lee McGee	Pending
5228-State v. Theodore Manning	Pending (2)
5230-State v/ Christopher Lee Johnson	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-095-Patricia Johnson v. Staffmark	Pending
2014-UP-110-State v. Raymond Franklin	Pending
2014-UP-113-The State v. Jamaal Hinson	Pending
2014-UP-121-Raymond Haselden v. New Hope Church	Pending
2014-UP-128-3 Chisolm Street Homeowners v. Chisolm Street Partners	Pending
2014-UP-132-State v. Ricky Bowman	Pending
2014-UP-158-Mell Woods v. John D. Hinson (2)	Pending
2014-UP-160-State v. Charles M. Harris	Pending
2014-UP-167-State v. David Gerrard Johnson	Pending
2014-UP-172-Willie Rogers v. Charles Carr	Pending
2014-UP-173-Reda Reilly v. Kevin Reilly	Pending
2014-UP-175-Bettencourt v. Wald	Pending
2014-UP-178-State v. Anthony Rodriekus Carter	Pending
2014-UP-180-State v. Travas D. Jones	Pending

2014-UP-183-Allison Johnson v. Russell Johnson Pending

2014-UP-187-State v. Mark Peters Pending

2014-UP-192-Lawrence Terry v. Allen University Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4888-Pope v. Heritage Communities Pending

4895-King v. International Knife Pending

4909-North American Rescue v. Richardson Pending

4956-State v. Diamon D. Fripp Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer Pending

4975-Greeneagle Inc. v. SCDHEC Pending

4979-Major v. City of Hartsville Pending

4995-Keeter v. Alpine Towers International and Sexton Pending

4997-Allegro v. Emmett J. Scully Pending

5008-Willie H. Stephens v. CSX Transportation Pending

5010-S.C. Dep't of Transportation v. Janell P. Revels et al. Pending

5013-Geneva Watson v. Xtra Mile Driver Training Pending

5017-State v. Christopher Manning Pending

5019-John Christopher Johnson v. Reginald C. Lloyd et al. Pending

5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual Pending

5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5052-State v. Michael Donahue	Pending
5053-State v. Thomas E. Gilliland	Pending
5055-Hazel Rivera v. Warren Newton	Pending
5060-State v. Larry Bradley Brayboy	Pending
5061-William Walde v. Association Ins. Co.	Pending
5062-Duke Energy v. SCDHEC	Pending
5071-State v. Christopher Broadnax	Pending
5072-Michael Cunningham v. Anderson County	Pending
5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5078-Estate of Livingston v. Clyde Livingston	Pending
5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending
5082-Thomas Brown v. Peoplease Corp.	Pending
5084-State v. Kendrick Taylor	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5092-Mark Edward Vail v. State	Pending
5093-Diane Bass v. SCDSS	Pending
5095-Town of Arcadia Lakes v. SCDHEC	Pending
5097-State v. Francis Larmand	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending

5101-James Judy v. Ronnie Judy	Pending
5110-State v. Roger Bruce	Pending
5111-State v. Alonza Dennis	Pending
5112-Roger Walker v. Catherine Brooks	Pending
5113-Regions Bank v. Williams Owens	Pending
5116-Charles A. Hawkins v. Angela D. Hawkins	Pending
5117-Loida Colonna v. Marlboro Park (2)	Pending
5118-Gregory Smith v. D.R. Horton	Pending
5119-State v. Brian Spears	Pending
5121-State v. Jo Pradubsri	Pending
5125-State v. Anthony Marquese Martin	Pending
5126-A. Chakrabarti v. City of Orangeburg	Pending
5127-Jenean Gibson v. Christopher C. Wright, M.D.	Pending
5130-Brian Pulliam v. Travelers Indemnity	Pending
5131-Lauren Proctor v. Whitlark & Whitlark	Pending
5135-Microclean Tec. Inc. v. Envirofix, Inc.	Pending
5139-H&H Johnson, LLC v. Old Republic National Title	Pending
5140-Bank of America v. Todd Draper	Pending
5144-Emma Hamilton v.Martin Color Fi	Pending
5148-State v. Henry Jermaine Dukes	Pending
5151-Daisy Simpson v. William Simpson	Pending

5152-Effie Turpin v. E. Lowther	Pending
5154-Edward Trimmier v. SCDLLR	Pending
5156-State v. Manuel Marin	Pending
5157-State v. Lexie Dial	Pending
5159-State v. Gregg Henkel	Pending
5160-State v. Ashley Eugene Moore	Pending
5161-State v. Lance Williams	Pending
5164-State v. Darren Scott	Pending
5165-Bonnie L. McKinney v. Frank J. Pedery	Pending
5166-Scott F. Lawing v. Univar USA Inc.	Pending
5171-Carolyn M. Nicholson v. SCDSS and State Accident Fund	Pending
5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5177-State v. Leo Lemire	Pending
5178-State v. Michael J. Hilton	Pending
5181-Henry Frampton v. SCDOT	Pending
5185-Hector G. Fragosa v. Kade Construction	Pending
5188-Mark Teseniar v. Professional Plastering	Pending
5191-Jacqueline Carter v. Verizon Wireless	Pending
5196-State v. James Anderson	Pending
5201-Phillip Grimsley v. SLED	Pending

2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-580-State v. Kendrick Dennis	Pending

2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-654-State v. Marion Stewart	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending
2013-UP-014-Keller v. ING Financial Partners	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-034-Cark D. Thomas v. Bolus & Bolus	Pending
2013-UP-058-State v. Bobby J. Barton	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-063-State v. Jimmy Lee Sessions	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending
2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending

2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending
2013-UP-110-State v. Demetrius Goodwin	Pending
2013-UP-120-Jerome Wagner v. Robin Wagner	Pending
2013-UP-125-Caroline LeGrande v. SCE&G	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-133-James Dator v. State	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al.	Pending
2013-UP-183-R. Russell v. DHEC and State Accident Fund	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-189-Thomas J. Torrence v. SCDC	Pending
2013-UP-199-Wheeler Tillman v. Samuel Tillman	Pending
2013-UP-232-Theresa Brown v. Janet Butcher	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-267-State v. William Sosebee	Pending

2013-UP-272-James Bowers v. State	Pending
2013-UP-279-MRR Sandhills v, Marlboro County	Pending
2013-UP-286-State v. David Tyre	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-294-State v. Jason Thomas Husted	Pending
2013-UP-296-Ralph Wayne Parsons v. John Wieland Homes	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-304-State v. Johnnie Walker Gaskins	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-317-State v. Antwan McMillan	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-323-In the interest of Brandon M.	Pending
2013-UP-340-Randy Griswold v. Kathryn Griswold	Pending
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-360-State v. David Jakes	Pending
2013-UP-380-Regina Taylor v. William Taylor	Pending
2013-UP-381-L. G. Elrod v. Berkeley County	Pending
2013-UP-389-Harold Mosley v. SCDC	Pending
2013-UP-393-State v. Robert Mondriques Jones	Pending
2013-UP-403-State v. Kerwin Parker	Pending

2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending
2013-UP-428-State v. Oran Smith	Pending
2013-UP-435-State v. Christopher Spriggs	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending
2013-UP-444-Jane RM Doe v. Omar Jaraki	Pending
2013-UP-459-Shelby King v. Amy Bennett	Pending
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending
2014-UP-010-Mell Woods v. John Hinson	Pending
2014-UP-013-Roderick Bradley v. The State	Pending
2014-UP-028-Randy Beverly v. Bucksville Farms	Pending
2014-UP-047-State v. Sam Harold Smith	Pending
2014-UP-062-Stoneledge v. IMK Development	Pending
2014-UP-069-Joseph Carew v. RBC Bank	Pending
2014-UP-074-Tim Wilkes v. Horry County	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending

The Supreme Court of South Carolina

In re: Proposed Revision to Rule 7.1 of the Rules of Professional Conduct, Rule 407, SCACR.

Appellate Case No. 2014-000107

ORDER

The Commission on Lawyer Conduct has proposed a revision to Rule 7.1 of the Rules of Professional Conduct, Rule 407, SCACR, regarding the prominence of disclaimers used in lawyer advertisements. Specifically, the Commission recommends adding the following language as section (f) of the rule:

> **(f) Disclaimers**. In addition to any specific requirements under these rules, any disclosures or disclaimers required by these rules to appear in an advertisement or unsolicited written communication must be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the viewer. If the disclosure or disclaimer is televised or broadcast in an electronic or video medium, it shall be displayed for a sufficient time to enable the viewer to see and read the disclosure or disclaimer. If the disclosure or disclaimer is spoken aloud, it shall be plainly audible to the listener. If the statement is made on a website, online profile, Internet advertisement, or other electronic communication, the required words or statements shall appear on the same page as the statement requiring the disclosure or disclaimer.

We find the proposed language appropriate, but that it should be added to Rule 7.2 of the Rules of Professional Conduct. Pursuant to Article V, § 4, of the South

Carolina Constitution, we hereby amend Rule 7.2 to include the language proposed by the Commission as section (i).

This amendment shall become effective July 1, 2014. A copy of the amended rule is attached.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 28, 2014

RULE 7.2: ADVERTISING

(a) Subject to the requirements of this Rule and Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media. All advertisements shall be predominately informational such that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.

(b) A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct. The lawyer shall keep a copy or recording of every advertisement or communication for two (2) years after its last dissemination along with a record of when and where it was disseminated.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service, which is itself not acting in violation of any Rule of Professional Conduct; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer responsible for its content.

(e) No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising

lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(f) Every advertisement that contains information about the lawyer's fee shall disclose whether the client will be liable for any expenses in addition to the fee and, if the fee will be a percentage of the recovery, whether the percentage will be computed before deducting the expenses.

(g) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or fee range for at least ninety (90) days following dissemination of the advertisement, unless the advertisement specifies a shorter period; provided that a fee advertised in a publication which is issued not more than annually, shall be honored for one (1) year following publication.

(h) All advertisements shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made.

(i) In addition to any specific requirements under these rules, any disclosures or disclaimers required by these rules to appear in an advertisement or unsolicited written communication must be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the viewer. If the disclosure or disclaimer is televised or broadcast in an electronic or video medium, it shall be displayed for a sufficient time to enable the viewer to see and read the disclosure or disclaimer. If the disclosure or disclaimer is spoken aloud, it shall be plainly audible to the listener. If the statement is made on a website, online profile, Internet advertisement, or other electronic communication, the required words or statements shall appear on the same page as the statement requiring the disclosure or disclaimer.

The Supreme Court of South Carolina

RE: Annual License Fee

Appellate Case No. 2014-000337

ORDER

The South Carolina Bar has filed a petition seeking to amend Rule 410(j), SCACR, to increase the Annual License Fee by $15 for members who have been admitted for less than three years. The Bar reports the increase is necessary based on a recent five-year fiscal projection.

Pursuant to Article V, § 4 of the South Carolina Constitution, we grant the Bar's request to amend Rule 410(j), SCACR, to provide as follows:

> **(j) License Fees.** The membership year shall be the calendar year. By January 1st, each member who is in good standing (other than deceased members) shall pay the South Carolina Bar the fees specified in this section and in section (k) below. All income and assets shall be handled separately by the South Carolina Bar, as prescribed in its Constitution and Bylaws. For the purpose of this rule, the term "license fee" shall include any assessment under Rule 411, SCACR.
>
> > **(1) Regular Member.** The license fee for a regular member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $175. The license fee for all other regular members shall be $260. In addition, the license fee of a regular member shall include the Lawyer's Fund for Client Protection assessment specified by Rule 411, SCACR. Finally, each regular member shall pay $30 which shall be designated for meeting the civil legal needs of indigents as directed by the Board of Governors of the Bar, but any member may deduct this fee before remitting payment.

(2) Inactive Member. The license fee shall be $190.

(3) Judicial Member. The license fee shall be $190.

(4) Judicial Staff Member. The license fee for a judicial staff member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $175. The license fee for all other judicial staff members shall be $190.

(5) Military Member. The license fee for a military member shall be $190. This fee shall be waived during a time of war declared by the Congress of the United States and, upon written request, shall be waived when the member is serving on active duty in an area designated as a combat zone by the President of the United States.

(6) Administrative Law Judge Member. The license fee shall be $190.

(7) Retired Member. No fee is required.

(8) Limited Member. No fee shall be required for a person holding a limited certificate under Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program), SCACR. The license fee for all other persons holding a limited certificate shall be $260.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 28, 2014

The Supreme Court of South Carolina

RE: Lawyers' Fund for Client Protection

Appellate Case No. 2014-000421

ORDER

The South Carolina Bar has filed a petition to amend Rule 411, SCACR, to increase the annual assessment for the Lawyers' Fund for Client Protection from $20 to $50, and to add two lawyer members to the Fund's Committee. The Bar states increasing the assessment and adding two new Committee members is necessary based on an increase in the volume of claims and the amount of losses incurred by clients.

Pursuant to Article V, § 4 of the South Carolina Constitution, we grant the Bar's request to amend Rule 411, SCACR, to provide as follows:

(1) Rule 411(b), SCACR, is amended to read:

> **(b) Membership and Terms of Office of Lawyers' Fund for Client Protection Committee.** The Lawyers' Fund for Client Protection Committee shall consist of twelve (12) members of the South Carolina Bar and one (1) member selected from the general public appointed by the President and approved by the Supreme Court. The appointments shall be for a term of five (5) years, and no member who has served a full term shall be eligible for reappointment to the Committee until one (1) year after the termination of the member's last term. Vacancies shall be filled for the unexpired term in the same manner as the original appointments to the Committee.

(2) Rule 411(d)(1), SCACR, is amended to read:

(1) The South Carolina Bar shall assess each regular member of the South Carolina Bar the sum of fifty ($50.00) dollars in each calendar year and shall make an appropriation to the Lawyers' Fund for Client Protection in that amount for each year of its operation; provided, however, that no assessment or appropriation may be made which will increase the assets of the fund to an amount in excess of $3,000,000. Payment and enforcement of collection shall be in the same manner and at the same time and with the same penalties for non-payment as provided for payment and collection of license fees under Rule 410, SCACR, but otherwise shall be treated as a separate assessment of regular members.

Additionally, the Court requests that the Bar amend the Lawyers' Fund for Client Protection of the South Carolina Bar Rules of Procedure to provide that a quorum at any meeting of the Committee be increased from six members to seven members.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 28, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Phillip Wesley Sawyer, Respondent.

Appellate Case No. 2011-201206

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27393
Heard November 5, 2013 – Filed June 4, 2014

AFFIRMED

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Barry Joe Barnette, of Spartanburg, for Petitioner.

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Respondent.

JUSTICE PLEICONES: The Court granted the State's petition for a writ of certiorari to review an unpublished Court of Appeals decision that affirmed the circuit court's suppression of respondent's breath test results and video in this prosecution for driving under the influence (DUI). *State v. Sawyer*, 2011-UP-263 (S.C. Ct. App. filed June 7, 2011). We affirm, holding that a videotape from the breath test site that lacks the audio portion of the reading of Miranda rights and the informed consent law did not satisfy the requirements of S.C. Code Ann. § 56-5-2953(A)(2) (2006).[1]

FACTS

In September 2007, respondent was taken to the Spartanburg County Jail by Deputy Evett, who picked him up following a traffic stop made by Lt. Woodward. Evett, a certified Data Master operator, placed respondent in the "subject test area" which is a room that adjoins the Data Master room. The rooms are separated by a glass panel. The deputy retrieved some forms from the Data Master room and then appeared to read respondent his Miranda rights and the implied consent information. Both respondent and Deputy Evett signed the forms. There are separate audio and video recording devices in both the subject test area and in the breathalyzer room. In this case, the audio device in the subject test area did not function.

Respondent moved to suppress the evidence relating to the breath test site alleging the videotape did not meet the requirements of S.C. Code Ann. § 56-5-2953(A). Section (A) required that a person charged with DUI have his conduct at both the incident site and the breath test site videotaped. Subsection (A)(2) provided:

> The videotaping at the breath site:
>
> > (a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the

[1] Subsection A of this statute was rewritten by 2008 Act No. 201, § 11, effective February 10, 2009 or when new equipment is installed. Essentially, the statute no longer requires the test to be conducted within 3 hours, and eliminates the requirement that the video include the reading of Miranda rights at the breath test site.

> person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;
>
> (b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;
>
> (c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;
>
> (d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

The circuit court first held that the videotape itself must be excluded because "the videotape has no audio of the conversations between the testing officer and [respondent] concerning such matters as his Miranda warnings, the explanation of implied consent or other matters that may have been discussed between them." The judge held that evidence other than the videotape could be used, citing § 56-5-2953(B).

On respondent's motion for reconsideration, the circuit court clarified that it was suppressing not only the videotape, but also any evidence or testimony that respondent was offered and/or took a breath test, as well as the results of that test. The court noted the State had supplied an "exigency" affidavit, seeking to invoke the provisions of § 56-5-2953(B) that provides "Failure by the **arresting officer** to produce the videotapes required by this section is not alone a ground for dismissal of any charge . . . if the **arresting officer** submits a . . . sworn affidavit that it was physically impossible to produce the videotape because . . . exigent circumstances existed." (emphasis supplied). The judge held "an exigency" required an

emergency situation, or one requiring immediate attention or remedy, and found that since the State did not even know of the audio malfunction for several months after respondent's test, there was no exigent circumstance here. The court also noted the affidavit was not prepared by the arresting officer, Lt. Woodward, as required by the statute, but rather by Deputy Evett, the breath test administrator.

In the direct appeal, the State argued first that since a videotape was produced, no consideration of Deputy Evett's "exigency" affidavit was necessary.[2] The State also argued that any defects in the audio portion of the tape went to its weight, not its admissibility, and that all the statute required was a video, which it produced. Alternatively, the State argued the trial judge should not have relied on the "exigency" exception, but that instead he should have admitted the evidence based upon a different part of § 56-5-2953(B), which permits the court to consider "other valid reasons" for the lack of a videotape based upon the "totality of the circumstances." This "totality of the circumstances" argument was not preserved for appeal as it was not ruled upon in either the circuit court's original order or in its amended order. *E.g. State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) fn. 3.

Following the Court of Appeals' decision affirming the trial court's suppression of all evidence obtained at the breath test site, the State sought a writ of certiorari. In its petition, the State made two arguments:

> I. The Court of Appeals erred in affirming the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.
>
> II. The Court of Appeals erred in refusing to reverse the trial court's decision based on the totality of the circumstances pursuant to Section 56-5-2953(B) of the South Carolina Code.

---

[2] We note that, assuming it was error to consider this affidavit, the State was the party that introduced it. It is well-settled that a party cannot complain of an error it induced. *E.g. State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984).

State's petition for a writ of certiorari to the Court of Appeals (filed November 18, 2011) (C-TRACK Appellate Case No. 2011-201206).

On January 9, 2013, the Court granted certiorari on the first question but denied certiorari on the second. S. Ct. Order dated January 9, 2013 (C-TRACK Appellate Case No. 2011-201206).[3]

ISSUE

> Did a breath test site video that did not include audio demonstrating that Miranda warnings were given, that the individual was informed that he was being videotaped, or that he has the right to refuse the breath test meet the requirements of § 56-5-2953(A) as it existed in September 2007?

ANALYSIS

The State argues that the statute only required that the individual's "conduct" be recorded, and that conduct under the statute has been defined by the Court of Appeals as "one's behavior, action or demeanor." *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) *superseded by statute as stated in State v. Gordon*, 2014 WL 1614854 (S.C. Ct. App. filed Apr. 23, 2014). Thus, the State contends that only video of the individual is necessary to satisfy the statute. We disagree.

In *Murphy*, the incident site video did not capture a full length image of the individual as she attempted field sobriety tests. *Murphy* held that the video adequately reflected the individual's behavior. Here, however, we are concerned not with the defendant's conduct but with the content of the statutorily required warnings. At the breath test site, the videotape must record the individual's conduct during the twenty-minute waiting period [§ 56-5-2953(A)(2)(d)] and the action of the breathalyzer operator conducting the test [§ 56-5-2953(A)(2)(c)]. Silent tape of this conduct would be acceptable under *Murphy*. However, the statute required a videotape not merely of the individual's conduct while being read his Miranda and informed consent rights, but also that it "must include" "the reading of Miranda rights" and "the person being informed that he is being

[3] While the dissent would find the scope of the circuit court's suppression order too broad, there is no challenge to the breadth of that order on certiorari.

videotaped, and that he has the right to refuse the test." § 56-5-2953(A)(2)(b). A silent video simply cannot meet these statutory requirements.[4]

The State argues that this defect in the videotape goes only to its weight, not its admissibility. Here we are concerned with a statute which governs the admissibility of certain evidence. *Compare e.g.* S.C. Code Ann. § 19-1-180 (Supp. 2012) (certain hearsay statements made by children admissible in family court if statute's terms complied with). In § 56-5-2953(B), the General Assembly specified:

> Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a [DUI charge]. Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of [charges] if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the . . . breath test device [sic] was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment . . . and certifying there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed . . . .
> Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances . . . .
>
> Section 56-5-2953(B) (2006).

---

[4] Contrary to the dissent's contention that the video shows respondent being read his *Miranda* warnings, being told the matter was videotaped, and being informed of his right to refuse, all that the video shows is the officer's lips moving. As for respondent's failure to challenge the contents of the officer's warnings, at this juncture the sole issue before the circuit court was whether the silent video complied with the statute. Further, respondent has not conceded the adequacy of the officer's statements, as reflected in his briefs which refer to the "alleged warnings." Finally, "bad faith" and "bad motive" are irrelevant here.

While defects in evidence do not generally affect admissibility, as the State maintains, the Court has interpreted the statute to require strict compliance with Section (A) as a prerequisite for admissibility, unless an exception in Section (B) applies. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *see also State v. Elwell*, 403 S.C. 606, 743 S.E.2d 802 (2013). The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the legislature's inaction is evidence that our interpretation is correct. *E.g. McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012). While the General Assembly has amended § 56-5-2953 following our *Suchenski* decision, nothing in the amended statute alters our holding that failure to comply with the statute's terms renders the evidence inadmissible.[5]

As explained above, we declined certiorari to consider whether the circuit court might have admitted the flawed tape under § 56-5-2953(B)'s "totality of the circumstances" exception, and we have determined this tape did not satisfy § 56-5-2953(A). The Court of Appeals properly affirmed the circuit court's suppression order. *City of Rock Hill v. Suchenski*, *supra*.[6]

---

[5] The dissent maintains that a prejudice analysis is appropriate whenever evidence is obtained without full compliance with statutory requirements, citing *State v. Odom*, 382 S.C. 144, 676 S.E.2d 124 (2009) (actually involving violation of executive agreements); *State v. Huntley*, 349 S.C. 1, 562 S.E.2d 472 (2002); *State v. Chandler*, 267 S.C. 138, 226 S.E.2d 533 (1976); *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975). As we have explained, these decisions are inapposite since, unlike 56-5-2953, they involve statutes where the General Assembly did not specify the remedy for the State's failure to comply. *Suchenski*, *supra*.

[6] The only arguable error of law was the circuit court's failure to dismiss the charges once it determined that the State did not produce a videotape meeting the requirements of (A) and that it did not meet any of the exceptions in (B). *Suchenski*, *supra*; *Elwell*, *supra*. Respondent, however, did not appeal the circuit court's denial of his request that the charges be dismissed.

CONCLUSION

The Court of Appeals' decision is

AFFIRMED.

HEARN and BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. I would hold that the circuit court committed an error of law in suppressing the evidence at issue in this case.

Assuming, without deciding, that the video recording of Respondent's breath test site did not comply with section 56-5-2953,[7] I would apply a harmless error analysis in determining whether the video recording and breath test evidence should have been suppressed. This Court has recognized that the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, *at least where the appellant cannot demonstrate prejudice* at trial resulting from the failure to follow statutory procedures." *State v. Chandler*, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) (emphasis added) (citing *State v. Sachs*, 264 S.C. 541, 566 n.11, 216 S.E.2d 501, 514 n.11 (1975)). In *State v. Huntley*, 349 S.C. 1, 5, 562 S.E.2d 472, 474 (2002), the circuit court suppressed a defendant's breathalyzer results where the simulator test solution did not contain the proper alcohol concentration required by an Act.[8] Despite non-compliance with the Act, this Court held that the circuit court improperly excluded the breathalyzer test results because the defendant was not prejudiced by the violation, as the breathalyzer machine itself was operating properly. *Id.* at 6, 562 S.E.2d at 474. Therefore, the Court determined that evidence of non-compliance with the Act went to the weight, not the admissibility of the defendant's breathalyzer results. *Id.*

Relying on these cases, I would hold that the circuit court committed an error of law in failing to engage in a prejudice analysis upon finding that the video

---

[7] The State argues that the video recording satisfied section 56-5-2953 because the video recording captured all conduct and events required by the statute. In addition, the police officer who administered the breath test submitted an affidavit to the circuit court indicating that exigent circumstances existed under 56-5-2953(B) because the audio failure was unknown and out of the officer's control at the time of the test.

[8] The Act amended South Carolina Code Ann. § 56-5-2950(a) to require a simulator test be performed before a breath test is administered to ensure the reliability of the breathalyzer machine results. Act No. 434, 1998 S.C. Acts 3220–23.

recording failed to satisfy the requirements of section 56-5-2953.[9]

Contrary to the majority's assertion, the General Assembly did not specify a remedy in section 56-5-2953 for failure to comply with the statutory requirements. Subsection (B) merely provides that noncompliance with the statute "is not alone a ground for dismissal" *if* the video recording qualifies under an exception in subsection (B). S.C. Code Ann. § 56-5-2953(B); *see also Suchenski*, 374 S.C. at 16, 646 S.E.2d at 881 (finding that failure to produce a video recording in compliance with 56-5-2953 *may* be a ground for dismissal if no exceptions apply). Regardless, in my opinion, a statute's failure to specify a remedy for noncompliance does not preclude a prejudice analysis, as the majority implies. *C.f. State v. Landon*, 370 S.C. 103, 108–09, 634 S.E.2d 660, 663 (finding a prejudice analysis appropriate for an alleged violation of a recordkeeping statute which does not specify a remedy for noncompliance).

In my view, Respondent was not prejudiced by the video recording's lack of audio. Aside from its lack of audio, the video recording complies with the statutory requirements of 56-5-2953 by including the reading of Respondent's *Miranda*[10] warnings, the officer informing Respondent of the video recording and his right to refuse the breath test, and the breath test procedure itself. This Court has stated that "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Despite the malfunctioning of the audio, the video recording nevertheless creates evidence of Respondent's breath test. Significantly, Respondent has challenged neither the validity of the *Miranda* warnings he was given nor any other aspect of the breath test procedure. Respondent has not

---

[9] The mention of prejudice in *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 881 (2007) has no impact on the present case. In *Suchenski*, the Court found that a violation of 56-5-2953, even without a showing of prejudice to the defendant, may result in dismissal of the charges. *Id.* As the majority points out, in this case, Respondent did not appeal the circuit court's denial of his motion to dismiss.

[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

asserted that bad faith or a bad motive existed on the part of any actor involved in the video recording audio failure.

Therefore, I would hold that Respondent was not prejudiced by the omission of audio in the video recording and, consequently, the circuit court erred in suppressing the evidence. Absent a violation of Respondent's constitutional rights—which are not in dispute here—the circuit court should not have excluded the video recording or the evidence surrounding Respondent's breath test without a showing that (1) the video did not comply with section 56-5-2953 *and* (2) Respondent was prejudiced as a result of the video's non-compliance. *See Huntley*, 349 S.C. at 6, 562 S.E.2d at 474; *Chandler* 267 S.C.at 143, 226 S.E.2d at 555.

In my view, nothing in section 56-5-2953 mandates suppression of a defective video recording, nor has this Court ever interpreted the statute as requiring strict compliance for admission of a video recording, as the majority asserts. Defects in evidence generally do not affect admissibility. *See State v. Odom*, 382 S.C. 144, 152, 676 S.E.2d 124, 128 (2009) (citing *Huntley*, 349 S.C. at 6, 562 S.E.2d at 474). As indicated, *supra*, in the prejudice analysis, "exclusion is typically reserved for constitutional violations." *Id.* (citing *Huntley*, 349 S.C. at 6, 562 S.E.2d at 474); *Chandler*, 267 S.C. at 143, 226 S.E.2d at 555. Thus, I would find that the defect in the video recording goes to the weight, rather than the admissibility, of the evidence. *See Odom*, 382 S.C. at 152, 676 S.E.2d at 128.

Likewise, I disagree with the majority's interpretation of *Suchenski*. Specifically, the majority believes *Suchenski* stands for the proposition that strict compliance with section 56-5-2953 is a prerequisite for admissibility of evidence. *Suchenski* merely holds that dismissal of a DUI charge is "*an* appropriate remedy provided by [section] 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." *Suchenski*, 374 S.C. at 17, 646 S.E.2d at 881 (emphasis added). In fact, the case makes no mention of suppression of evidence, addressing only dismissal of DUI charges as a possible remedy for non-compliance with the statute. *Id.* Because dismissal of Respondent's DUI charges is not before us, this Court may only review the circuit court's suppression order. As a result, the majority's reliance on *Suchenski* is misplaced.

Furthermore, the majority provides no support for upholding the circuit court's suppression of Respondent's breath test results along with all evidence or testimony related to the breath test.[11] Even if the failure to comply with the statute did, in fact, require suppression of the defective video recording, and assuming the circuit court declined to dismiss the DUI charges, I cannot conceive of a basis, statutory or otherwise, for excluding the breath test results and the related testimony and evidence. To the contrary, section 56-5-2953 provides that "[n]othing in this section may be construed as prohibiting the introduction of other relevant evidence" in the trial for a DUI. S.C. Code Ann. § 56-5-2953(B).

Therefore, because I would hold that the circuit court erred in failing to conduct a prejudice analysis and Respondent demonstrated no prejudice resulting from admission of the evidence, and because at the very least the circuit court erred in suppressing the evidence surrounding the breath test, I would reverse the court of appeals' decision upholding the circuit court's suppression order and remand for a new trial.

KITTREDGE, J., concurs.

[11] I disagree with the majority's contention that there is no challenge to the breadth of the circuit court's suppression order on certiorari. While the State's petition does not use that language, the State argued that the court of appeals erred in affirming the circuit court's suppression of the video recording, the testimony or evidence that a breath test was offered or administered, *and* the results of the breath test. In my opinion, if the State contended the circuit court erred in excluding the video recording only, the State's argument would have only mentioned the video recording.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Horry Telephone Cooperative, Inc., Appellant,

v.

City of Georgetown, and the South Carolina Secretary of State, Respondents.

Appellate Case No. 2012-212185

Appeal from Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27394
Heard January 23, 2014 – Filed June 4, 2014

AFFIRMED

Dominic Allen Starr and Alan Grant Jones, both of McAngus, Goudelock, & Courie, LLC, of Myrtle Beach, for Appellant.

Douglas Charles Baxter, of Richardson Plowden & Robinson, PA, of Myrtle Beach, Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Respondent.

JUSTICE PLEICONES: This issue on appeal is whether the City of Georgetown's denial of multiple franchise applications by Horry Telephone Cooperative Inc. to provide cable television was a violation of the South Carolina Competitive Cable Services Act (the Act), S.C. Code Ann. §§ 58-12-5 et seq. (Supp. 2013).[1] We hold that it was not.

FACTS

Appellant, Horry Telephone Cooperative Inc. (HTC), is a telecommunications company providing services in the Georgetown and Horry County areas. In 2007, as required by the Act, HTC filed for a state-issued certificate of franchise authority, where it sought to provide cable television services in the City of Georgetown (City). The Secretary of State, pursuant to § 58-12-310, forwarded the notice of application to the City which was required to respond to the request within 65 days.[2]

The City first took up HTC's request during a city council meeting on November 29, 2007 and approved it. Since a franchise is granted by ordinance, a second

---

[1] The purpose of the Act is to promote competition between cable providers in order to "relieve consumers of unnecessary costs and burdens," "encourage investment," and "promote deployment of innovative offerings that provide competitive choices for consumers."§ 58-12-5. To accomplish these goals, the General Assembly "streamlined policy framework providing statewide uniformity necessary. . .to allow these functionally equivalent services to compete fairly and deploy new consumer services more quickly." *Id.*

[2] Under the Act, the process for obtaining a franchise requires the applicant to send an application to the Secretary of State describing the political subdivision, municipality, or county to be served in whole or part by the applicant. § 58-12-310(B). Next, the Secretary of State forwards a notice of this application to the municipality or county described by the applicant. § 58-12-310(C). The municipality or county has 65 days to respond, and if the consent is denied or there is a failure to give unconditional consent to the franchise, the Secretary of State "shall deny the application," with regard to that municipality or county. § 58-12-310(D). If consent is given, the Secretary of State will issue the provider a certificate of franchise authority with respect to the consenting entity. § 58-12-310(D)-(E). Accordingly, the political subdivision ultimately determines whether the franchise is awarded.

reading approval was required. On second reading, the request was denied. The City informed the Secretary of State of the denial, and notice was sent to HTC informing them that their franchise for the City of Georgetown had been denied.

HTC filed for reconsideration, which was ultimately denied. Finally, HTC applied for a third time, and after consideration, the application was tabled and subsequently failed.

HTC filed a declaratory judgment action in circuit court to declare that the City's denial was unlawful under the Act. The circuit court held a bench trial[3] and ruled that the Act did not create a private cause of action and the City's denial of HTC's consent request was a reasonable and valid exercise of legislative discretion. Consequently, the circuit court dismissed HTC's complaint with prejudice. This appeal followed.

DISCUSSION

On appeal, the parties focus on two issues: first, whether the Act creates a private cause of action, and if so, whether the actions of the City were unreasonable in light of council members' testimony that their decisions to deny consent were at least partially based on a build-out[4] requirement and anti-competitive reasons in violation of the Act. We hold that the Act does create a cause of action, but we find that the record supports the circuit court's denial of HTC's requested relief.

1. Does the South Carolina Competitive Cable Services Act create a private cause of action?

HTC contends that the plain language of the Act creates a cause of action, such a reading furthers the purpose of the Act, and therefore, the circuit court erred in finding that the Act did not create a cause of action. We agree.

---

[3] The Secretary of State stipulated and agreed to be bound by the declaratory and prospective relief issued by the circuit court and did not participate in the trial or this appeal.

[4] A build-out requirement forces the cable service provider to service all residents in a municipality rather than allowing the provider to determine how and where to offer such services. It creates a burdensome initial capital investment on any incoming cable provider thereby restricting competition, and it is expressly proscribed by the Act. S.C. Code Ann. § 58-12-350 (Supp. 2012).

The Act lays out multiple purposes for its enactment, which consist of promoting competition, investment, development, and ultimately lowering costs for consumers. *See* § 58-12-5. Additionally, the Act seeks to achieve these goals in multiple ways, including streamlining the process for granting franchises, requiring "cable and video franchises to be nonexclusive, and for requests for competitive cable or video franchises not to be unreasonably refused." *Id.*; S.C. Code Ann. § 58-12-300(5) (Supp. 2012).

> In the event of a denial of the application for a franchise, the Act provides:
>
> If the applicant takes the position that the denial of the application or amended application is actionable, it may seek any appropriate relief under state or federal law in state or federal court, and if the applicant takes the position that the denial of consent by the municipality or county is actionable, it may add the municipality or county denying consent as a party to such action.
> S.C. Code Ann. § 58-12-310(D) (Supp. 2012).

HTC argues this language unambiguously demonstrates that the General Assembly intended to create a right for cable providers to bring an action against a municipality when they believe their application has been denied in violation of the Act. We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.,* 313 S.C. 1, 437 S.E.2d 6 (1993)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed.1992)). Whether the legislature intended to create a private cause of action for the violation of a statute is determined primarily by the language of the statute. *16 Jade Street, LLC v. R. Design Const. Co., LLC,* 405 S.C. 384, 389, 747 S.E.2d 770, 773 (2013).

The language of § 58-12-310(D) expressly provides that when the cable provider believes the municipality's denial of consent is actionable, it may bring an action against the municipality and that action may seek any appropriate remedy under state or federal law. Accordingly, we find that the Act does create a private cause of action for aggrieved cable providers.

2. Did the circuit court err in finding that the denial of consent was reasonable?

HTC argues it presented sufficient evidence that the City's refusal to grant consent violated the Act,[5] and therefore, the circuit court erred in holding that the City's actions were reasonable.

To support its argument, HTC relies almost exclusively on the trial testimony and depositions of individual city council members concerning their respective motivations for denying HTC's request. This testimony was improperly admitted over Respondents' objection. Testimony of individual council members as to their motivations for denying consent is not competent evidence. We have stated that in reviewing decisions of municipal governments, "[m]unicipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of governing bodies." *Berkley Electric Cooperative, Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992) (citing E. McQuillan, *The Law of Municipal Corporations* § 14.05 (3d 3. 1989). Accordingly, we do not consider the council members' testimonial evidence at trial.

Essentially, HTC's argument is that the individual members had motives for denying consent to the franchise agreement which were prohibited by the Act. This argument asks this Court to inquire into individual city council members' motives behind their legislative acts. *Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999) ("A municipal ordinance is a legislative enactment. . ."). This is a fundamentally inappropriate inquiry for a

---

[5] HTC contends the City denied its request because HTC would not satisfy a "build-out" requirement, and therefore, the denial violated the express prohibition against build-out requirements in § 58-12-350. In addition, HTC contends the denial was based on anticompetitive reasons, and thus conflicts with the purpose of the Act. Finally, HTC argues these improper bases render the City's denial of consent unreasonable, and requests this Court vacate the City's denial and issue an injunction requiring the City to grant HTC a franchise. This requested relief is fundamentally improper, as it would require this Court to compel a city council to enact an ordinance, which would consist of a violation of the separation of powers. *Foster v. Taylor*, 210 S.C. 324, 42 S.E.2d 531(1947) (discussing separation of powers, "[t]he court will, of course, not attempt to compel the legislature by mandamus to perform a legislative duty or function").

court. *See Pressley v. Lancaster County,* 343 S.C. 696, 542 S.E.2d 366 (2001) ("Judicial inquiry into legislative motivation is to be avoided") (citation omitted); *Columbia Ry., Gas & Elec. Co. v. Carter,* 127 S.C. 473, 121 S.E. 377, 379 (1924) ("The court cannot speculate as to the intention, much less as to the motives, of the Legislature"); *Douglas v. City Council of Greenville,* 92 S.C. 374, 75 S.E. 687, 689 (1912)(discussing improper motives for passing an ordinance, "[w]e cannot inquire into the motives which induce legislative action"); *State v. Cardozo*, 5 S.C. 297 (1874) ("So far as it implies any wrong or improper motive on the part of the Legislature in the particular enactment, it is beyond the control of the judicial department.").

In any case, looking to the competent evidence, there were myriad reasons in this record for why the City denied consent beyond those complained of by HTC, including: the overburdening of infrastructure, concerns over drainage if existing cable infrastructure was to be expanded, as well as lack of tax revenue provided by HTC. While the competent evidence in the record is capable of conflicting inferences, there is evidence from which a fact finder could conclude that the reasons for denial of the application did not violate the proscriptions of the statue. In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976). Thus, we affirm the circuit court's decision denying HTC's requested relief.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cynthia Holmes, M.D., Appellant,

v.

Haynsworth, Sinkler & Boyd, P.A., successor to Sinkler & Boyd, P.A., Manton Grier and James Y. Becker, Respondents.

Appellate Case No. 2010-154986

Appeal from Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 27395
Heard October 16, 2012 – Filed June 4, 2014

AFFIRMED

Chalmers Carey Johnson, of Tacoma, Washington, for Appellant.

Richard S. Dukes, Jr., of Charleston, and R. Hawthorne Barrett, of Columbia, both of Turner, Padget, Graham & Laney, P.A., for Respondent.

CHIEF JUSTICE TOAL: Cynthia Holmes, M.D. (Appellant) appeals the circuit court's grant of a directed verdict with respect to her malpractice claim in favor of Haynsworth, Sinkler & Boyd, P.A. (Haynsworth), Manton Grier, and James Y. Becker (collectively Respondents), and award of sanctions against her. We affirm.

FACTS/ PROCEDURAL BACKGROUND

Appellant, an ophthalmologist currently in private practice in Sullivan's Island, South Carolina, was previously a member of the consulting medical staff of Tenet HealthSystem Medical, Incorporated, d/b/a East Cooper Community Hospital, Incorporated (the Hospital).[1] On September 10, 1997, Appellant lost her privileges to admit patients and perform procedures at the Hospital. Appellant engaged Respondents to represent her in a legal action against the Hospital on May 5, 1998. On Appellant's behalf, Respondents pursued an unsuccessful appeal for reinstatement of full admitting privileges through the Hospital's administrative process, which was exhausted in October 1998.

In March 1999, Respondents filed a lawsuit in federal court on Appellant's behalf, alleging violations of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, *et seq.* (2004), as well as pendant state law claims.[2] Respondents filed a request for temporary injunction, which would permit Appellant to perform medical procedures at the Hospital. On November 22, 1999, the United States District Court for the District of South Carolina granted a temporary injunction reinstating Appellant's admitting privileges based, in part, on Appellant's averments in an affidavit that her patients needed urgent surgeries and her inability to perform surgery at the hospital was causing her to lose patients. However, because Appellant did not perform a single surgery in the wake of the temporary injunction, the district court dissolved the injunction on January 25, 2000, because "the alleged harm suffered by [Appellant's] current patients had not materialized."[3] Furthermore, the district court held that Appellant and Respondents failed to comply with the scheduling order and the rules of discovery. Appellant blames Respondents for the dissolution of the injunction, claiming that Respondents did not act with due diligence on her behalf because she disputed their fees and refused to pay her legal bills. Respondents, however, attribute the dissolution of the

---

[1] Appellant also holds a license to practice law in South Carolina, but has not practiced in nearly thirty years with the exception of representing herself in litigation related to this matter.

[2] According to Respondent Becker, he initially advised Appellant to file the lawsuit in state court, but she insisted on filing the federal action.

[3] Respondent Becker testified at trial that Respondents did not appeal the dissolution because an appeal would have been futile.

injunction to Appellant's failure to utilize the injunction to perform surgery while it was in place and her lack of cooperation during discovery.[4]

As the federal case began in earnest, a fee dispute arose between Appellant and Respondents, resulting in Respondents filing a motion to be relieved as counsel. Respondent Becker testified that the relationship broke down due to communication issues between the parties, Appellant's continued mischaracterization of the parties' engagement agreement as a contingency agreement, and Appellant's refusal to pay her legal bills. Appellant alleges that Respondents agreed to take the case on a contingency fee basis once the preliminary injunction was successfully in place. However, the engagement letter states that "[f]ees generally are based on the time spent rounded up to the nearest tenth of an hour."[5] In addition, correspondence from Respondents to Appellant confirms that Respondents would not take the case on a contingency basis.[6]

---

[4] For example, Respondent Becker testified that Appellant cancelled her deposition two days before it was to be held without reason and withheld documents from Respondents that would have assisted them in their representation of Appellant.

[5] The engagement letter set forth the terms of the parties' agreement and was signed by Appellant and Respondent Becker.

[6] For example, in a letter dated December 15, 1999, Respondent Becker wrote:

> What I meant to convey to you [Appellant] in prior conversation was that I would seriously consider and seek the necessary internal firm approval for converting your matter to contingency fee basis for any fees to be incurred past the preliminary injunction stage. This process would involve first seeking management committee approval to do so. The second step would be making my own decision in consultation with other lawyers in the firm . . . . [However,] [n]either I nor other litigators in the firm believe that we should proceed on contingency fee basis.
>
> We will not proceed forward on a contingency fee basis . . . .

Likewise, in a December 27, 1999, letter to Appellant, Respondent Becker stated unequivocally, "We have clarified and you understand that we are not representing you on a contingent fee basis."

However, on January 25, 2000, Respondents withdrew the motion because the parties were able to resolve the dispute through the execution of an addendum to the engagement letter (the Addendum), setting forth the terms of Respondents' engagement moving forward. In the Addendum, Appellant agreed to pay $43,000 in attorney's fees upfront, and pay any addition legal fees incurred at an hourly rate.[7]

On January 31, 2000, Appellant filed a pro se motion requesting the district court reconsider the dissolution of the preliminary injunction. In this motion, she also indicated she was dissatisfied with Respondents' representation and was critical of how Respondents had handled her case to that point and sought additional time to obtain substitute counsel and complete discovery. Because Appellant still refused to pay her legal bills, on February 2, 2000, Respondents filed a motion to be relieved as counsel.

On April 17, 2000, the district court granted summary judgment in the Hospital's favor, and dismissed the pendant state law claims without prejudice. Pursuant to the terms of the engagement letter, Respondents did not appeal this decision and chose not to proceed in representing Appellant in any state action.[8]

---

[7] Appellant claims that the "[A]ddendum called for [Appellant] to pay [Respondents] $43,000.00 in fees, to be used if the case against [the Hospital] went to trial . . . . [, and that Respondents] never did represent [Appellant] in a trial, but failed to return the $43,000.00 in fees that [Appellant] had paid in advance for trial." However, the Addendum establishes that Appellant owed an outstanding unpaid balance of $19,471.44 and required Appellant to pay $15,000 upfront and "$25,000 now on account," and explicitly specified that fees "through the completion of discovery period and arguing of summary judgment motions will not exceed $25,000." The Addendum does not state that the remaining fees would be used only in the event the case went to trial.

[8] Appellant filed a pro se appeal from the district court's decision in the United States Court of Appeals for the Fourth Circuit, which was dismissed on November 17, 2000. She subsequently sought a writ of certiorari from the United States Supreme Court, which was denied on October 1, 2001. Ultimately, Appellant pursued a claim in state court with different representation that resulted in a settlement agreement with the Hospital in 2003. Appellant subsequently sued counsel in that action for malpractice, as well. That action was dismissed.

After Respondents and Appellant ended their professional relationship, Appellant sought the return of the $43,000 in attorney's fees she paid pursuant to the Addendum. Respondents refused, and on April 1, 2002, Appellant filed a Complaint alleging professional malpractice in handling her federal antitrust claims. She also included claims for breach of contract, quantum meruit, breach of fiduciary duty, violation of the Unfair Trade Practices Act, abandonment, civil conspiracy, promissory estoppel, constructive fraud, conversion, negligent misrepresentation, negligent supervision, fraud, and misrepresentation. However, Appellant did not deliver copies of the Summons and Complaint to the Richland County Sheriff's Department for service upon Respondents Becker and Grier until April 30, 2003.

Appellant filed her Summons and Complaint in Charleston County, and Respondents successfully moved to transfer venue to Richland County on July 24, 2002. Appellant appealed that decision on March 12, 2003. On May 1, 2003, the court of appeals dismissed the appeal as interlocutory. Appellant filed a petition for rehearing, which was denied on June 16, 2003. Appellant subsequently filed a petition for a writ of certiorari in this Court, which was denied on April 8, 2004. Appellant filed a petition for rehearing regarding the denial of certiorari, and remittitur was issued on April 22, 2004. Appellant filed a "Motion to Reinstate the Appeal" and a "Petition for Original Jurisdiction" on April 23 and April 26, 2004, respectively. After this Court refused to accept the first petition, Appellant filed a second petition for original jurisdiction. This Court denied the petition on June 9, 2004. Appellant then filed a petition for rehearing en banc, which the Court denied.

On August 17, 2004, the circuit court ordered Appellant, who had been attempting to proceed under a "J. Doe" pseudonym to proceed under her real name. On September 24, 2004, Appellant appealed this decision. The court of appeals dismissed this appeal as interlocutory on January 13, 2005. Appellant filed a petition for rehearing, which was denied on May 25, 2005. On June 20, 2005, Appellant filed a petition for a writ of certiorari and a motion for sanctions against Respondents in this Court, which were denied.

On October 29, 2004, Appellant appealed the circuit court's decision to dismiss various motions filed there by Appellant because venue had been transferred to Richland County. On June 16, 2005, the court of appeals dismissed this appeal. On June 28, 2005, Appellant filed a petition for rehearing which was denied, and on April 14, 2006, Appellant filed another petition for a writ of

certiorari in this Court, which was denied on October 19, 2006.

The circuit court transferred venue back to Charleston County on March 29, 2007. At this time, the case returned to the circuit court, where discovery resumed, and Appellant filed various discovery-related motions. In March 2008, the circuit court denied Appellant's motions. Appellant appealed this decision to the court of appeals, which dismissed the appeal as interlocutory on August 12, 2008. Appellant filed a petition for rehearing, which was denied on November 21, 2008, and a petition for rehearing en banc, which the court of appeals denied. On January 10, 2009, Appellant filed a "Petition for Writ of Certiorari in Original Jurisdiction and Petition for Certiorari" in this Court, which this Court denied on April 23, 2009. Remittitur was issued on April 29, 2009.[9] Subsequently, Appellant filed a petition for rehearing, which this Court denied on May 13, 2009.

Trial commenced on June 8, 2009, despite Appellant's last minute attempts to obtain a continuance. Prior to trial, the circuit court heard Respondents' pending motion for summary judgment, which he denied because he did not have time on the eve of trial to review the extensive file in this case. On June 12, 2009, the circuit court granted Respondents' directed verdict as to all causes of action.[10] Respondents subsequently moved for sanctions against Appellant. On July 19, 2009, Appellant filed a motion for new trial. The circuit court held a hearing on the post-trial motions on September 29, 2009. By order dated November 18, 2009, the circuit court denied Appellant's motion for a new trial, and granted Respondents' motion for sanctions.

Appellant filed a Notice of Appeal. On December 2, 2009, this Court issued an order directing all clerks of court to refuse any filings by Appellant unless they were signed by a licensed South Carolina attorney. Therefore, the court of appeals dismissed Appellant's appeal for failure to obtain a signature by a licensed attorney on February 24, 2010. On March 10, 2010, current counsel for Appellant moved to reinstate the appeal. However, Appellant failed to file a brief in time.

---

[9] The instant case made its first trial roster appearance on April 8, 2008, and the clerk of court notified the parties of the transfer to the trial roster at that time. Pursuant to Rule 40(b), SCRCP, the circuit court issued a scheduling order stating the case would not go to trial before January 1, 2009.

[10] The circuit court signed a formal order to this effect on July 14, 2009.

Therefore, the court of appeals granted Respondents' motion to dismiss the appeal on June 10, 2011. Appellant filed another motion to reinstate the appeal on June 15, 2011, and filed an initial brief and designation of matter on July 14, 2011. On August 24, 2011, the court of appeals issued an order accepting those materials and reinstating the appeal.

This Court transferred the case pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether Appellant timely commenced her action against Respondents Becker and Grier within the statute of limitations?

II. Whether the circuit court erred in granting a directed verdict in favor of Respondents as to Appellant's legal malpractice claims?

III. Whether the circuit court erred in refusing to grant Appellant's motion for continuance?

IV. Whether the circuit court erred in awarding sanctions against Appellant?

V. Whether the circuit court erred in dismissing the other causes of action?

ANALYSIS

I. Statute of Limitations

Appellant argues that the circuit erred in finding that the claims against Respondents Becker and Grier were barred by the statute of limitations. We disagree.

Section 15-3-530 of the South Carolina Code provides for a three year statute of limitations for legal malpractice lawsuits. S.C. Code Ann. § 15-3-530 (2005). "The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (citation omitted). "The exercise of reasonable diligence means

simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). "[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean*, 321 S.C. at 364, 468 S.E.2d at 647 (citation omitted).

In the instant case, as early as January 31, 2000, Appellant was openly critical of her attorneys' performance in a pro se filing in the district court:

> [My] Attorney, however, has not been timely: first taking months to schedule the Motion for Temporary Injunction; second not responding in a timely manner to your Honor's Scheduling order; third, not providing adequate representation and preparation of the case; and fourth, not notifying opposing counsel until the eleventh hour on January 4, 2000[,] of the request to reschedule the deposition which was made by letter dated December 17, 1999.

At that time, it is apparent that Appellant, an attorney, clearly should have known, and in fact *did* know, she had a potential claim against Respondents Becker and Grier, as these complaints appear to be the basis of her legal malpractice claim. Consequently, we find the statute of limitations began to run on January 31, 2000. *See Epstein*, 363 S.C. at 376, 610 S.E.2d at 818.

Appellant filed her Complaint against Respondents on April 1, 2002. However, Appellant did not timely serve her Complaint by forwarding it to the Richland County Sheriff's Department. *See* Rule 3(b), SCRCP ("For purposes of tolling the statute of limitations, an attempt to commence an action is equivalent to the commencement thereof when the summons and complaint are filed with the clerk of court *and delivered for service to the sheriff* of the county in which defendant usually or last resided . . . .") (emphasis added).[11]

[11] In 2002, the South Carolina legislature amended section 15-3-20 of the South Carolina Code. S.C. Code Ann. § 15-3-20 (Supp. 2002). The new provision provides that a civil action commences as of the date of filing if actual service is accomplished within 120 days after filing and became effective on May 24, 2002. *Id.* It only applies to causes of action filed on or after that date. *Id.* Therefore, the new rule does not operate to render Appellant's service effective. Regardless,

The circuit court found that Appellant did not deliver the summons and complaint to the Richland County Sheriff's Department until after April 30, 2003—more than three years after January 31, 2000, when the statute of limitations began to run.[12]

Appellant relies on the circuit court's order dated February 5, 2008, denying Respondents Becker and Grier's partial summary judgment motion based on non-service, claiming the circuit court found that they waived their objection to service and to the statute of limitations defense. While the circuit court did deny Respondents Becker and Grier's motion, the order makes no mention of waiver. Consequently, we hold Respondents Becker and Grier did not waive their right to assert the statute of limitations as a defense.

Appellant also argues that the circuit court should have tolled the statute of limitations after Respondents Becker and Grier appeared and subjected themselves to the personal jurisdiction of the court by responding to Appellant's complaint on May 1, 2002, and participating in a motion to dismiss for lack of jurisdiction and a motion to transfer venue.

We have never tolled the statute of limitations by the date on which a party subjects himself to the personal jurisdiction of the court, and we decline to do so here. We hold that the claims against Respondents are barred by the statute of limitations because Appellant did not deliver a summons and complaint to the Richland County Sheriff's Department until after April 30, 2003—more than three years after she should have known that she had a cause of action against Respondents Becker and Grier. *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818. Thus, we now turn to whether the remaining claims against Haynsworth were also properly dismissed by the circuit court.

II. Merits of the Professional Malpractice Claim

Appellant failed to accomplish service within 120 days after filing.

[12] Respondents served Requests to Admit on Appellant addressing the issue of when Appellant forwarded the summons and complaint to the Richland County Sheriff's Department. Because the circuit court found Appellant's responses inadequate, the circuit court deemed these requests admitted for all purposes.

Appellant argues that the Court erred in granting a directed verdict to Respondents with respect to her legal malpractice claim. We disagree.

"In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one inference or its inference is in doubt." *Harvey v. Strickland*, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002) (citation omitted). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* (citation omitted). In essence, the Court "must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Id.* (citation omitted). "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998) (citation omitted).

A. Expert Testimony

First, Appellant argues the circuit court erroneously found that she failed to present expert testimony to support her malpractice claim. During trial, Appellant tendered herself as an expert regarding the applicable standard of care for professional malpractice. The circuit court disqualified Appellant as an expert witness, finding she lacked the requisite experience as an attorney to testify as an expert concerning the applicable standard of care in a federal anti-trust action. Appellant argues this decision was erroneous. We disagree.

"The qualification of an expert witness and the admissibility of an expert's testimony are matters within the trial court's discretion" and will not be overturned absent a finding of abuse of that discretion. *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 344, 468 S.E.2d 633, 636 (1996) (citing *Creed v. City of Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993)). "An abuse of discretion occurs when the circuit court's rulings 'either lack evidentiary support or are controlled by an error of law.'" *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. Regardless of

whether the expert testimony is scientific, technical or otherwise, "all expert testimony must meet the requirements of Rule 702." *Graves*, 401 S.C. at 74, 735 S.E.2d at 655 (2012) (citing *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)).

> In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." Finally, the substance of the testimony must be reliable.

Id. (internal citations omitted) (quoting *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)).

With respect to a legal malpractice claim, a claimant must rely on expert testimony to "establish both the standard of care and the deviation by the defendant from such standard." *Gilliland v. Elmwood Props.*, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990) (citation omitted); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002). In this regard, a claimant must establish, through expert testimony, the following:

> (1) the existence of an attorney-client relationship;
>
> (2) a breach of duty by the attorney;
>
> (3) damage to the client; and
>
> (4) proximate cause of the plaintiff's damages by the breach.

Hall, 349 S.C. at 174, 561 S.E.2d at 656. Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005) (quoting *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)). "The question of the success of the underlying claim, if suit had been brought, is a question of law." *Id.* (footnote omitted).

Appellant argues that the mere fact that she is a licensed attorney qualifies her as an expert in the field of the applicable standard of care in a federal anti-trust action.

Regardless of her status as a licensed attorney, Appellant was required to demonstrate to the circuit court's satisfaction that she had the requisite training, experience, and education to testify as an expert witness in this case. Although Appellant is a licensed attorney, we agree Appellant was unqualified to testify as an expert regarding the applicable standard of care for attorneys handling a federal antitrust lawsuit due to the mere fact that she is licensed to practice law. First, Appellant is a physician, and has not practiced law in over thirty years. She does not represent clients, and in fact, has never represented a client other than herself at various points in this litigation, and has never represented a client in federal court, let alone handled a federal anti-trust action. Under these undisputed facts, the circuit court did not abuse its discretion in disqualifying Appellant from testifying as an expert as to the standard of care in this case.[13]

As Appellant failed to present any expert testimony supporting her contention that Respondents breached their standard of care, Appellant was unable to satisfy her burden of proof, meaning there was no issue of fact to submit to the jury. As such, the record before the circuit court permitted only one reasonable inference—that Respondents did not breach the standard of care, and were entitled to a direct verdict.

2. Respondents' Expert Testimony

[13] Furthermore, Appellant misapprehends the "common knowledge" exception to the requirement for expert testimony. Under the common knowledge exception, expert testimony is not required where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence on the part of the professional and to determine the presence of the required causal link between the professional's performance and the alleged malpractice. *Pederson v. Gould*, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986). Here, Appellant overestimates the legal knowledge of a layperson to understand the complex issues of her case, including the intricacies of civil procedure, the standard for applying and granting injunctions, and how to successfully pursue a federal anti-trust claim. Therefore, we find that Appellant's claim does not fall within the exception.

Alternatively, Appellant argues that Respondents' own expert, Professor John Freeman, conceded they committed professional malpractice. More specifically, Appellant avers that Professor Freeman, "testified that what [R]espondents did when they threatened to prejudice the case in order to extract fees was consistent with extortion, a form of blackmail, and criminal in South Carolina." We disagree.

Professor Freeman's comments have been taken out of context. In his testimony, Professor Freeman repeatedly and unequivocally stated that he believed Respondents did not commit malpractice and nothing Respondents did in representing Appellant would have altered the result given applicable federal anti-trust law.[14] However, during Appellant's cross-examination of Professor Freeman, the following colloquy ensued:

> Q: Do you believe that threatening a case in order to—threatening to prejudice a case in order to extract fees is—complies with the standard of care?
>
> A: No, ma'am. Let me be real clear on this. I . . . consider that would be unethical. I consider that would be a form of blackmail or extortion and criminal in South Carolina to do that . . . .
>
> Q: And isn't it true that if a contingency fee was in place, . . . then . . . forcing . . . the terms of this Addendum . . . would be a breach of the standard of care?

Respondents' counsel objected to the line of questioning, and the circuit court sustained the objection on the ground that Appellant assumed facts not in evidence, as Professor Freeman had already testified that there was no evidence of a contingency fee agreement between the parties.

Considering Professor Freeman answered a hypothetical question which was not based on the facts of this case, we find Appellant's reliance on this testimony is specious. Consequently, it cannot form the basis for establishing a breach of the

[14] For example, Professor Freeman testified, Appellant lost the "lawsuit because there was no case there—no federal antitrust case, and the judge found various technical, legal failings with the case."

standard of care.[15]

Thus, we affirm the circuit court's finding that Appellant's malpractice claim fails as a matter of law, and find the circuit court did not err in directing a verdict in favor of Respondents.

III. Continuance

Appellant argues that the circuit court erred in refusing to grant her a continuance, claiming the trial court set a trial date less than thirty days from the date of remittitur. We disagree.

Rule 40(b), SCRCP, provides:

> The clerk initially shall place all cases in which a jury has been requested on the General Docket. *A case may not be called for trial until it has been transferred to the Jury Trial Roster. Trial shall be had no earlier than 30 days from the date the case first appears on the Jury Trial Roster*. Cases shall be called for trial in the order in which they are placed on the Jury Trial Roster, *unless* the court in a Scheduling Order has set a date certain for the trial, *or, after the case has been set on the Jury Trial Roster, the court, upon motion, grants a continuance as provided in (i) below*. The first 20 cases on the Jury Trial Roster at the opening of court on the first day of a term, excluding those previously dismissed, continued or otherwise resolved before the opening of that term of court, may be called for trial.

(Emphasis added).

The instant case first appeared on a trial roster on April 8, 2008, and the clerk of court notified the parties of the transfer to the trial roster at that time. On that date, the circuit court issued a scheduling order stating the case would not be set for trial before January 1, 2009. This Court denied certiorari after Appellant instituted interlocutory appeals stemming from a discovery order issued by the circuit court. Remittitur was issued on April 29, 2009. On May 1, 2009, Appellant

[15] In any event, Professor Freeman qualified his answer by explaining that there was no evidence of any contingency fee agreement between the parties in the instant case, and that he did not believe Respondent breached any standard of care.

filed a motion to strike the case from the jury trial roster. The Chief Administrative Judge for the Tenth Judicial Circuit denied Appellant's motion to strike, noting that the case first appeared on the trial roster in April 2008. Therefore, after this Court denied Appellant's petition for rehearing, the Chief Administrative Judge returned the case to the jury roster. On May 18, 2009, the case was called for trial. After granting Appellant a one-week continuance, the court set the case for a date-certain trial to begin on June 8, 2009. Appellant objected and filed numerous motions to delay the start of the trial, arguing that she needed additional time to prepare and arrange for her counsel to be present. The chief administrative judge noted Appellant had previously requested numerous continuances to obtain counsel, but had failed to do so in the past. Consequently, the circuit court denied Appellant's continuance request and allowed the case to proceed to trial on June 8, 2009.

Appellant argues that because the Court denied her motion on May 18, 2009, returning the case to the jury docket, the circuit court erred in commencing trial on June 8, 2009, less than thirty days from "remittitur." As stated previously, in actuality, remittitur was issued on April 29, 2009. Therefore, even assuming *arguendo* that Appellant's understanding of Rule 40(b) was correct, a trial date of June 8, 2009, fell more than thirty days after remittitur.

However, Appellant misapprehends Rule 40(b). Rule 40(b) provides, in pertinent part, that trial shall take place *no earlier* than 30 days from the date the case *first appears on the jury roster*. As stated, *supra*, Appellant's case first appeared on a trial roster on April 8, 2008. The mere fact that an appeals court touched the case does not re-start the cycle. Therefore, the trial date complied with Rule 40(b), SCRCP.

We further affirm the circuit court's denial of Appellant's request for a continuance. Under Rule 40(i)(1), SCRCP, a court may grant a continuance for cause as follows:

> As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court. Ordinarily such continuances shall be only until the next term of court. Each scheduled calendar week of circuit court shall constitute a separate term of court.

As noted by the chief administrative judge, Appellant did not establish good and

sufficient cause to continue her case to the next term of court, as she had repeatedly requested a continuance on the same ground of failure to secure counsel, and no counsel appeared on her behalf. Moreover, due to the relative age of the case, the circuit court was justified in disposing of it. Therefore, we find the circuit court did not abuse its broad discretion in denying her request for a continuance. *See Pyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) ("The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record . . . . Moreover, the denial of a motion for a continuance on the ground that counsel has not had time to prepare is rarely disturbed on appeal.") (citations omitted); *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) ("The granting or refusal of a motion for continuance is within the discretion of the trial judge and his disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of appellant . . . . Review of them shows that reversals of refusal of continuance are about as rare as the proverbial hens' teeth.").

IV. Sanctions

Appellant argues the circuit court abused its discretion in awarding sanctions against her. We disagree.

On November 18, 2009, the circuit court found Appellant's lawsuit to be frivolous, and awarded sanctions to Respondents. The circuit court found Appellant was subject to sanctions based on the following: (1) both iterations of the South Carolina Frivolous Civil Proceedings Sanctions Action, S.C. Code Ann. §§ 15-36-10, et seq. (2005) and S.C. Code Ann. § 15-36-10 (Supp. 2012) (the FCPSA); (2) Rule 11, SCRCP; and (3) the court's inherent authority to award sanctions.

A. The FCPSA

Because "the decision whether to impose sanctions under the FCPSA is a decision for the judge, not the jury, it sounds in equity rather than at law." *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003) (refusing to adopt the more deferential "abuse of discretion" federal standard of review in assessing decisions to impose sanctions under the FCPSA); *see also Se. Site Prep, L.L.C. v. Atl. Coast Builders & Contractors, L.L.C.*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011) ("The determination of whether attorney's fees should be awarded under Rule 11 or under the [FCPSA] is treated as one in equity.").

Therefore, an appellate court reviews the findings of fact with respect to the decision to grant sanctions under the FCPSA by "taking its own view of the evidence." *Father*, 353 S.C. at 260, 578 S.E.2d at 14 (citing S.C. Const. art. V, § 5); *see also* S.C. Code Ann. § 14-3-320 (Supp. 2012). However, "[t]he 'abuse of discretion' standard . . . does . . . play a role in the appellate review of a sanctions award." *Father*, 353 S.C. at 261, 578 S.E.2d at 14. For example, "where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citation omitted); *Se. Site Prep*, 394 S.C. at104, 713 S.E.2d at 654. "An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." *Father*, 353 S.C. at 261, 578 S.E.2d at 14.

As an initial matter, Appellant contends that the circuit court erred in sanctioning her under the 2005 revised version of the FCPSA, and argues that the circuit court should have instead relied on the pre-2005 version of the FCPSA, as she filed the original complaint in 2002. Therefore, she claims the circuit court erred in basing sanctions on her amended complaint, which she filed in 2007. To this end, Appellant argues that her amended complaint "relates back" to her original complaint pursuant to Rule 15(c), SCRCP. *See* Rule 15(c), SCRCP ("Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."). Therefore, Appellant contends, the action on which the sanctions were based was not a "new" action for purposes of dating the sanctions.

Regardless of the version applied, we find the circuit court did not err in sanctioning Appellant pursuant to the FCPSA.

Under the prior provisions of the FCPSA:

> Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:
>
> (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

> (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (2005). Thus, the party seeking sanctions bears the burden of proving:

> (1) the other party has procured, initiated, continued, or defended the civil proceedings against him;
>
> (2) the proceedings were terminated in his favor;
>
> (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings;
>
> (4) the aggrieved person has incurred attorney's fees and court costs; and
>
> (5) the amount of the fees and costs set forth in item (4).

Id. § 15-36-40.[16]

---

[16] In 2005, the General Assembly substantially amended section 15-36-10, and repealed sections 15-36-20 through -50. *See* Act No. 27, 2005 S.C. Acts 114, § 5 (effective July 1, 2005) (revising § 15-36-10); Act No. 27, 2005 S.C. Acts 121, § 12 (effective March 21, 2005) (repealing §§ 15-36-20 through -50).

> Section 15-36-10 now reads, in pertinent part:
>
> At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.

S.C. Code Ann. § 15-36-10(C)(1) (Supp. 2012).

Here, the circuit court found:

> As became evident throughout the trial, [Appellant] filed a non-meritorious and baseless lawsuit. Prior to filing suit, [Appellant] obviously conducted no serious investigation of the facts she would be required to prove to substantiate her wide-ranging claim. Rather, the entire tenor of [Appellant's] case appears to be her belief that she is right and her former lawyers and 4 other courts are all wrong. [Appellant] failed to develop any evidence that could satisfy her burden of proof at trial. Any reasonable attorney would conclude that [Appellant's] entire case was completely frivolous and was brought, and continued for seven years, without any reasonable basis.
>
> [Appellant] engaged in dilatory litigation tactics and appealed numerous interlocutory matters, including orders regarding venue and several orders on discovery matters. These appeals were likewise frivolous and dilatory. [Appellant] also submitted numerous affidavits and memoranda accusing [Respondents] and [Respondents'] counsel of engaging in all manner of inappropriate and abusive conduct, each of which has been dismissed and discounted by the Court, and all of which were submitted without reasonable basis. [Appellant] has never accepted the rulings of the Court and has moved for reconsideration on each and every order denying whatever relief she sought, sometimes multiple times.

The Record supports the circuit court's finding that Appellant's claim was frivolous. However, Appellant argues that failure of the moving party to prevail on summary judgment under any circumstances precludes an award of sanctions pursuant to the the FCPSA based on the reasoning of *Hanahan v. Simpson*, 326 S.C. 140, 156–58, 485 S.E.2d 903 (1997).[17]

[17] In *Hanahan v. Simpson*, 326 S.C. 140, 156–58, 485 S.E.2d 903, 911–13 (1997), this Court overturned sanctions awarded against an appellant under the FCPSA. In *Hanahan*, the appellant, the daughter of the decedent, challenged the will left behind by her late father to dispose of his $48 million estate. 326 S.C. at 146, 485 S.E.2d at 906. She sued his estate alleging fraud, mistake, undue influence, and lack of testamentary capacity. *Id.* The estate moved for summary judgment, and the court denied the motion. *Id.* After a trial on the merits, the jury returned a verdict against the daughter, and the circuit court sanctioned the daughter pursuant

Even if Appellant's interpretation of *Hanahan* is correct, the circuit court also imposed sanctions pursuant to Rule 11, SCRCP, and we hold that Rule 11 sanctions were appropriate in this case.

Under Rule 11,

> Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay . . . .
>
> If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Rule 11(a), SCRCP.[18]

---

to the FCPSA. *Id.* On appeal, this Court acknowledged that there was a split of authority as to whether sanctions may be awarded under the FCPSA notwithstanding the denial of a summary judgment. *Id.* at 157, 485 S.E.2d at 912. Nevertheless, the Court reversed the circuit court's award of sanctions, reasoning that if the daughter's case survived a motion for summary judgment and was "submitted to the jury" because of its merits, "it cannot be deemed frivolous" later. *Id*.

[18] Because we find that sanctions were appropriately awarded pursuant to Rule 11, SCRCP, we do not reach the question of whether sanctions were appropriate according to the Court's inherent authority to award sanctions. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)

The circuit court found that Appellant engaged in "dilatory litigation tactics," lodged "frivolous and dilatory appeals," filed affidavits and memoranda "without reasonable basis," and moved for reconsideration after nearly every ruling made by the circuit court. Without a doubt, the circuit court did not abuse its discretion in awarding sanctions against Appellant in this case. Therefore, we affirm.

V. Remaining Issues

Appellant also claims the circuit court erred in directing a verdict in favor of Respondents on the issues of breach of contract, quantum meruit, breach of fiduciary duty, violation of the Unfair Trade Practices Act, abandonment, civil conspiracy, promissory estoppel, constructive fraud, conversion, negligent misrepresentation, negligent supervision, fraud, and misrepresentation. However, Appellant addresses neither the merits nor the law of these issues in her brief and merely mentions them in a laundry list of claims she presented to the circuit court. Thus, we find Appellant abandoned these arguments. *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("A bald assertion, without supporting argument, does not preserve an issue for appeal.") (citation omitted).

CONCLUSION

For the foregoing reasons, the circuit court is

AFFIRMED.

KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in a separate opinion in which BEATTY, J., concurs.

(holding an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

JUSTICE PLEICONES: I concur but write separately as I view the proper disposition of several issues somewhat differently than does the majority.

The majority affirms the trial court's grant of a directed verdict to the individual respondents on the grounds of insufficient service. As I understand the applicable law, however, these respondents waived their right to rely upon the belated service when they failed to raise the issue pursuant to Rule 12(h), SCRCP. *See Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993). Failure to properly raise this issue under the rule also operates as a waiver of a statute of limitations defense. *Id.*; *see also Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000). Assuming appellant has properly preserved this argument,[19] this directed verdict ruling was incorrect.

I am also uneasy with the Court's discussion of the trial court's ruling that appellant was not qualified to testify as an expert. I fear the majority's opinion may be read to require a legal expert to have experience in the exact area of law that is the subject of the malpractice claim. Heretofore, we have not required such congruity. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596 (1997) (medical expert qualifications). With the caveat that an individual need not have practical experience in the exact same type of case in order to be qualified as an expert, I agree that there was no abuse of discretion in the trial court's decision not to qualify appellant as a legal expert. *Gooding*, *supra* (qualification of expert is within trial court's discretion). I therefore agree that the directed verdict should be affirmed as to both the firm and the individual respondents.

I agree with the majority that appellant cannot complain that Rule 40(b), SCRCP, was violated where more than 30 days passed after the remittitur was returned before the case was called for trial. Further, I agree with appellant that the original version of the FCPSA and not the amended version applies here. *See* 2005 S.C. Acts No. 27 § 16(3) 123 (revised FCPSA applies to causes of action arising on or after July 1, 2005). Thus the trial court erred as a matter of law in awarding sanctions under the FCPSA. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). I agree, however, that we should affirm the award of sanctions under Rule 11, SCRCP.

---

[19] To the extent her argument rests on the circuit court's March 2008 denial of the individual respondents' motion for summary judgment, appellant's argument fails as a matter of law. *E.g. Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994).

I concur in the result reached by the majority.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Town of Hilton Head Island, Respondent,

v.

Kigre, Inc., Appellant.

Appellate Case No. 2012-213239

Appeal from Beaufort County
The Honorable Marvin H. Dukes, III, Special Circuit Court Judge

---

Opinion No. 27396
Heard April 15, 2014 – Filed June 4, 2014

AFFIRMED

Thomas C. Taylor, of Hilton Head Island, for Appellant.

Gregory M. Alford, of Hilton Head Island, for Respondent.

PER CURIAM: This direct appeal involves a constitutional challenge to the Town of Hilton Head Island's ("Town") business license tax ordinance ("Ordinance"), which requires businesses within the Town to pay an annual license fee based upon a business's classification and gross income. We affirm the trial court's finding that the Ordinance is valid.

The legislature has specifically granted municipalities the authority to enact ordinances and "levy a business license tax on *gross income*." S.C. Code Ann. § 5-7-30 (Supp. 2013) (emphasis added). We emphasize that the business license fee is an excise tax—not an income or a sales tax. A business license fee is a tax on the privilege of doing business within the Town, and therefore, it is the manufacturing activity of Appellant Kigre, Inc. ("Kigre"), which occurs wholly within the Town limits, and not Kigre's receipt of income or sales of its products in interstate commerce that is the business activity being taxed. Kigre has no other manufacturing facility and pays no license fee to any other taxing jurisdiction. *See Carter v. Linder*, 303 S.C. 119, 123, 399 S.E.2d 423, 425 (1990) (finding "[a] business license fee is an excise tax on the owner for the privilege of doing business").

The Ordinance requires "[e]very person engaged or intending to engage in any calling, business, occupation or profession . . . in whole or in part, within the limits of the town" to obtain a business license and pay a license fee, the amount of which is determined by the classification of the business and its gross income. *See* Hilton Head Island, S.C., Code of Ordinances § 10-1-10 (Sept. 26, 1983). The Ordinance defines gross income as:

> The total revenue of a business, received or accrued, for one fiscal year collected or to be collected by reason of the conduct of business within the town, excepting therefrom income from business done wholly outside of the town on which a license tax is paid to some other municipality or a county and fully reported to the town. Gross income from interstate commerce shall be included in the gross income for every business subject to a business license fee.

Id. § 10-1-20(3) (Aug. 1, 2006). Further, section 10-1-60 provides a deduction from gross income for "business done wholly outside of the town on which a license tax is paid to some other municipality or a county." As previously noted, Kigre does not pay any license tax to any other municipality or county, either in South Carolina or anywhere in the world.

Kigre has clothed its many arguments in the premise that the Ordinance is not sound policy, for it is anti-business. However, it is not within our province to weigh-in on the wisdom of legislative policy determinations. Our judicial role is limited to determining whether the Ordinance withstands Kigre's constitutional challenges. *See Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C.

280, 300, 737 S.E.2d 601, 611 (2013) ("It is not the function of the courts to pass upon the wisdom or folly of municipal ordinances or regulations." (citation omitted)).

We have carefully reviewed the record on appeal and find Kigre's numerous challenges to be without merit. We affirm pursuant to the following authorities: *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 199 (1995) ("The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity."); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623–24 (1981) ("[I]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." (quotations and citation omitted)); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279–87 (1977) (overruling prior cases finding interstate commerce cannot be taxed by states and finding state taxes do not violate the Commerce Clause where the activity being taxed has a substantial nexus with the taxing jurisdiction, and the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to benefits provided by the state); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 425, 593 S.E.2d 462, 467 (2004) ("'A municipal ordinance is a legislative enactment and is presumed to be constitutional. The burden of proving the invalidity of an ordinance is on the party attacking it.'" (quoting *Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999))); *Eli Witt Co. v. City of W. Columbia*, 309 S.C. 555, 559, 425 S.E.2d 16, 18 (1992) ("It was not contemplated that the various phases of a business should be segregated and only that part taxed which was actually carried on within the corporate limits. The [business license] tax was imposed for the privilege of maintaining or conducting a place of business within that municipality and it was intended that the business should be considered as a whole. The gross income or volume of such business is merely made the basis on which the tax is graduated." (citation omitted)); *Carter*, 303 S.C. at 124–25, 399 S.E.2d at 426 (finding a business license tax which classifies businesses and assesses taxes at a graduated rate according to the gross income of the business does not constitute an equal protection violation); *S. Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985) ("The burden is on the taxpayer to prove unconstitutionality beyond a reasonable doubt."); *N. Charleston Land Corp. v. City of N. Charleston*, 281 S.C. 470, 474, 316 S.E.2d 137, 139 (1984) (finding a different municipality's similar business license fee

ordinance employing the Standard Industrial Classification (SIC) system to be constitutionally permissible).

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Desiree Gabriel Brown, Respondent,

v.

Wendell Brown, Appellant.

Appellate Case No. 2011-187106

Appeal From York County
Brian M. Gibbons, Family Court Judge

Opinion No. 5236
Heard October 7, 2013 – Filed June 4, 2014

REVERSED

Thomas F. McDow, IV, and Erin K. Urquhart, both of the Law Office of Thomas F. McDow, of Rock Hill, for Appellant.

David Christopher Shea, of the Law Offices of Shea and Barron, of Columbia, for Respondent.

WILLIAMS, J.: In this appeal from the family court, Wendell Brown (Father) argues the family court erred in awarding attorney's fees to Desiree Brown (Mother) following the family court's decision to apply Worksheet C in calculating Father's child support obligation. We reverse.

FACTS/PROCEDURAL HISTORY

On March 6, 2009, Mother and Father were divorced by final decree (Final Decree). The Final Decree provided that Mother and Father would share joint custody of their three children. Father was awarded primary custody of eighteen-year-old Malcolm, while Mother was awarded primary custody of the two minor children.

The Final Decree ordered Mother and Father to share expenses equally for the children until Malcolm's emancipation in May 2009. The Final Decree also provided that "[c]hild support may be addressed after June 1, 2009, in a new action, without prejudice[, or the] parties may submit a consent order in this action to address future support for the [minor children]." The parties never entered into a consent order, and as a result, Mother filed an action for child support modification and attorney's fees on July 14, 2009.

On November 5, 2009, the family court issued a pendente lite order addressing child support. In the pendente lite order, the family court applied Worksheet A to calculate Father's child support obligation and required Father to pay $1,121 per month in child support retroactive to the filing of the child support modification action. Because of the retroactive application, the family court found Father to be in arrears totaling $3,923.50 and ordered Father to pay an additional $224.20 per month in child support until his arrearage was paid. The family court also ordered Father to pay Mother $1,500 in attorney's fees.

On November 30, 2009, Father filed a motion to reconsider the pendente lite order. The family court held a hearing to address Father's motion. After the hearing, the family court issued an order denying Father's motion on April 19, 2010 (April 2010 Order). Because Father did not pay child support following the pendente lite order, the family court found Father's total arrearage had increased to $10,649.50. The family court ordered Father to pay his arrearage on the same terms set forth in the pendente lite order. Mother requested additional attorney's fees at the hearing, but Mother failed to provide the family court with an attorney's fees affidavit. The family court held Mother's attorney's fees in abeyance.

Father failed to pay child support as required by the pendente lite and the April 2010 orders and the $1,500 in attorney's fees also required by the pendente lite

order. As a result, on May 27, 2010, Mother filed a rule to show cause claiming Father had not paid child support or attorney's fees in compliance with the orders. As a part of its pretrial order, the family court consolidated Mother's rule to show cause with her child support modification action so that all of the issues could be heard at the final hearing.

On November 10, 2010, the family court held a final hearing to address: (1) Mother's child support modification action, (2) Mother's request for attorney's fees, and (3) Mother's rule to show cause.

The primary issue in dispute at the final hearing related to which child support worksheet should be used to calculate Father's child support obligation. The number of overnight visits that a child spends with a parent is a factor in determining which child support worksheet to apply. Both parties presented testimony concerning the number of overnight visits Father had with the minor children.

Mother submitted an affidavit for attorney's fees for the child support modification action and all of the related proceedings. The affidavit stated Mother's attorney's fees totaled $10,714.

Father testified that prior to the final hearing he became current with his child support payments and had paid Mother the $1,500 in attorney's fees required by the pendente lite order.

On December 22, 2010, the family court issued a final order addressing all three issues from the final hearing. In the final order, the family court stated that it applied the following factors to determine Father's child support obligation:

> Father's gross monthly income of $8,674; Mother's gross monthly income of $6,927; Mother's payment of health insurance premiums of $176.00 per month; no alimony paid or received; no other child support paid; no other children in the household of either party; 161 overnights for Father; a Worksheet C calculation; and anticipation that Father will continue to pay some or similar levels of support on the children as set forth in [the exhibit detailing the minor children's expenses].

The family court determined Father's testimony concerning the number of overnight visits he received with the minor children each year to be more credible than Mother's testimony regarding overnight visitation. The application of Worksheet C reduced Father's monthly child support obligation from $1,121 per month to $415 per month. The family court held the reduced child support payment obligation was retroactive to the date the child support modification action was filed, and as a result, Father was entitled to a $2,624 credit for overpayment.

The family court also ordered Father to pay an additional $5,000 of Mother's attorney's fees in the final order. The family court ordered Father to deduct the $2,624 credit from the award of attorney's fees to Mother. As a result, Father was required to pay $2,375 toward Mother's attorney's fees. The family court determined an award of attorney's fees was appropriate because Father was in a better financial position to pay attorney's fees. While the family court acknowledged that Father was more successful in the action, the family court concluded "this was a relatively simple case which was drawn out of proportion by Father." Additionally, the family court considered that Father had already paid $1,500 of the $10,714 Mother accrued in attorney's fees as well as the fact that Mother's attorney's fees from the April 2010 Order had been held in abeyance. Finally, the family court found Father was not in willful contempt.

Father filed a motion to reconsider the award of attorney's fees, arguing the award was not appropriate or reasonable. The family court denied Father's motion to reconsider. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). (footnote omitted). The burden is upon the appellant to convince the appellate court that the preponderance of the evidence is against the family court's findings. *Id*. "Stated differently, de novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." *Id*. at 388-89, 709 S.E.2d at 654 (italics omitted).

LAW/ANALYSIS

Father argues the family court erred in awarding Mother $5,000 in attorney's fees. We agree.

In determining whether to award attorney's fees, the family court should consider the following: (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 fees 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 addition to the *E.D.M.* factors, "[t]his court has previously held when parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees." *Bodkin v. Bodkin*, 388 S.C. 203, 223, 694 S.E.2d 230, 241 (Ct. App. 2010).

In the instant action, we find the application of the *E.D.M.* factors cannot support awarding Mother attorney's fees. Accordingly, we hold the family court erred in awarding Mother attorney's fees.

Upon review of the parties' financial records, we find that three of the four factors do not weigh heavily in favor of either party. We find Mother and Father are in a similar position with regard to their financial conditions, their ability to pay their attorney's fees, and the respective impact the fees will have upon each party's standard of living. Regarding the remaining factor, beneficial results, we agree with the family court's finding that Father was more successful than Mother in this litigation. The primary issue before the family court was the amount of Father's child support obligation, and with respect to this issue, Father attained a beneficial result by successfully petitioning for a reduction in his child support obligation. This reduction was caused by the family court's decision to apply Worksheet C instead of Worksheet A. The decision to change to Worksheet C was primarily based upon the family court agreeing with Father's testimony concerning the number of overnight visits and the family court's anticipation that Father would continue to spend a similar amount on voluntary expenses for the minor children.

The family court also ruled in Father's favor regarding Mother's rule to show cause. The family court found Father was not in willful contempt. Father was current with his child support payments and had paid Mother $1,500 in attorney's fees pursuant to the pendente lite order.

Mother argues the family court's award of attorney's fees was also based on Father's failure to cooperate in the litigation. Mother cites to the final order in which the family court stated that "this was a relatively simple case which was drawn out of proportion by Father." We are aware that a party's lack of cooperation is a sufficient basis to assess attorney's fees. *See Spreeuw v. Barker*, 385 S.C. 45, 73, 682 S.E.2d 843, 857 (Ct. App. 2009) (holding a party's lack of cooperation serves as an additional basis for the award of attorney's fees). However, in this instance, the record does not support the family court's conclusion that Father's lack of cooperation merited an imposition of attorney's fees.

There is evidence that Father was late in paying child support and attorney's fees pursuant to the pendente lite order and child support pursuant to the April 2010 Order. However, there is no evidence in the record that Father's failure to timely pay child support prolonged these proceedings. Father paid his arrearage and fees in full by the date of the final hearing. The family court declined to hold Father in contempt for his failure to timely pay child support, and Mother did not appeal the family court's ruling on her rule to show cause.

Mother also argues that Father's motion to reconsider the pendente lite order increased her costs. Father's motion to reconsider may have initially been unsuccessful in obtaining a reduction in his child support obligation, but Father ultimately prevailed on the issue raised in the motion. Accordingly, we fail to see how Father's motion to reconsider needlessly increased costs or prolonged the proceedings.

We find no other evidence in the record regarding Father's lack of cooperation that would lend support for an award of attorney's fees. Because the *E.D.M.* factors favor Father, we find the family court erred in assessing $5,000 in attorney's fees against Father and accordingly reverse the family court's decision on this issue.

CONCLUSION

Based on the foregoing, we find the family court erred in awarding Mother attorney's fees.[1] Accordingly, we reverse the family court's award of $5,000 in attorney's fees to Mother.

---

[1] In addition, Father argues the $5,000 Mother was awarded in attorney's fees is an unreasonable amount. Because the family court erred in awarding attorney's fees

REVERSED.

THOMAS and CURETON, JJ., concur.

---

to Mother, we find this issue is moot. *See Nemeth v. Nemeth*, 325 S.C. 480, 487 n.3, 481 S.E.2d 181, 185 n.3 (Ct. App. 1997) (reversing the family court's award of alimony and declining to address whether the family court erred in the amount of alimony it awarded because it was a moot issue following the reversal of the award).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lee C. Palms and Nelle S. Palms, as Guardians ad Litem for L.P., a minor, Respondents,

v.

The School District of Greenville County, Appellant.

Appellate Case No. 2013-002232

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 5237
Heard May 20, 2014 – Filed May 30, 2014

REVERSED

Thomas Kennedy Barlow and Kenneth L. Childs, Childs & Halligan, PA, both of Columbia, and Rodney Douglas Webb, of Greenville, for Appellant.

Carl F. Muller, of Greenville, for Respondents.

J. Theodore Gentry and Wade S. Kolb III, Wyche, P.A., both of Greenville, for amici curiae GeriAnn Bell and David Bell, as Guardians ad Litem for J.B., a minor, and Susan Stall and Russell Stall, as Guardians ad Litem for H.S., a minor.

FEW, C.J.: In this appeal, we hold it is not appropriate for courts to review the decisions of school administrators and school districts regarding how a student's grade point average (GPA) and class rank should be calculated, except on allegations of corruption, bad faith, or a clear abuse of power. We reverse.

I. Facts and Procedural History

In the fall of 2012, L.P. transferred from Riverside Military Academy in Georgia to Southside High School in Greenville County to begin his junior year. School administrators at Southside calculated L.P.'s GPA using the grades shown on his transcript from Riverside. According to this initial calculation, L.P. was the highest ranked student in Southside's junior class. Another student's mother expressed concern to Southside's administrators that Riverside's grading policy required some of L.P.'s grades to be inflated, and thus Southside incorrectly calculated L.P.'s GPA. Southside's administrators initially informed the student's mother they calculated L.P.'s GPA according to the School District's grading policy, and they would not change the calculation. Eventually, however, Southside recalculated L.P.'s GPA from 5.215 to 5.048, which reduced his class rank from first to sixth.

L.P.'s parents met with school administrators at Southside and expressed their dissatisfaction with the recalculation, but Southside refused to restore L.P.'s original GPA and class rank. L.P.'s parents then filed this lawsuit, asserting the School District violated South Carolina law and its own grading policy in recalculating L.P.'s GPA. They sought a writ of mandamus directing the School District to restore L.P.'s GPA and class rank to their original values, and an injunction prohibiting the School District from altering his GPA in a manner inconsistent with the writ. The trial court issued an order granting the writ of mandamus and injunction.

II. Justiciability

We find the trial court should not have reached the merits of the issues raised in this case because these issues are not appropriate for judicial determination. Our supreme court has refused to interfere with the internal decisions of school administrators and school districts "unless there is clear evidence of corruption, bad faith, or a clear abuse of power." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005); *accord Singleton v. Horry Cnty. Sch. Dist.*,

289 S.C 223, 227-28, 345 S.E.2d 751, 753-54 (Ct. App. 1986). The court has recognized that judicial review of such decisions must be limited to allow educational authorities to exercise the discretion necessary to carry out the duties imposed upon them. *See Laws v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978) ("In view of the powers, functions, and discretion which must necessarily be vested in educational authorities if they are to execute the duties imposed upon them, this Court cannot substitute its judgment for that of these authorities.").

Here, L.P.'s parents did not allege the School District acted corruptly or in bad faith, or abused its power, and they presented no evidence that would support such an allegation. The trial court commented in its order it "assign[ed] no blame to anyone for the change" in L.P.'s GPA, and stated the School District may have made the change "in a well-intentioned effort at what it considered to be fairness and equality in interpreting [L.P.'s] transcript from [Riverside]." We find no basis to question the trial court's characterization that the School District acted with a good-faith desire to place its students on equal footing academically.

We acknowledge that the cases cited above setting the standard for court involvement in school affairs are not factually identical to this case. In *Davis*, the decision at issue involved financial incentives for school district employees who obtained national board certification. 365 S.C. at 632-33, 620 S.E.2d at 66-67. *Singleton* involved an employment dispute, where the plaintiff sought to expunge a two-day suspension from his record and recover lost pay for those days. 289 S.C. at 224-26, 345 S.E.2d at 752-53. However, we believe the restraint the courts exercised in those cases is even more appropriate here, where we are asked to intervene in an even more fundamental function of a school district—grade calculation.

We also find support for our decision in several opinions of the Supreme Court of the United States. In *Epperson v. Arkansas*, the Court cautioned that judicial intervention in the operation of the public school system requires "care and restraint." 393 U.S. 97, 104, 89 S. Ct. 266, 270, 21 L. Ed. 2d 228, 234 (1968). It further noted, "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* In subsequent cases, the Court has exercised caution in deciding cases involving decisions of academic institutions. *See Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 92,

98 S. Ct. 948, 956, 55 L. Ed. 2d 124, 136 (1978) ("Courts are particularly ill-equipped to evaluate academic performance."); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 513, 88 L. Ed. 2d 523, 532 (1985) ("Considerations of profound importance counsel restrained judicial review of the substance of academic decisions.").

The circumstances of this case demonstrate that courts should not intervene in academic disputes. This conflict appears to have arisen when L.P. informed another Southside student that Riverside's grading policy provided that five points be added to a student's grade for honors courses, and ten points be added for certain advanced placement courses. The other student's mother contacted Riverside and verified these provisions of its grading policy. She then emailed administrators at Southside to explain Riverside's policy and complain that "when [L.P.] transferred into Southside, his already weighted courses got another 'weighting' since we weight ours a different way." She wrote, "I do not believe that [L.P.'s] GPA is accurately reflected because it seems he has been double-bumped." After a series of emails between school administrators, district officials, and Riverside that lasted three months, Southside changed the grades L.P. received in honors and advanced placement classes at Riverside and recalculated his GPA. This sparked another series of emails, letters, and meetings lasting an additional three months and ending only when the School District's lawyer wrote L.P.'s parents' lawyer to inform him the decision was final.

L.P.'s parents then filed this lawsuit claiming the School District's grading policy, which is actually a State policy that section 59-5-68 of the South Carolina Code (2004) mandates the districts follow, required Southside to accept the grades shown on the Riverside transcript and incorporate those grades into the formula Southside uses to calculate the GPA for a transferring student. The School District disagreed, contending "the four corners of [L.P.'s Riverside] transcript, at a minimum, create[] an ambiguity," and "[n]either South Carolina law nor the [grading policy] directly addresses which grades (actual or bumped) the School District should use in calculating [L.P.'s] GPA." L.P.'s parents dispute that his grades were "bumped," arguing Riverside teachers actually *deflate* students' grades in honors and advanced placement classes in anticipation of the points Riverside's policy provides will be added. They also argue the other parent's inquiry was improper in the first place because she had no access to L.P.'s grades and no right to contact Riverside or discuss the grades with Southside.

These questions of law and disputed facts are not part of our analysis, except to the extent they illustrate the difficulties courts and schools would face if we were to intervene in the academic decisions of schools and school districts. The necessity of addressing these and many other points of law and disputes of fact in order to resolve a lawsuit between parents as to whose child gets to be valedictorian demonstrates why our supreme court has kept the judiciary out of the internal affairs of schools and school districts. Our supreme court addressed these policy concerns in *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996):

> If students and parents were allowed to appeal every short-term suspension, then circuit courts could be flooded potentially with thousands of such cases. Not only would this place a severe strain on an already overburdened judicial system, but perhaps more importantly, the limited financial and human resources of schools and school districts would be deleteriously affected if every student suspension had to be defended through the court system. Imposing even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.

321 S.C. at 435-36, 468 S.E.2d at 866-67 (internal quotation marks omitted). We find the *Byrd* court's reasoning to be even stronger when applied to the question of whether courts should intervene in decisions regarding the calculation of a student's grades and GPA.

III. Conclusion

We find the trial court erred in reaching the merits of this case. The trial court should have dismissed the case because it does not present a justiciable controversy. We therefore **REVERSE** the trial court's order. In addition, we **SUPERSEDE** the trial court's injunction and specifically permit the School District to immediately recalculate L.P.'s GPA in accordance with its own interpretation of its grading policy as applied to the facts of this case.

SHORT and GEATHERS, JJ., concur.