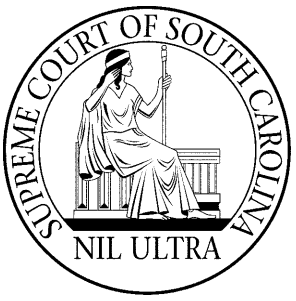

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 18, 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UNPUBLISHED OPINIONS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

EXTENSION TO FILE PETITION – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27370 - Dr. Cynthia Holmes v. East Cooper Community Hospital	Denied 6/13/2014
27380 - Sarah Dawkins v. Union County Hospital	Denied 6/11/2014
27392 - David Ray Tant v. SCDC	Pending
2014-MO-010 - Amy Davidson v. City of Beaufort	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2014-UP-223-Permanent General v. Karen D. Givens

2014-UP-224-State v. James E. Wise

2014-UP-225-In the matter of Ronald Owen #2

2014-UP-226-State v. India Sowell

2014-UP-227-South Carolina Second Injury Fund v. American Home Assurance Co.

2014-UP-228-State v. Taurus L. Thompson

2014-UP-229-State v. Antonio Thomas

2014-UP-230-State v. Travis Buck

2014-UP-231-Wiliam Outlaw v. State

2014-UP-232-State v. Willie Ritter

2014-UP-233-Stanley Wise v. State

2014-UP-234-State v. Julian Young

2014-UP-235-Rest Assured v. SCDEW

PETITIONS FOR REHEARING

5174-State v. Dondre Scott	Denied 06/16/14
5203-James Arthur Teeter III v. Debra M. Teeter (substituted opinion)	Pending
5205-Neal Beckman v. Sysco Columbia	Pending

5214-The State v. Alton Wesley Gore, Jr.	Pending
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	Denied 06/11/14
5227-State v. Frankie Lee McGee	Pending
5228-State v. Theodore Manning	Pending (2)
5229-Coleen Mick-Skaggs v. William Skaggs	Pending
5230-State v. Christopher Lee Johnson	Pending
5231-Centennial Casualty Co. v. Western Surety	Pending
5232-State v. Clarence Williams Jenkins	Pending
5234-State v. Kevin Tyrone Bennett	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-167-State v. David Gerrard Johnson	Denied 06/13/14
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	Denied 06/13/14
2014-UP-187-State v. Mark Peters	Denied 06/13/14

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

2014-UP-200-Branch Banking and Trust v. Luquire Pending

2014-UP-203-Helena P. Tirone v. Thomas W. Dailey Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal Granted 06/12/14

4764-Walterboro Hospital v. Meacher Pending

4888-Pope v. Heritage Communities 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

4977-State v. Phillip Miller Granted 06/11/14

4979-Major v. City of Hartsville Pending

4995-Keeter v. Alpine Towers International and Sexton Granted in part 06/12/14

4997-Allegro v. Emmett J. Scully Pending

4998-Wells Fargo Bank, NA v. Michael Smith Denied 06/11/14

5008-Willie H. Stephens v. CSX Transportation 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	
5046-State v. Kendra Samuel	Granted	06/11/14
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	Granted	06/12/14
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	Granted	06/12/14
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
5195-Laura Riley v. Ford Motor Company	Pending

5196-State v. James Anderson	Pending
5198-Statet v. Julia Gorman and Robert Palmer	Pending
5201-Phillip Grimsley v. SLED	Pending
5209-State v. Tyrone Whatley	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-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-601-Melanie Taylor v. Converse College	Granted in part 06/12/14
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-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	Granted 06/12/14

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	Granted	06/11/14
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-020-Joseph Marshall v. Carrie Marshall	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-082-W. Peter Buyck v. Williams Jackson	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending

2014-UP-088-State v. Derringer Young	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-114-Carolyn Powell v. Ashlin Potterfield	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kristie Ann McAuley, Respondent.

Appellate Case No. 2014-000724

Opinion No. 27399
Submitted May 8, 2014 – Filed June 18, 2014

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Bruce A. Byrholdt, of Byrholdt Drawdy, LLC, of Anderson, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension not to exceed eighteen (18) months. She requests any suspension be imposed retroactively to August 24, 2011, the date of her interim suspension. In the Matter of McAuley, 396 S.C. 215, 721 S.E.2d 767 (2011). In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School within twelve (12) months of reinstatement from any suspension. We accept the Agreement and suspend respondent from the practice of law in this state for eighteen (18) months, retroactive to August 24, 2011, the date of her interim suspension. Respondent shall complete the Legal Ethics and Practice Program Ethics School within twelve

(12) months of reinstatement to the practice of law. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent was employed as a full-time attorney with the Tenth Circuit Public Defender's Office. During her employment, respondent represented clients who were not financially qualified to receive a public defender. In addition, she accepted funds from some of the non-qualified clients whom she represented.

Respondent was arrested and charged with Misconduct in Office by a public official. She resigned from the Tenth Circuit Public Defender's Office on August 22, 2011. The Court placed respondent on interim suspension on August 24, 2011. Id.

On January 16, 2014, respondent pled guilty to Misconduct in Office by a public official. She was ordered to pay a $100.00 fine and various court costs. On the same day, respondent paid in full the fine and all court costs.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5(a) (lawyer shall not practice law in violation of regulation of legal profession); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as lawyer in other respects). Respondent also admits she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or bring courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for eighteen (18) months, retroactive to August 24,

2011, the date of her interim suspension. If reinstated to the practice of law, respondent shall complete the Legal Ethics and Practice Program within twelve (12) months of the date of her reinstatement and shall, within ten (10) days after completion of the program, submit proof of completion to the Commission on Lawyer Conduct. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dennis N. Lambries, Respondent,

v.

Saluda County Council; T. Hardee Horne, Chairman; William "Billie" Pugh, Councilman; Steve Teer, Councilman; Jacob Schumpert, Councilman; and James Frank Daniel, Sr., Councilman; Petitioners.

Appellate Case No. 2012-212790

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Saluda County
The Honorable William P. Keesley, Circuit Court Judge

Opinion No. 27400
Heard May 7, 2014 – Filed June 18, 2014

REVERSED

Christian G. Spradley, of Moore, Taylor & Thomas, P.A., of Saluda, and Katherine Carruth Goode, of Winnsboro, for Petitioners.

Richard R. Gleissner, of Gleissner Law Firm, LLC, of Columbia, for Respondent.

Robert E. Lyon, Jr., John K. DeLoache, and Alexander White Smith, all of Columbia, for Amicus Curiae South Carolina Association of Counties.

Danny C. Crowe, of Crowe LaFave, L.L.C., of Columbia, for Amicus Curiae the Municipal Association of South Carolina.

ACTING JUSTICE JAMES E. MOORE: This Court granted a petition for a writ of certiorari to review *Lambries v. Saluda County Council*, 398 S.C. 501, 728 S.E.2d 488 (Ct. App. 2012), in which the Court of Appeals held, in a matter of first impression, that Saluda County Council's practice of amending its agenda during regularly scheduled meetings violated S.C. Code Ann. § 30-4-80 (2007), the notice provision in South Carolina's Freedom of Information Act (FOIA). We reverse.

I. FACTS

On December 8, 2008, at a regularly scheduled meeting of the Saluda County Council, a motion was made and seconded to amend the posted agenda to take up a resolution. Both the motion and the resolution were voted upon and passed unanimously during the meeting, which was open to the public. The nonbinding resolution pertained to water and sewer services, although that subject was not originally listed on County Council's agenda.

Dennis N. Lambries ("Lambries") filed this action in the circuit court against the Saluda County Council and its members (collectively, "County Council"), alleging County Council's amendment of the agenda without notice and in the absence of exigent circumstances and its passage of a resolution that was not on the posted agenda violated FOIA's notice provision in section 30-4-80. Lambries brought the action as a citizen of Saluda County and noted he was also the Chairman of the Saluda County Water and Sewer Authority.

Lambries sought declaratory and/or injunctive relief. Specifically, Lambries asked the circuit court to declare that all resolutions, acts, ordinances, and statements made by County Council in violation of FOIA were null and void, and he sought injunctive relief to prevent future amendments of an agenda in the absence of "truly exigent circumstances," adopting the language contained in a

1984 South Carolina Attorney General Opinion.[1] Lambries contended the only exception in section 30-4-80 to the requirement that a public notice include an agenda, date, time, and place of meeting was for emergency meetings.

Lambries ultimately dropped his request that certain acts of County Council be declared void and sought only an interpretation of FOIA's notice provision that would prevent County Council from amending its agenda during regularly scheduled meetings. The circuit court denied Lambries's request for injunctive relief and found that under the clear terms of section 30-4-80, which referred to the publication of an "agenda, if any," an agenda was not even required for regularly scheduled meetings, and FOIA contained no prohibition on the amendment of a published agenda. The circuit court rejected Lambries's argument that a sentence in section 30-4-80 states that an agenda is required, finding it applied only to "called, special, or rescheduled meetings," not to "regularly scheduled meetings."

The circuit court noted the purpose of FOIA is for the activities of government "to be in open session and not behind closed doors." The court found that "the amendment of the agenda was performed in open session and in accordance with Saluda County Council rules of order as codified in their ordinances," and S.C. Code Ann. § 4-9-110 (1986) authorizes counties to establish their own rules and order of business. The circuit court denied Lambries's motion to alter or amend under Rule 59(e), SCRCP, reiterating that it "d[id] not agree with the plaintiff's fundamental position that a county council cannot amend agendas for regularly scheduled meetings without advance notice or exigent circumstances."

The Court of Appeals reversed in a split decision, the majority finding (1) an agenda is required for regularly scheduled meetings, and (2) County Council's amendment of an agenda less than twenty-four hours before the meeting violated the "spirit" and "purpose" of FOIA's notice requirement. *Lambries v. Saluda*

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[1] Op. No. 84-20, 1984 Op. S.C. Att'y Gen. 56, 1984 WL 159828. Lambries mischaracterizes the Attorney General's opinion as stating agendas are *required* for regularly scheduled meetings. However, the Attorney General actually stated that agendas are posted for regularly scheduled meetings "if there is an agenda[.]" *Id.* at *2. Moreover, the language referenced by Lambries, wherein the Attorney General "advise[d] that in the absence of truly exigent circumstances, [FOIA] requires a public body to give notice in the manner prescribed," was made in the context of stating FOIA's notice requirements did not apply to emergency meetings. *Id.* at *4.

County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct. App. 2012) (2-1 decision). This Court granted County Council's petition for a writ of certiorari. In addition, the Court has accepted briefs in support of County Council from the amici curiae, the Municipal Association of South Carolina and the South Carolina Association of Counties.

II. STANDARD OF REVIEW

As an initial matter, County Council contends "the Court of Appeals applied the wrong standard of review" when it found it could decide the issue presented in this case "with no particular deference to the circuit court." County Council contends the matter should be reviewed under an abuse of discretion standard, as indicated by the dissent.[2]

"Actions for injunctive relief are equitable in nature." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Id.* at 140-41, 691 S.E.2d at 470 (citation omitted).

"An order granting or denying an injunction is reviewed for [an] abuse of discretion." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the trial court's decision is *based upon an error of law* or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008) (emphasis added).

"Upon review of an action in equity, this Court may make factual findings based on its own view of the preponderance of the evidence." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 120-21, 603 S.E.2d 905, 907 (2004). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466, 636 S.E.2d 598, 605

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[2] The dissenting judge found, as an alternative basis for affirming, that the issuance of an injunction is within the trial court's discretion. *Lambries*, 398 S.C. at 507-08, 728 S.E.2d at 492 (Pieper, J., dissenting).

(2006). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Id.* at 467, 636 S.E.2d at 605-06.

We find that, while an injunction is equitable and subject to the trial court's discretion, where the decision turns on statutory interpretation—here, an interpretation of section 30-4-80 in FOIA—this presents a question of law. As a result, this Court need not give deference to the trial court's interpretation. If, based on this Court's assessment, the trial court committed an error of law in its interpretation of FOIA's notice requirement, that would constitute an abuse of discretion by the trial court.

III. LAW/ANALYSIS

On appeal, County Council contends the Court of Appeals erred in interpreting FOIA as prohibiting a public body from amending its agenda at a regularly scheduled meeting. In analyzing this issue, it will be helpful to consider the relevant FOIA provisions, the applicable principles of statutory interpretation, and the reasoning of the Court of Appeals before turning to the propriety of County Council's conduct.

A. Overview of FOIA Provisions

There is no common-law right to attend the meetings of government bodies, so many jurisdictions have legislated public meeting statutes, variously referred to as, *inter alia*, "open meeting laws" or "Sunshine Acts." *See generally* 4 Eugene McQuillin, *The Law of Municipal Corporations* § 13:10 (3d ed. rev. vol. 2011); 2 Am. Jur. 2d *Administrative Law* § 84 (2004).

In South Carolina, FOIA governs the public disclosure of the activities of public bodies, and it has provisions pertaining to public meetings as well as documents. S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2013). The essential purpose of FOIA is to protect the public from secret government activity. *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998).

In declaring FOIA's purpose, the General Assembly has found "that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public

policy." S.C. Code Ann. § 30-4-15 (2007). "Toward this end, [FOIA's] provisions . . . must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." *Id.*

FOIA's open meeting provision, section 30-4-60, provides "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to [section] 30-4-70 of this chapter." *Id.* § 30-4-60. Meetings may be closed for certain enumerated reasons, including such matters as the discussion of proposed contractual arrangements and the proposed sale or purchase of property; the receipt of legal advice related to a pending, threatened, or potential claim; and the discussion of the proposed location, expansion, or provision of services. *Id.* § 30-4-70.

FOIA's notice provision is set forth in section 30-4-80 and requires "written public notice" of the meetings of public bodies as follows:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their *regular meetings* at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, *if any*, for *regularly scheduled meetings* must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings.
>
> All public bodies must post on such bulletin board public notice for any *called, special, or rescheduled meetings*. *Such notice* must be posted as early as is practical but not later than twenty-four hours before the meeting. *The notice* must include the agenda, date, time, and place of the meeting. *This requirement* does not apply to *emergency meetings* of public bodies.

Id. § 30-4-80(a) (emphasis added). The statutory language is set forth in one paragraph, but it is separated into two paragraphs here for readability.

"Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held." *Id.* § 30-4-80(d).

Any citizen of this state may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of FOIA no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever occurs later. *Id.* § 30-4-100(a). The court may award attorney's fees and other litigation costs to a prevailing plaintiff. *Id.* § 30-4-100(b). Any person or group willfully violating FOIA shall be deemed guilty of a misdemeanor. *Id.* § 30-4-110.

B. Principles of Statutory Interpretation

"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, 5, 437 S.E.2d 6, 8 (1993). "The determination of legislative intent is a matter of law." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue,* 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010) (citation omitted).

If a statute is ambiguous, the courts must construe its terms. *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 750 S.E.2d 61 (2013). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Id.* at 128, 750 S.E.2d at 63 (citation omitted). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Id.* (citation omitted).

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Media Gen.*, 388 S.C. at 148, 694 S.E.2d at 530 (quoting *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "If a statute's 'terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense.'" *Id.* (citation omitted).

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03, at 94 (5th ed. 1992)). "Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* "While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a

plain statute." *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582; *cf. Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.").

C. Majority & Dissenting Opinions of the Court of Appeals

The majority of the Court of Appeals found the circuit court's interpretation of the "if any" language in section 30-4-80(a) to mean that an agenda was not required for regularly scheduled meetings "is inconsistent with the requirement that agendas be posted twenty-four hours prior to a meeting." *Lambries v. Saluda Cnty. Council*, 398 S.C. 501, 504, 728 S.E.2d 488, 490 (Ct. App. 2012). The majority found such a construction could allow County Council to "circumvent the notice requirement by simply not preparing a formal agenda and then discussing matters on an ad hoc basis at the meeting." *Id.* The majority reasoned "[s]uch conduct would not be in keeping with the purpose of FOIA, [so the court would] not construe a statute in a way that defeats the legislative intent." *Id.*

The majority noted the plain meaning of words in a statute would be rejected if it leads to an absurdity that is not in keeping with the legislative intent, and it found if no agenda is required for regularly scheduled meetings, then the publication requirement for instances when there is an agenda is "superfluous" because "[m]eetings with or without an agenda are equally open to the public." *Id.*

The majority stated, however, that if "agenda" (which is undefined in FOIA) "is not viewed narrowly as only a formally prepared piece of paper but instead as representing the impactful actions and business the paper memorializes, then the statute can be read harmoniously." *Id.* In such case, "the 'if any' language simply recognizes that regularly scheduled meetings of public bodies may occur during which *no formal action or discussion is to take place*. If so, there is no agenda and no requirement for publication of a blank piece of paper." *Id.* (emphasis added).

The majority acknowledged that the remaining issue, whether a published agenda of a regularly scheduled meeting could be amended during a meeting without violating FOIA, was "a close question[] because no provision appears to prohibit such action." *Id.* at 505, 728 S.E.2d at 490. However, the majority ultimately decided allowing an amendment "undercuts the purpose of the notice requirement in section 30-4-80." *Id.* The majority stated, "While Lambries does

not argue Council's deeds have been done with ill intent, permitting the amendments to the agenda during a regularly scheduled meeting is a practice that could be abused and *violates the spirit of FOIA*." *Id.* at 505, 728 S.E.2d at 491 (emphasis added). The majority conceded that its "decision may be inconvenient in some instances," *id.* at 506, 728 S.E.2d at 491, and this point has been extensively argued by the amici in their briefs to this Court.

In contrast, the dissenting judge found no FOIA violation by County Council, stating: "Section 30-4-80 is completely silent as to whether an amendment to a published agenda for a regularly scheduled meeting is permitted. What is clear is that an agenda is not required for a regularly scheduled meeting as indicated by the 'if any' language in the statute." *Id.* at 507, 728 S.E.2d at 491-92 (Pieper, J., dissenting). "Because an agenda is not required for a regularly scheduled meeting, it is difficult to conclude that the statute's silence clearly demonstrates legislative intent to prohibit a public body from amending a discretionary agenda." *Id.* at 507, 728 S.E.2d at 492. "Additionally, [County] Council's amendment of the agenda did not violate FOIA's purpose of providing the public access to a public body's actions behind closed doors." *Id.* "[T]he meeting was performed in an open and public manner, and the public was advised of both the meeting and the decisions reached at the meeting." *Id.*

"Moreover, because a FOIA violation can be criminal in nature, the law should be clear as to what is proscribed; otherwise, unintended prosecutions could be threatened." *Id.* "Until the legislature resolves this issue, I would not judicially impose requirements that would have the effect of creating new and potentially unintended criminal liability." *Id.* Lastly, the dissenting judge observed, "[I]n light of the admitted lack of legislative clarity on this issue, I would alternatively affirm the trial court's denial of Lambries' temporary injunction, as the decision to grant or deny an injunction is within the discretion of the trial court." *Id.* at 507-08, 728 S.E.2d at 492.

D. Propriety of County Council's Actions

We find the reasoning of the circuit court and the dissent to be most persuasive. In reviewing FOIA's notice provision, the General Assembly appears to have identified three broad classes of meetings and set forth different notice requirements for each:

(1) Regularly scheduled meetings. "All public bodies . . . must give written public notice of their *regular meetings* at the *beginning of each calendar year*. The notice *must* include the *dates, times, and places* of such meetings. Agenda, *if any*, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body *at least twenty-four hours* prior to such meetings." S.C. Code Ann. § 30-4-80(a) (emphasis added).

(2) Called, special, or rescheduled meetings. "All public bodies must post on such bulletin board public notice for any *called*, *special*, or *rescheduled meetings*. *Such notice* must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice *must* include the *agenda, date, time, and place* of the meeting." *Id.* (emphasis added).

(3) Emergency meetings. "*This requirement* [posting a notice including the agenda, date, time, and place not less than twenty-four hours before the meeting as required for called, special, or rescheduled meetings] does *not* apply to *emergency meetings* of public bodies." *Id.* (emphasis added).

The General Assembly did not specifically define any of the foregoing types of meetings in FOIA. However, we agree with the circuit court and the dissent that the plain language of the words "if any" can mean only that an agenda is *not* required for regularly scheduled meetings. To conclude otherwise would be to read the words "if any" completely out of the statute. In plain terms, written public notice of regularly scheduled meetings must be given at the *beginning* of each calendar year and must include the *dates*, *times*, and *places* of the meetings. An agenda, *if there is one*, must be posted at least twenty-four hours before the meeting. Thus, County Council could chose to issue no agenda at all.

To the extent the Court of Appeals found the "if any" language was meant to distinguish two types of regularly scheduled meetings, i.e., (1) those at "which no formal action or discussion is to take place," for which an agenda is not required because "publication of a blank piece of paper" serves no purpose, and (2) those involving action or discussion, which require an agenda, nothing in FOIA supports this reasoning.

To the contrary, FOIA makes it clear that meetings are not limited to instances where action is taken, as evidenced in section 30-4-20(d), which defines a "meeting" as "the convening of a quorum . . . *to discuss or act* upon a matter over which the public body has supervision, control, jurisdiction or advisory power."

S.C. Code Ann. § 30-4-20(d) (2007) (emphasis added); *see also* 62 C.J.S. *Municipal Corporations* § 308 (2011) ("Under an open meetings law, a meeting is a gathering of a quorum or more members of a governing body at which members discuss, decide, or receive information as a group on issues relating to the official business of the body. . . . A meeting is not limited to gatherings at which action is taken by a governing body. Deliberative gatherings are included as well, and deliberation in this context connotes not only collective decision-making but also the collective acquisition and exchange of facts in preparation for the final decision." (footnote omitted)).

Moreover, although the specific types of meetings are not defined in FOIA itself, in light of the General Assembly's references to these different meetings in section 30-4-80(a) and its general references in section 4-9-110 to meeting requirements, we believe the General Assembly made an intentional delineation because the terms do have commonly understood distinctions in the common parlance for procedures governing public bodies.

As other jurisdictions have long recognized, a "regular" meeting is one "convened at a stated time and place pursuant to a general order, statute or resolution." *Barile v. City Comptroller of Utica*, 288 N.Y.S.2d 191, 196 (Sup. Ct. 1968). Since notice is given at the beginning of the year, the public is well apprised of these meetings, which provide an ongoing opportunity for the public body to consider and act upon routine matters that arise throughout the year.

In contrast, a "special" meeting is a meeting called for a special purpose and at which nothing can be done beyond the objects specified for the call. *Id.; see also Stoddard v. Dist. Sch. Bd. for Sch. Dist. 91*, 12 P.2d 309, 312 (Or. 1932) ("A meeting called for a special purpose is a special meeting. A regular meeting is one not specially called, but one convened at a stated time and place pursuant to a general order, statute, or resolution."); 4 Eugene McQuillin, *The Law of Municipal Corporations* § 13:17 (3d ed. rev. vol. 2011) (stating regular meetings are provided for by ordinance, resolution, or motion under legal authority, while special or called meetings are convened by the chief executive officer or presiding officer of the body, or in some other definite way, upon due notice); 39B *Words and Phrases* (2006 & Supp. 2013) (citing authorities defining "special meeting" and distinguishing it from a regular meeting).

In South Carolina, statutory law governing county governments requires councils to hold at least one meeting each month in accordance with a schedule

prescribed by the council, and special meetings may be called by the chairman or a majority of the members after twenty-four hours' notice. S.C. Code Ann. § 4-9-110 (1986). A council must conduct its meetings in accordance with the general state law affecting the meetings of public bodies, but it is entitled "to determine its own rules and order of business." *Id.* This statute supports the premise that there is a distinction between regularly scheduled meetings and other meetings. Since the permissible topics for a special meeting are restricted to the "objects of the call," it is reasonable to infer that our General Assembly has purposefully chosen to mandate that an agenda be prepared for this type of meeting, as compared to a regularly scheduled meeting. The consideration of the limited subject matter necessarily dictates different notice requirements.

By mandating an agenda for regularly scheduled meetings and forbidding County Council from amending its agenda, the Court of Appeals is, effectively, treating a regularly scheduled meeting as a called, special, or rescheduled meeting. As County Council asserts, "[t]he majority's decision expands the scope of [] FOIA and imposes a new agenda requirement and a new prohibition against amendment of published agenda not contained in [] FOIA itself." It has long been the law of this state that where a statute's plain language is clear, a court is not allowed to change its meaning, and a court cannot speculate on legislative intention because to do so would be an assumption of legislative power. *State v. Lewis*, 141 S.C. 207, 139 S.E. 386 (1927); *see also Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

In sum, nowhere in FOIA is there a statement that an agenda is required for regularly scheduled meetings. Since what the General Assembly says in the text of the statute itself is the best evidence of legislative intent, *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581, we believe the legislative intent evidenced in the use of the phrase "if any" is that the issuance of an agenda for regularly scheduled meetings lies within the discretion of County Council. *Cf.* 62 C.J.S. *Municipal Corporations* § 148 (2011) ("The functions of a municipal corporation may be either imperative or discretionary. Whether any particular power or duty is mandatory, permissive, or discretionary is purely a question of legislative intent." (footnote omitted)).

If the General Assembly wanted to require an agenda for regularly scheduled meetings, it could have done so with the simple use of the word "shall," which generally signals a command. *Cf. City of Midwest City v. House of Realty, Inc.*, 198 P.3d 886, 891 n.6 (Okla. 2008) ("All public bodies shall give notice in writing

by December 15 of each calendar year of the schedule showing the date, time and place of the regularly scheduled meetings of such public bodies for the following calendar year. . . . In addition . . . , all public bodies shall, at least twenty-four (24) hours prior to such meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting . . . ; provided, however, the posting of an agenda shall not preclude a public body from considering at its regularly scheduled meeting any new business." (quoting Okla. Stat. tit. 25, § 311 (2001)); *cf. Grapski v. City of Alachua*, 31 So. 3d 193, 199 (Fla. Dist. Ct. App. 2010) (holding while Florida courts have recognized that notice of public meetings is mandatory, the preparation of an agenda that reflects every issue that may come up at a properly noticed meeting is not, and notice need not be given of every potential deviation from a previously announced agenda; the public has the right to attend open meetings, but no authority to interfere with the decision-making process.)

Nor is there any restriction contained in FOIA on the amendment of an agenda. We agree with the dissent that it appears the majority of the Court of Appeals engrafted this prohibition onto FOIA based on its subjective view of the "spirit" and "purpose" of FOIA. Although we understand the concerns articulated by the majority, the purpose of the notice provision in section 30-4-80 is to prevent government business from taking place in secret, as noted in our case law, *e.g.*, *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998), and in the General Assembly's statement of purpose in section 30-4-15. The public was not prevented from finding out the actions of County Council where the proposed amendment to the agenda and the resolution were both raised and voted upon in public and were recorded in the minutes of the meeting of County Council. Since County Council posted the regularly scheduled meeting at the beginning of the year and posted a discretionary agenda at least twenty-four hours prior to the meeting, it complied with the requirements of FOIA's notice requirement in section 30-4-80. *Cf. Dorsten v. Port of Skagit County*, 650 P.2d 220, 223 (Wash. Ct. App. 1982) ("The primary requirement for regularly scheduled meetings is that they be 'open to the public.' Notice of the agenda is required only for special meetings. RCW 42.30.080.").

Some jurisdictions have provisions in their open meetings laws that specifically address when and how amendments may be made. *E.g., Zoning Bd. of Appeals v. Freedom of Info. Comm'n*, 784 A.2d 383, 385 n.3 (Conn. App. Ct. 2001) ("The agenda of the regular meetings of every public agency . . . shall be

available to the public and shall be filed, not less than twenty-four hours before the meetings to which they refer . . . . Upon the affirmative vote of two-thirds of the members of a public agency present and voting, any subsequent business not included in such filed agendas may be considered and acted upon at such meetings . . . ." (quoting Connecticut's General Statutes, revision to 1997, § 1-21(a), recodified at § 1-225(c)); *see also* 29 Del. Code Ann. tit. 29, § 10004(e)(2) (Supp. 2012) ("All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . . ; however, the agenda shall be subject to change to include additional items . . . or the deletion of items . . . which arise at the time of the public body's meeting.").

In the absence of such a legislative directive here, we decline to judicially impose a restriction on the amendment of an agenda for a regularly scheduled meeting, especially when it is clear that no agenda is required at all. We find this is also the better public policy in light of the fact that a violation of FOIA can carry a criminal penalty, and we note this Court has previously declined to impose restrictions that are not expressly provided by the General Assembly in FOIA. *See, e.g. Wiedemann*, 330 S.C. at 535 n.4, 500 S.E.2d at 785 n.4 (stating "[t]here is no requirement, in section 30-4-60 or elsewhere in [] FOIA, that meetings of a public body be conducted in a **public** building" and holding "[a]bsent a specific statutory restriction, [] meetings may be held in locations other than public buildings"); *Herald Publ'g Co. v. Barnwell*, 291 S.C. 4, 11, 351 S.E.2d 878, 882 (Ct. App. 1986) (citing section 30-4-80(a) and stating FOIA "requires that public bodies post a public notice of any special meeting including the agenda, date, time and place of the meeting," but finding FOIA "does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session").

IV. CONCLUSION

We conclude FOIA's notice statute does not require an agenda to be issued for a regularly scheduled meeting, and FOIA contains no prohibition on the amendment of an agenda for a regularly scheduled meeting. Thus, we hold County Council did not violate FOIA in this instance. The imposition of any additional restrictions in FOIA is a matter for the General Assembly.

REVERSED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Darlene Dean, as Personal Representative of the Estate of Louise Porter, Respondent,

v.

Heritage Healthcare of Ridgeway, LLC, Uni-Health Post Acute Care-Tanglewood, LLC and UHS Pruitt Corporation, Appellants.

Appellate Case No. 2013-000509

Appeal From Fairfield County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27401
Heard April 1, 2014 – Filed June 18, 2014

REVERSED AND REMANDED

Todd W. Smyth and Joshua Steven Whitley, both of Smyth Whitley, LLC, of Charleston, South Carolina, for Appellants.

John D. Kassel and Theile Branham McVey, of Kassel McVey, and Gerald Jowers, Jr., of Janet, Jenner & Suggs, all of Columbia, and Kenneth G. Goode, of Winnsboro, South Carolina, for Respondent.

CHIEF JUSTICE TOAL: Heritage Healthcare of Ridgeway, LLC, Uni-Health Post-Acute Care - Tanglewood, LLC (Tanglewood), and UHS-Pruitt Corporation (collectively, Appellants) ask this Court to reverse the circuit court's denial of their motion to compel arbitration in this wrongful death and survival action involving Appellants' allegedly negligent nursing home care. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Tanglewood is a skilled nursing facility located in Ridgeway, South Carolina, and is owned and controlled by Appellants. In January 2007, Tanglewood and Darlene Dean (Respondent) entered into a nursing home residency agreement in which Tanglewood assumed responsibility for the care of Respondent's mother, Louise Porter (the patient). The same day, Respondent signed a separate, voluntary arbitration agreement (the Agreement).[1]

The Agreement states that:

> any and all controversies, claims, disputes, disagreements or demands of any kind . . . arising out of or relating to the [patient's residency agreement] with the Facility . . . or any service or care provided to the [patient] by the Facility shall be settled exclusively by binding arbitration. This means that the parties are waiving their right to a trial before a jury or a judge.

Further, the Agreement provides that:

> Any arbitration proceeding that takes place under this [] Agreement *shall follow the rules of the American Arbitration Association ('AAA')* and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceeding shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected *in accordance with the rules of the AAA*. The

[1] The patient did not sign either the residency agreement or the Agreement on her own behalf, although she was competent at the time of her admission to Tanglewood. Moreover, Respondent did not have a health care power of attorney empowering her to sign on the patient's behalf.

> parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

Id. (emphasis added). Finally, the Agreement contains a severability clause and states, in bold font directly above the signature lines, that the patient "is not required to sign this [] Agreement in order to be admitted to or to remain in the Facility." (Emphasis in original).

In 2009, the patient fell three separate times within a ten day period, fracturing her hip in the third fall. Over the next two months, the patient underwent two hip surgeries; however, due to complications following the surgeries, the patient died on September 30, 2009.

On December 20, 2011, Respondent—acting in her capacity as personal representative of her mother's estate—filed a Notice of Intent (NOI) to file a medical malpractice suit against Appellants, as well as an expert affidavit in support of her NOI. *See* S.C. Code Ann. § 15-79-125 (Supp. 2012). Respondent also alleged claims for survival and wrongful death.

Appellants requested discovery of all of the patient's medical records, which Respondent provided. The parties then engaged in the statutorily required pre-suit mediation; however, following an impasse, Respondent filed her complaint on March 23, 2012. In lieu of filing an answer to the complaint, Appellants filed a motion to dismiss pursuant to Rules 12(b)(1) and (6), SCRCP, or, in the alternative, a motion to compel arbitration and stay the litigation.

Respondent opposed the motion, arguing, *inter alia*, that the Agreement was unenforceable because the "forum selection" clause had failed. More specifically, Respondent claimed the portion of the Agreement stating that "[a]ny arbitration proceeding that takes place under this [] Agreement shall follow the rules of the [AAA]" meant that the parties had agreed to an arbitration proceeding administered exclusively by the AAA. However, since January 1, 2003, the AAA has refused to accept personal injury disputes without a post-injury agreement to arbitrate.[2] Thus, because Respondent viewed the "exclusive" arbitral forum as unavailable, she

[2] Am. Arbitration Ass'n, *Healthcare Policy Statement*, ADR.org, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011014 (last visited June 13, 2014).

contended it would be improper to compel arbitration.

Relying on *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009), the circuit court agreed, invaliding the Agreement in its entirety and refusing to compel arbitration between the parties.[3] Specifically, the court found that "the forum selection is an integral part of the [A]greement and cannot be remedied" because "the forum selected by [Appellants] will not hear this type of dispute." Because the court held the Agreement completely invalid, it declined to address any of Respondent's remaining arguments as to why the court should not compel arbitration between the parties.[4]

Appellants filed a motion to reconsider, which the circuit court denied. Appellants appealed, and this Court certified the appeal pursuant to Rule 204(b), SCACR.

STANDARD OF REVIEW

Arbitrability determinations are subject to *de novo* review. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). However,

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[3] The circuit court refused to compel arbitration for two reasons, namely "wrongful death actions are not something that's arbitrated, one, two Triple A doesn't take them." We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curiam) (invalidating West Virginia's policy refusing to refer wrongful death claims against a nursing home to arbitration).

[4] In addition to arguing that the specified forum was unavailable, Respondent asserted that: (1) the Federal Arbitration Act (FAA) did not apply because the residency agreement did not involve interstate commerce; (2) there was no meeting of the minds in forming the Agreement because Appellants' employee did not know how the AAA functioned; (3) Appellants waived their right to arbitrate by requesting discovery prior to the pre-suit mediation conference, participating in the mediation, and "waiting too long" to move to compel arbitration after the mediation concluded; and (4) there was no valid arbitration agreement at all because the patient, although competent, did not sign the Agreement, and Respondent had no authority to sign on the patient's behalf because she lacked a health care power of attorney.

a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.* at 453, 730 S.E.2d at 315. "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000); *accord Blue Cross Blue Shield of Ala. v. Rigas*, 923 So. 2d 1077, 1083 (Ala. 2005).

ANALYSIS

I. Interstate Commerce and the Federal Arbitration Act

As a threshold matter, we address whether federal or state arbitration law applies to the instant controversy. Respondent claims that the Federal Arbitration Act (FAA) does not apply to the Agreement because the residency agreement does not involve interstate commerce. (Citing *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993), *overruled in part by Cape Romain Contractors, Inc. v. Wando E., L.L.C.*, 405 S.C. 115, 123 n.5, 747 S.E.2d 461, 465 n.5 (2013)). We disagree.

"[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995), and "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315. To that end, the United States Supreme Court held in *Allied-Bruce* that, unless the parties specifically contracted otherwise, the FAA would apply whenever an arbitration agreement involves interstate commerce. 513 U.S. at 273–77; *Bradley*, 398 S.C. at 453–54, 730 S.E.2d at 315. Moreover, the Supreme Court clarified that the reach of interstate commerce—and thus the FAA—was coextensive with the broad reach of the Commerce Clause.[5] *Allied-Bruce*, 513 U.S. at 277; *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Thus, in practice, arbitration agreements enjoy a strong presumption of validity in federal and state courts. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118.

To ascertain whether an arbitration agreement implicates interstate commerce and the FAA, "the court must examine the agreement, the complaint,

[5] U.S. Const. art. I, § 8, cl. 3.

and the surrounding facts," focusing particularly on "'what the terms of the contract specifically require for performance.'" *Bradley*, 398 S.C. at 455, 730 S.C. at 316 (quoting *Thornton v. Trident Med. Ctr. L.L.C.*, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003)); *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117. This is generally a very fact-specific inquiry. *Cf. Thornton*, 357 S.C. at 95–96, 592 S.E.2d at 52 (citing *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117).

In arguing that the residency agreement did not involve interstate commerce, Respondent relied heavily on *Timms v. Greene*, which predated *Allied-Bruce*'s pronouncement regarding the breadth of interstate commerce. In *Timms*, the parties entered into a nursing home residency contract that included an arbitration agreement. 310 S.C. 469, 470–71, 427 S.E.2d 642, 643 (1993). After the plaintiff-resident suffered an injury at the hands of a nursing home employee, she filed suit instead of initiating arbitration proceedings, arguing that arbitration could not be compelled under the FAA because the contract was for the provision of patient-resident services in South Carolina and therefore did not involve interstate commerce. *Id.* at 472, 427 S.E.2d at 644.[6] In attempting to compel arbitration, the nursing home asserted, *inter alia*, that they purchased the majority of their goods, equipment, and supplies from out-of-state vendors. *Id.* at 473, 427 S.E.2d at 644.

This Court held that "the contract . . . [was] obscure, if not devoid, of any basis for holding that [interstate] commerce was involved." *Id.* at 472, 427 S.E.2d at 644. Specifically, the Court found the nursing home's assertion regarding the supplies and goods irrelevant because it was not the basis of the contract between the parties, which was to provide patient care services in a South Carolina facility. *Id.* at 473, 427 S.E.2d at 644. Therefore, the Court found the FAA inapplicable because the basis of the contract did not involve interstate commerce. *Id.*

Since the Supreme Court decided *Allied-Bruce*, many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA. Generally, these holdings center on a common theme: nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably

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[6] The *Timms* Court could not compel arbitration under state law because the South Carolina Uniform Arbitration Act does not apply to any claims "arising out of personal injury[, whether such claims are] based on contract or tort . . . ." S.C. Code Ann. § 15-48-10(b)(4) (2005 & Supp. 2012).

shipped across state lines from out-of-state vendors.[7]

We likewise find the terms of the residency agreement implicate interstate commerce and, thus, the FAA. Appellants are contractually required to provide meals and medical supplies, which are instrumentalities of interstate commerce. *Cf. Zabinski*, 346 S.C. at 580, 553 S.E.2d at 110 (explaining construction contracts involve interstate commerce because they are based on transactions for the purchase and use of materials and supplies from out-of-state vendors). Although the meals and medical supplies are irrelevant to the current dispute, they must nonetheless be considered because the residency agreement specifically requires Appellants provide these goods and supplies. *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316 (stating that the Court must "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce was involved" (internal marks omitted)). Although *Timms* might compel us to hold to the contrary, we find *Timms* is a relic of the past, decided before the broad definition of interstate commerce set forth in *Allied-Bruce*. Consequently, we explicitly overrule *Timms* in its entirety and find that the residency agreement here does, in fact, involve interstate commerce, and thus is governed by the FAA.

II. Validity of the Agreement

In essence, the outcome of this appeal turns on whether the unavailability of the AAA to serve as arbitrator dooms the Agreement as a whole. *See Meskill v. GGNSC Stillwater Greeley, L.L.C.*, 862 F. Supp. 2d 966, 972 (D. Minn. 2012). "This question has vexed courts across the country and resulted in a substantial split of authority." *Id.*

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[7] *See, e.g.*, *McCutcheon v. THI of S.C. at Charleston, L.L.C.*, No. 2:11–CV–02861, 2011 WL 6318575, at *5 (D.S.C. Dec. 15, 2011) (holding that the contracted-for care involved providing food and medical services from out-of-state vendors and thus involved interstate commerce); *Pickering v. Urbantus, L.L.C.*, 827 F. Supp. 2d 1010, 1014–15 (S.D. Iowa 2011) (same); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 668 (Ala. 2004) (same); *Triad Health Mgmt. of Ga., III, L.L.C. v. Johnson*, 679 S.E.2d 785, 787–88 (Ga. Ct. App. 2009) (same); *Miller v. Cotter*, 863 N.E.2d 537, 544 (Mass. 2007) (holding health care in general is an activity subject to federal control under the Commerce Clause and thus involves interstate commerce).

In resolving similar cases, the courts' primary inquiry is whether the named forum is an integral part of the arbitration agreement, or whether it is instead an ancillary consideration. *See Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439 ("[O]nly [when] the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern, will the failure of the chosen forum preclude arbitration." (quoting *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1220 (11th Cir. 2000)) (internal quotation and alteration marks omitted)); *see also Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933, at *4 (W.D. Wash. Oct. 26, 2009).

> [T]his is because arbitration is a matter of contract. If designation of a specific arbitral forum was of great import to the parties and that forum later turns out to be unavailable, [courts] should not rewrite their agreement and order arbitration someplace else. In such a situation, it is as though an essential term of the agreement has failed. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 150 N.M. 398, 259 P.3d 803, 812 (2011) ("If the plain language of a contract evidences the parties' intention to resolve disputes solely through a specific arbitration provider, the parties' intent would be frustrated if a court appointed a different arbitration provider.").

Meskill, 862 F. Supp. 2d at 975.

Thus, in examining similar clauses, a majority of jurisdictions distinguish agreements requiring a proceeding "administered by" the named forum from those requiring a proceeding conducted "in accordance with" the named forum's rules. In the case of proceedings "administered by" a named forum, most courts view the forum selected as an integral term of the agreement because it is an express statement of the parties' intent to arbitrate exclusively before that forum; therefore, if the forum is unavailable, a material term of the agreement has failed, rendering the entire arbitration agreement invalid. *See, e.g.*, *Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439; *see also, e.g.*, *Carideo*, 2009 WL 3485933, at *4; *Carr v. Gateway, Inc.*, 918 N.E.2d 598 (Ill. Ct. App. 2009); *Covenant Health & Rehab. of Picayune, L.P. v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009).

Conversely, in the case of proceedings conducted "in accordance with" a named forum's rules, most courts view that forum "selection," if it was intended to

serve as such,[8] as an ancillary consideration to the parties' primary intent of arbitrating, in front of any arbitrator, while using a set of pre-specified rules; therefore, if the forum itself is unavailable, courts nonetheless uphold the arbitration agreement and compel arbitration in an alternate forum, so long as the alternate forum follows the agreed-upon rules. *See, e.g.*, *Rigas*, 923 So. 2d at 1077; *Westmoreland v. High Point Healthcare Inc.*, 721 S.E.2d 712 (N.C. Ct. App. 2012); *see also, e.g.*, *Meskill*, 862 F. Supp. 2d at 971–77; *Fellerman v. Am. Ret. Corp.*, No. 03:09-CV-803, 2010 WL 1780406, at *5 (E.D. Va. May 3, 2010) (collecting cases and noting that "courts tend to enforce arbitration agreements whose terms specify that the parties be bound only by the rules of the AAA"); *Carideo*, 2009 WL 3485933, at *4 ("Where the arbitration clause selects merely the rules of a specific arbitral forum, as opposed to the forum itself, and another arbitral forum could apply those rules, the unavailability of the implicitly intended arbitral forum will not require the court to condemn the arbitration clause." (citing *Reddam v. KPMG L.L.P.*, 457 F.3d 1054, 1059–61 (9th Cir. 2006), *abrogated on other grounds by Atl. Nat'l Trust L.L.C. v. Mount Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010))).

For the reasons discussed, *infra*, we adopt the majority rule distinguishing between "in accordance with" and "administered by." More specifically, we find that the named arbitral forum is not a material term to agreements in which the parties agree to arbitrate "in accordance with" the named forum's rules, absent other evidence to the contrary; however, as in *Grant*, when parties elect for a proceeding "administered by" a named forum, that forum should be viewed as integral to the arbitration agreement, absent other evidence to the contrary.

First, looking at the plain language of the arbitration agreement, there is no reason any potential arbitration proceeding between the parties cannot "follow the rules of" the AAA in a different arbitral forum. *Deeds v. Regence Blueshield of Idaho*, 141 P.3d 1079, 1081–82 (Idaho 2006); *see also Meskill*, 862 F. Supp. 2d at 972 ("On its face, this provision does not mandate that the NAF actually *conduct* the arbitration—it requires only that the NAF Code be *applied* by the arbitrator."); *Rigas*, 923 So. 2d at 1092 (same); *Westmoreland*, 721 S.E.2d at 719–20 (same).

[8] For the reasons we will discuss, *infra*, we find it difficult to believe that choosing to arbitrate "in accordance with" a named forum's rules truly indicates an intent to select the named forum as the exclusive arbiter, absent additional evidence to the contrary.

Second, the Agreement states that the parties wish to follow the AAA's rules, not its policies. While the AAA has a *policy* not to arbitrate individual patients' claims, it does not have a *rule* stating that such claims are not arbitrable. Thus, according to the plain language of the Agreement, any potential arbitration proceeding between the parties must "follow the rules of" the AAA; however, the "AAA policy on the types of arbitrable claims is simply just that—AAA's policy." *Oesterle v. Atria Mgmt. Co., L.L.C.*, No. 09-4010-JAR, 2009 WL 2043492, at *8–9 (D. Kan. July 4, 2009) (citing and discussing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)); *see also Nail v. Consol. Res. Health Care Fund I*, 229 P.3d 885, 887–89 (Wash. Ct. App. 2010). To read the Agreement's language in accordance with the AAA's policy—that personal injury claims are non-arbitrable—would be "in direct conflict with [the] strong public policy in favor of arbitration." *Westmoreland*, 721 S.E.2d at 720; *cf. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curiam) (unanimously invalidating a state's public policy to not refer wrongful death claims against a nursing home to arbitration).[9]

Likewise, we reject Respondent's argument that the AAA rules themselves bar any non-AAA arbiter from applying the AAA's rules. For example, Respondent cites AAA Rule R-2, which states that "[w]hen parties agree to arbitrate under [the AAA's] rules, . . . they thereby authorize the AAA to administer the arbitration."[10] However, we find that "authorization to administer does not rise to the level of contractual assent to have the matter administered

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[9] This is not to say that parties cannot mutually agree that personal injury claims are not arbitrable; indeed, arbitration is a matter of contract, and parties "may limit . . . the issues which they will arbitrate." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). However, because all doubts concerning the scope of an arbitration agreement must be resolved in favor of arbitration, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983), the parties must be explicit in their intent to exclude such claims from the scope of the agreement.

[10] Am. Arbitration Ass'n, *Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)*, ADR.org, 11 (Oct. 1, 2013), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased.

exclusively before that forum." *Fellerman*, 2010 WL 1780406, at *5. Further, had the parties truly intended that the AAA serve as the exclusive arbitral forum, they could have easily said so, with "no need for them to do so obliquely by specifying that the arbitration must be conducted" in accordance with the AAA's rules. *See Meskill*, 862 F. Supp. 2d at 973 (quoting *Brown v. Delfre*, 968 N.E.2d 696, 703 (Ill. App. Ct. 2012)) (internal quotation and alteration marks omitted) (collecting cases). Rather, by invoking only the AAA's rules, and not the AAA itself, the Agreement suggests that the parties anticipated an entity *other than the AAA* might conduct the arbitration. *See id.*

Notably, aside from AAA Rule R-2, Respondent has not offered any evidence that the "exclusive" designation of the AAA was an important consideration to either herself or Appellants when the parties entered the Agreement. *See id.* at 975. In fact, Respondent herself admits that neither she nor Appellants' employee (who signed the Agreement on Appellants' behalves) even knew about the AAA—or its rules—when signing the Agreement. *Accord id.*

Moreover, after examining the portions of the AAA's rules submitted by Respondent, we find nothing so unique to suggest that the parties implicitly designated the AAA as their exclusive arbitral forum because of some particular expertise the AAA held. *See id.* at 973–74 (collecting cases); *accord Wright v. GGNSC Holdings L.L.C.*, 808 N.W.2d 114, 120–21 (S.D. 2011). Rather, given the Agreement's mere passing reference to the AAA's rules, we find that the parties' intentions in selecting the rules were to set forth, prior to a dispute, common procedural rules, such as those concerning service. *See Wright*, 808 N.W.2d at 121.[11] Thus, because a substitute arbitrator could easily apply such predetermined

[11] *Cf. Meskill*, 862 F. Supp. 2d at 975–76 (finding significant the fact that the named arbitral forum was "mentioned only once" in the arbitration agreement because it "suggest[ed] that the parties' 'overarching purpose' was to submit to arbitration any disputes that might arise between them," and not to only arbitrate in front of the named forum (citing *Diversicare Leasing Corp. v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, at *6 (W.D. Ark. Nov. 18, 2011))); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 815 (N.M. 2011) ("Given the number of references to the NAF as the only named arbitrator and the substantial reliance on the NAF *Code of Procedure* throughout the contract, we could not sever the unenforceable terms of the arbitration provisions without substantially rewriting the contract."); *Crossman v. Life Care Ctrs. of Am., Inc.*, 738 S.E.2d 737, 740 (N.C. Ct. App.

procedural rules, we find that the parties did not select the AAA for its particular expertise. *Id.* at 121.[12]

Finally, the Agreement contains a severance clause that permits severance of any portion of the Agreement later found to be unenforceable. "'The severance provision indicates that the intention was not to make the [AAA] integral, but rather only to have a dispute resolution process through arbitration.'" *Meskill*, 862 F. Supp. 2d at 976 (quoting *Jones v. GGNSC Pierre L.L.C.*, 684 F. Supp. 2d 1161,

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2013) (same).

[12] We note that Respondent relied primarily on *Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858 (4th Cir. 2000), and *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554 (2d Cir. 1995), in support of her reading of the Agreement. Both of these cases involve arbitration agreements requiring a proceeding "in accordance with" a named forum's rules; however, both are also distinguishable from the present action:

> These cases involve federal securities law and the decision to arbitrate before a self-regulatory organization (SRO), a forum which must operate in strict compliance with the Securities and Exchange Act of 1934 (SEC)[.]
>
> . . .
>
> In contrast to the SROs, which are closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes, the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration, and coordinates the logistics of setting up the parties with the chosen arbitrator. Here, no one has argued the dominant intent of the parties was that *only* an AAA arbitrator could handle the dispute or that an AAA arbitrator, or the AAA as an organization, has some type of special expertise. Unlike the SROs, arbitration "in accordance with the applicable rules of the AAA" is not dependent on the AAA overseeing the arbitration.

Deeds, 141 P.3d at 1082.

1167 (D.S.D. 2010)) (internal alteration marks omitted) (collecting cases); *Fellerman*, 2010 WL 1780406, at *5.

Thus, we find that Respondent has not carried her burden to show that the AAA was both unavailable and material to the Agreement as a whole. *Grant*, 383 S.C. at 131–32, 678 S.E.2d at 438–39. Accordingly, we reverse the circuit court's determination that the Agreement is unenforceable, and we remand for the circuit court to consider Respondent's remaining arguments as to why the Agreement should not be enforced. *See supra* note 4.

III. Waiver

Because remand is necessary, we address Respondent's claim that Appellants waived their right to arbitrate the claims against them because they "waited too long" to file the motion to compel arbitration. We disagree.

Parties may waive their right to enforce an arbitration clause. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 251 (Ct. App. 2007) (citing *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). However, the FAA requires courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or *an allegation of waiver, delay*, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (emphasis added). Thus, there is a presumption against finding a party has waived its right to compel arbitration, *E. Dredging & Constr., Inc. v. Parliament House, L.L.C.*, 698 So. 2d 102, 103 (Ala. 1997), and a "party seeking to prove a waiver of a right to arbitrate carries a heavy burden . . . ." *Rigas*, 923 So. 2d at 1093; *accord Green Tree*, 531 U.S. at 91. Specifically, the party seeking to avoid arbitration "must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders*, 336 S.C. at 665, 521 S.E.2d at 753.

Here, after Respondent filed her NOI, the parties attempted to mediate the claims in accordance with section 15-79-125 for approximately four months prior to Respondent filing her formal complaint, and Appellants subsequently filing their motion to compel arbitration. During this mediation process, Appellants requested limited discovery in order to engage in meaningful settlement talks.

We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity. Further, even were we to find that Appellants should have filed the motion to compel arbitration immediately after Respondent filed the NOI, rather than after Respondent filed the complaint, Respondent has shown no prejudice or undue burden to her from the four month delay. Thus, we conclude that Respondent's argument that Appellants' waived their right to enforce the Agreement is without merit.

We note that Respondent originally raised five arguments to the circuit court as to why the court should invalidate the Agreement. We have addressed three of these arguments; however, upon remand, the circuit court must consider her remaining arguments (concerning Respondent's authority to sign the Agreement and whether there was a meeting of the minds between the parties) prior to deciding whether to compel arbitration between the parties. *See supra* note 4.[13]

CONCLUSION

For the foregoing reasons, we reverse the circuit court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

[13] We are concerned that, according to the Record, the patient did not sign either the residency agreement or the Agreement on her own behalf, despite being competent at the time, nor did Respondent possess a health care power of attorney to sign either contract on the patient's behalf. The parties did not address this issue on appeal, and Respondent's only argument that this issue should serve as an additional sustaining ground was located in a cursory footnote in her brief. Accordingly, we merely note that, on remand, the circuit court must engage in a full inquiry into this matter prior to any attempt to enforce the Agreement.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Damien Inman, Appellant.

Appellate Case No. 2011-193887

Appeal From Dillon County
Thomas A. Russo, Circuit Court Judge

Opinion No. 27402
Heard March 4, 2014 – Filed June 18, 2014

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor William B. Rogers, Jr., of Bennettsville, for Respondent.

CHIEF JUSTICE TOAL: Damien Inman (Appellant) was convicted and sentenced to life without the possibility of parole (LWOP) for the robbery,

kidnapping, and murder of Mary Alice Stutts.[1] Appellant was seventeen years old at the time of the crimes. On appeal, Appellant challenges his convictions on several bases, including that the circuit court improperly granted the State's motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), after Appellant offered a race-neutral explanation for striking a particular juror. We reverse and remand the case for a new trial.

FACTS/PROCEDURAL BACKGROUND

Prior to the start of Appellant's trial, the circuit court required the State and Appellant to select three separate juries to hear Appellant's case due to Appellant's alleged racial bias in exercising his peremptory strikes. For example, during the first jury selection, not including strikes for alternate jurors, Appellant used his peremptory strikes against seven white jurors and two black jurors, and the State raised *Batson* challenges to six of the seven white jurors struck by Appellant.

One of these six jurors was Juror 60, a white male self-employed as a farmer. Appellant's counsel explained that she struck Juror 60 based on his occupation:

> [APPELLANT'S COUNSEL]: In terms of [Juror] 60, he's a farmer. Your Honor, just in terms of education. Forensics is going to be introduced . . . .
>
> THE COURT: Well, what was his level of education?
>
> [APPELLANT'S COUNSEL]: Well, based on the fact that he was a farmer, Your Honor. I wanted someone in a more sophisticated occupation.
>
> THE COURT: I graduated from law school with a farmer. Because someone's a farmer, they're not educated?

[1] Specifically, the circuit court sentenced Appellant to LWOP for both murder and first-degree burglary, thirty years for kidnapping, thirty years for armed robbery, ten years for grand larceny, and five years apiece for criminal conspiracy and possession of a weapon during the commission of a violent crime, the sentences all to run consecutively.

[APPELLANT'S COUNSEL]: Your Honor, it was based on his employment.

THE COURT: All right.

The circuit court then had Appellant's counsel state her rationale for striking the other contested jurors and requested the State respond. The solicitor conceded the rationale for striking one juror was race-neutral; however, as to the other five contested jurors—including Juror 60—the solicitor simply said:

> All of the other [jurors], *I would say were very pretext* [sic]. Don't think they're race neutral reasons as recognized by the State of South Carolina for a peremptory challenge to a juror and absent that non-pretextural reason, we would submit that the jury be redrawn and that those individuals be returned to the jury pool. And that basically *the defense has failed to meet its burden* of showing race neutral or pretextural reason for having struck those jurors.

(Emphasis added). Appellant's counsel responded by stating that "[n]one of the information that I provided to Your Honor was based on any kind of race or gender excuse . . . . [I]f you were to look at individuals that I did strike . . . , [they were] all of different races, different ages."

In making its ruling, the circuit court stated, in relevant part:

> And as far as [J]uror 60, the juror's a farmer and you based that on the fact that farmers are not educated . . . .
>
> . . .
>
> I'm going to grant the State's motion based on those three individuals jurors numbers 17, 60, and 166 *that the reasons given I don't believe are sufficient* . . . . [J]urors 17, 60, and 166 should those names be called again would not be subject to being struck by the defense based on the [c]ourt's ruling.[2]

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[2] "It is within the trial judge's discretion to prohibit a strike against a [juror] previously struck in violation of *Batson*." *State v. Ford*, 334 S.C. 59, 63 n.4, 512 S.E.2d 500, 503 n.4 (1999) (citing *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357

(Emphasis added).

Because of the circuit court's ruling during the first jury selection, Appellant was unable to strike Juror 60 from the third and final jury drawn for his case, and Juror 60 served as the jury foreman at Appellant's trial. The jury ultimately convicted Appellant of all of the crimes on which the State indicted him.

Appellant appealed his convictions, and this Court certified the appeal pursuant to Rule 204(b), SCACR.

ISSUE

Whether the circuit court inappropriately left the burden of persuasion on the party opposing the *Batson* motion to show that a peremptory strike was not racially discriminatory?[3]

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). A court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829; *see also State v. Edwards*, 384 S.C. 504, 508, 509, 682 S.E.2d 820, 822, 823 (2009); *State v. Haigler*, 334 S.C. 623, 630, 515 S.E.2d 88, 91 (1999) ("The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous.").

(1995)).

[3] Appellant raises several other issues on appeal, including an evidentiary challenge to the admission of an out-of-court identification of Appellant, and three challenges to the sentences imposed on him. One of his sentencing challenges involves an identical argument to that he raised as a Petitioner in *Aiken v. Byars*, No. 2012-213286 (considering the import of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), on juvenile LWOP sentences in South Carolina), which is currently pending before this Court. However, because the *Batson* issue is dispositive, we need not reach these issues. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009) (finding that an appellate court need not discuss remaining issues when determination of prior issue is dispositive).

ANALYSIS

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[4] prohibits the striking of a [juror] on the basis of race or gender." *McCrea v. Gheraibeh*, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008) (citing *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)); *see also Batson*, 476 U.S. at 89. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. *See Purkett v. Elem*, 514 U.S. 765, 767–68 (1995).

> First, the [party asserting the *Batson*] challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the *Batson*] challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. The ultimate burden always rests with the [party asserting the *Batson* challenge] to prove purposeful discrimination.

State v. Giles, 407 S.C. 14, ---, 754 S.E.2d 261, 263 (2014) (internal citations omitted); *see also Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005)).[5]

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. *Purkett*, 514 U.S. at 768; *Randall v. State*, 716 So. 2d 584, 588 (Miss. 1998). The explanation must only be "clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on

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[4] U.S. Const. amend. XIV, § 1.

[5] Neither party disputes that the State made a prima facie showing of discrimination under step one of the above analysis.

it." *Giles*, 407 S.C. at ---, 754 S.E.2d at 265; *see., e.g., id.* at ---, 754 S.E.2d at 262, 265–66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to "assess the plausibility of the proffered reason for striking the potential jurors").

In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. *State v. Green*, 655 So. 2d 272, 290 (La. 1995); *see also Batson*, 476 U.S. at 93–94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the *Batson* challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. *Edwards*, 384 S.C. at 508–09, 682 S.E.2d at 822; *see also Haigler*, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party proves that the "originally neutral reason was . . . a pretext because it was not applied in a neutral manner." *State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989).[6]

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[6] The party asserting the *Batson* challenge may also point to circumstantial evidence of racial discrimination, such as a "pattern" of strikes against jurors of a particular race, particularly when the number of strikes exercised against that race is disproportionate to the race's representation among the jury pool. *Huntley v. State*, 627 So. 2d 1013, 1015 (Ala. 1992) (citing *Ex parte Branch*, 526 So. 2d 609, 623–24 (Ala. 1987)); *see also London v. State*, 125 S.W.3d 813, 817 (Ark. 2003); *Capitol Hill Hosp. v. Baucom*, 697 A.2d 760, 765–66 (D.C. 1997) (Ruiz, J., concurring); *Tursio v. United States*, 634 A.2d 1205, 1210–12 (D.C. 1993); *State v. Murphy*, 747 N.E.2d 765, 787 (Ohio 2001); *cf. Batson*, 476 U.S. at 97 (finding that a "'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination" in step one of the analysis); *Robinson v. United States*, 878 A.2d 1273, 1283 (D.C. 2005) (same). However, such statistical evidence, standing alone, is not sufficient to establish purposeful discrimination. *Ford*, 334 S.C. at 66, 512 S.E.2d at 504 (finding that a criminal defendant's use of twelve of his thirteen strikes to strike white jurors did not demonstrate, by itself, that the defendant had a discriminatory intent). Rather, the statistical evidence must be paired with some other evidence of discrimination, such as direct evidence

We find that, with respect to the *Batson* hearing conducted for Juror 60, the circuit court committed legal error by improperly placing the ultimate burden of persuasion on Appellant. During step two of the hearing, Appellant's counsel stated that she struck Juror 60 because of his employment as a farmer. Thus, Appellant met his minimal burden to produce a valid, race-neutral reason for striking a prospective juror. *State v. Ford*, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (holding that employment is sufficiently race-neutral to meet the burden of production during step two of a *Batson* hearing). At that point, the circuit court should have shifted the ultimate burden of persuasion back to the State to show that the proffered reason was pretextual. *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

Instead, the circuit court—and not the State—challenged the sufficiency of Appellant's counsel's explanation, arguing to Appellant's counsel that farmers could be highly educated and sophisticated individuals. Further, when the State was given a chance to respond to the proffered race-neutral reason for striking Juror 60, it declared only that striking Juror 60 for his employment was "very pretext" [sic]. In light of the facially race-neutral explanation for striking Juror 60, the State's conclusory statement that striking Juror 60 was pretextual failed to carry its burden of persuasion. Thus, in finding that Appellant's counsel's proffered rationale was "not sufficient," the circuit court inappropriately left the burden of persuasion on Appellant's counsel to prove that her explanation was not pretextual instead of shifting the burden to the State to prove why the explanation *was* pretextual. *See Giles*, 407 S.C. at ---, 754 S.E.2d at 263.

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of other jurors being struck for pretextual reasons. *Miller-El v. Cockrell*, 537 U.S. 322, 331–35, 341 (2003) (comparing the percentage of strikes used on black jurors and white jurors and finding that, in conjunction with other direct evidence, a *Batson* violation had occurred); *Yancey v. State*, 813 So. 2d 1, 8 (Ala. Crim. App. 2001) (holding that the State's use of twelve of its fifteen strikes to strike black jurors, when paired with other direct evidence of discrimination, demonstrated that the trial court's rejection of a *Batson* challenge was clear error).

The circuit court must also consider the credibility and demeanor of the party opposing the *Batson* challenge when that party sets forth the race-neutral explanations in step two. *Snyder*, 552 U.S. at 477; *Ford*, 334 S.C. at 65, 512 S.E.2d at 503.

During its oral argument before this Court, the State asserted two compelling arguments in support of the circuit court's ruling on the *Batson* motion involving Juror 60. First, the State pointed to direct evidence that Appellant's strike of Juror 60 was racially motivated, explaining that Appellant did not likewise strike Juror 226, a black farmer, from the same jury in which he struck Juror 60. *See Oglesby*, 298 S.C. at 281, 379 S.E.2d at 892. Second, the State argued that Appellant struck a disproportionate number of white jurors in all three of the juries selected to try his case.[7]

However, because the State did not raise these arguments during the *Batson* hearing, we find these post hoc justifications untimely. *Evins*, 373 S.C. at 418, 645 S.E.2d at 910. Regardless of their veracity in hindsight, neither explanation helped the State carry its burden of persuasion *at the time of the hearing*, and the circuit court therefore improperly granted the State's *Batson* motion and denied Appellant his right to exercise his peremptory challenges.

When an appellate court finds that the circuit court improperly granted a *Batson* motion, and "one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed in such cases 'because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged.'" *Edwards*, 384

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[7] The Record demonstrates that slightly more than half of the jury pool was black. During the first jury selection, the parties selected nine black jurors, three white jurors, and two white alternate jurors. Including the strikes for alternate jurors, Appellant struck eight white jurors and three black jurors.

During the second jury selection, the parties selected nine black jurors, three white jurors—one of whom the court prohibited Appellant from striking due to a *Batson* violation during the first jury selection—and two black alternate jurors. Including the strikes for alternate jurors, Appellant struck nine white jurors and one black juror.

During the final jury selection, the parties selected five black jurors, seven white jurors—four of whom the court prohibited Appellant from striking due to *Batson* violations during the first two jury selections—and two black alternate jurors. Including the strikes for alternate jurors, Appellant struck nine white jurors and three black jurors.

S.C. at 509, 682 S.E.2d at 823 (quoting *State v. Rayfield*, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006)). "The proper remedy in such cases is the granting of a new trial." *Id.*; *see also Ford*, 334 S.C. at 66, 512 S.E.2d at 504 ("[B]ecause appellant established he was wrongfully denied the right to exercise a peremptory challenge, we reverse his conviction."). Accordingly, we reverse Appellant's convictions and grant Appellant a new trial.

CONCLUSION

For the foregoing reasons, we reverse Appellant's convictions and remand this case for a new trial.

REVERSED AND REMANDED.

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