Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

July 27, 2022

The Public Hearings for the Judicial Merit Selection Commission have been scheduled to begin Monday, November 14, 2022, with the hearings commencing at 9:00 a.m. regarding the qualifications of the following candidates for judicial positions:

Supreme Court

Seat 4

The Honorable Ralph K. Anderson III, Columbia, SC
The Honorable David Garrison "Gary" Hill, Greenville, SC
The Honorable Aphrodite Konduros, Simpsonville, SC
The Honorable Stephanie Pendarvis McDonald, Charleston, SC
The Honorable Maite D. Murphy, North Charleston, SC

Court of Appeals

Seat 1

The Honorable Blake A. Hewitt, Conway, SC

Seat 2

Whitney B. Harrison, Columbia, SC
The Honorable Jan B. Bromell Holmes, Georgetown, SC
The Honorable Grace Gilchrist Knie, Campobello, SC
The Honorable Letitia H. Verdin, Greenville, SC

Circuit Court

15th Judicial Circuit, Seat 1

Amanda A. Bailey, Myrtle Beach, SC
B. Alex Hyman, Conway, SC
Steven H. John, Little River, SC

At-Large, Seat 3

Patrick C. Fant III, Greenville, SC
The Honorable Emmanuel Joseph Ferguson Sr., Charleston, SC
Doward Keith Karvel Harvin, Florence, SC

	Robert Marshall Paul Masella, Columbia, SC **Charles J. McCutchen**, Orangeburg, SC **Ashley A. McMahan**, Columbia, SC **Jane H. Merrill**, Greenwood, SC **William K. Witherspoon**, Columbia, SC **S. Boyd Young**, Columbia, SC
Family Court	
1st Judicial Circuit, Seat 3	**Deanne M. Gray**, Summerville, SC **Mandy W. Kimmons**, Ridgeville, SC **Margie A. Pizarro**, Summerville, SC
9th Judicial Circuit, Seat 4	**Elisabeth Hoover**, Ridgeville, SC
9th Judicial Circuit, Seat 6	**Julianne M. Stokes**, Daniel Island, SC
10th Judicial Circuit, Seat 1	**Joshua B. Raffini**, Anderson, SC **Brittany Dreher Senerius**, Anderson, SC
12th Judicial Circuit, Seat 1	**Philip B. Atkinson**, Marion, SC **Joshua A. Bailey**, Marion, SC **William Vickery Meetze**, Marion, SC **Alicia A. Richardson**, Britton's Neck, SC
At-Large, Seat 7	**The Honorable Thomas T. Hodges**, Greenville, SC
At-Large, Seat 8	**The Honorable Rosalyn Frierson-Smith**, Columbia, SC
Administrative Law Court	
Seat 5	**Anthony R. Goldman**, Columbia, SC **Stephanie N. Lawrence**, Columbia, SC **The Honorable Crystal Rookard**, Boiling Springs, SC
Master-in-Equity	
Pickens County	**John D. Harjehausen**, Easley, SC **Adam B. Lambert**, Easley, SC **Kimberly S. Newton**, Seneca, SC
Retired	
Circuit Court	**The Honorable Edgar Warren Dickson**, Orangeburg, SC **The Honorable Tommy Hughston**, Charleston, SC
Family Court	**The Honorable Arthur Eugene "Gene" Morehead III**, Florence, SC **The Honorable Dana A. Morris**, Camden, SC

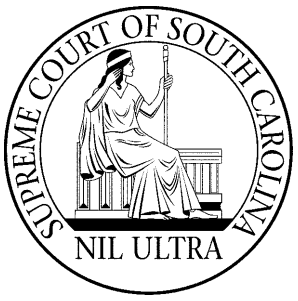
Persons desiring to testify at public hearings shall furnish written notarized statements of proposed testimony, in accordance with the Procedural Rules of the Judicial Merit Selection Commission. These statements must be received by **Noon, Monday, October 31, 2022.** The Commission has witness affidavit forms that may be used for proposed testimony. While this form is not mandatory, it will be supplied on request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Erin B. Crawford, Chief Counsel
104 Gressette Building
Post Office Box 142
Columbia, SC 29202

All testimony, including documents furnished to the Commission, must be submitted under oath. Persons knowingly giving false information, either orally or in writing, shall be subject to penalty.

For further information about the Judicial Merit Selection Commission and the judicial screening process, the website is available here:
https://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php.

Questions concerning the hearing and procedures should be directed to the Commission at (803) 212-6623.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
August 3, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Callawassie Island Members Club, Inc., Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Michael J. Frey and Grace I. Frey, Defendants,

and

The Callawassie Island Members Club, Inc., Respondent,

v.

Mark K. Quinn and Sherry B. Quinn, Defendants,

Of Whom Michael J. Frey is the Petitioner.

Appellate Case No. 2020-000667

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28102
Heard November 9, 2021 – Filed August 3, 2022

REVERSED AND REMANDED

Ian S. Ford, Neil Davis Thomson, and Ainsley Fisher Tillman, all of Ford Wallace Thomson, L.L.C., of Charleston, for Petitioner.

Andrew F. Lindemann, of Lindemann and Davis, P.A., of Columbia; M. Dawes Cooke Jr., John W. Fletcher, and Bradley B. Banias, all of Barnwell Whaley Patterson & Helms, L.L.C., of Charleston; Stephen P. Hughes, of Howell Gibson & Hughes, of Beaufort; and James Andrew Yoho, of Boyle, Leonard & Anderson, P.A., of Charleston, for Respondent.

CHIEF JUSTICE BEATTY: The Callawassie Island Members Club, Inc. ("the Club"), brought separate actions against three couples—the Martins, the Freys, and the Quinns—following a dispute over membership dues. The circuit court granted the Club's motion for summary judgment. The court of appeals consolidated the parties' appeals and affirmed. *Callawassie Island Members Club, Inc. v. Martin*, Op. No. 2019-UP-393, 2019 WL 6897780 (S.C. Ct. App. filed Dec. 18, 2019). We granted a petition for a writ of certiorari filed by Michael J. Frey ("Frey") challenging the award of summary judgment.[1] Frey contends material questions of fact exist as to whether the Club improperly billed him for continuing membership dues, particularly where his membership was suspended over a decade ago and membership was undisputedly optional when he joined. We reverse and remand.

[1] Frey's wife, the Martins, and the Quinns are not participating in the appeal to this Court.

I. FACTS

The Club is a social and recreational organization operating within a private, gated, residential community on Callawassie Island, an area in Beaufort County. Frey purchased a Golf Membership in 1995 for a capital contribution of $22,000.00 from the Club's predecessor, the Callawassie Island Club, Inc. ("the Island Club"), thus becoming an equity member. In addition, he purchased real property on Callawassie Island in a separate transaction.

The Island Club was established as a South Carolina nonprofit corporation to provide amenities for the Callawassie Island development, including a golf course, clubhouse, tennis facilities, and swimming pools. The Island Club had a specified number of equity memberships available, which corresponded to the capacity of its facilities: Golf Memberships (595), Spring Island Founder Memberships (40), and Social Memberships (850 less the number of outstanding Golf Memberships). Payment of an initial capital contribution, monthly dues, monthly food and beverage minimums, and any special assessments were required to be an equity member of the Island Club.

At the time Frey joined, equity memberships were not required to own property on Callawassie Island. Rather, according to the Island Club's 1994 "Plan for the Offering of Memberships in the Callawassie Island Club" ("the 1994 Plan"), memberships were options to be offered "to purchasers of residential units or lots in Callawassie and such other persons as the Club determines appropriate from time to time."[2] The 1994 Plan, along with the Island Club's Bylaws and General Club Rules, made up the core of the Island Club's organizational documents.

The Island Club's facilities, including the real property, equipment, and supplies, were initially owned by the Callawassie Island Company, L.P., a Delaware limited partnership ("the Partnership"). The 1994 Plan contemplated the eventual transfer of ownership and control of the facilities from the Partnership to the Island Club's equity members. In 2001, the transfer of assets was completed, and the Island Club began operating under its current designation, the Club. In August 2001, the Club issued a membership plan adopted by the board of directors ("the 2001 Plan"),

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[2] The Island Club reserved the right to offer recallable "non-equity associate memberships" on an annual or seasonal basis to prospective members who were not current property owners in order to promote the sale of residential units and lots on Callawassie Island.

along with its own Bylaws and General Club Rules, which were similar in form to the organizational documents of the Island Club.

The Club's organizational documents were amended several more times after the Club assumed control in 2001. Among the notable changes that occurred in 2001 was an amendment to the Callawassie Island development's covenants to provide that all persons who purchased property on Callawassie Island after December 1, 2001 were required to purchase an equity membership in the Club and retain it so long as they owned their property.[3] Although the new membership requirement did not apply to existing property owners like Frey, he nevertheless encountered difficulties in exiting the Club.

After nearly fifteen years as a dues-paying member, Frey wished to end his Club membership, and he stopped paying dues in October 2009. There is evidence in the record that the Club formally deemed Frey's account delinquent and placed Frey's membership on the Club's suspension list in 2011.[4] Frey retained ownership of his property on Callawassie Island.

In 2012, the Club brought the instant action against Frey to collect allegedly delinquent dues, fees, and assessments based on claims of breach of contract and quantum meruit. The Club maintained that, when Frey purchased his property in 1995, he "could have elected to decline a membership with the Club at the time," but his purchase of an equity membership and ownership of a lot "require[d] [him] to remain [a member] in good standing under the terms and conditions of the governing

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[3] The membership requirement was included in the "Amended and Restated General Declaration for Callawassie Island and Provisions for the Callawassie Island Property Owners Association, Inc." ("the 2001 Property Declaration"), which was adopted on December 1, 2001.

[4] The record contains a published list of the Club's suspended members as of November 15, 2011, which includes Frey. In addition, a "Member History" prepared by the Club (for the time period of 11/1/07 to 2/27/14) shows Frey's status as "S," i.e., suspended, and an affidavit dated March 3, 2014 from the Club's General Manager, Jeff Spencer, confirms in relevant part that the Club "ha[d] been forced, owing to non-payment, to suspend [Frey's] membership rights and privileges pursuant to the applicable documents."

documents, including the Plan and the Declaration."[5] According to the Club, Frey was required to continue paying dues until his membership was reissued by the Club to a new member.

Frey, in turn, asserted Club membership was not contingent upon or linked to the ownership of his property on Callawassie Island. Further, the organizational documents at the time he signed a membership agreement provided a suspended member "shall" be expelled after four months of nonpayment. Frey alleged he should have been expelled from the Club four months after he stopped paying dues, which would have terminated his membership and the accrual of additional financial obligations. Frey contended the expulsion provision was unilaterally changed by the Club by amending the Club Rules (around 2007 to 2008) to make expulsion subject to the Club's discretion rather than compulsory. Frey further contended this change was made without notice to, or voting by, the equity members, contrary to provisions in the organizational documents that required any material alterations in the controlling terms affecting equity members to be approved by a majority of the members.

Frey additionally asserted the Club was obligated to keep a Resale List whereby memberships would be reissued pursuant to an agreed-upon protocol, but the Club did not do so and it has refused to provide full disclosure of its resale activities. Frey stated the Club selectively permitted some individuals to leave the Club without imposing the ongoing accrual of dues. In Frey's case, however, the Club insisted—and continues to insist, more than a decade after Frey was suspended from his "optional" membership—that Frey has a continuing obligation to pay dues until the Club reissues his membership. It is undisputed that the Club has never reissued Frey's membership. Frey alleged the Club effectively prevented him and other members from leaving because only the Club can expel a member and reissue memberships.

Based on the foregoing, Frey asserted several defenses and counterclaims regarding the Club's policies and contended he had no further obligations to the Club.

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[5] "The Plan" apparently referred to the Club's 2001 Plan, as may be amended, and "the Declaration" referred to the 2001 Property Declaration, *see supra* note 3. The Club is a distinguishable entity from the Callawassie Island Property Owners Association, Inc., which is not involved in this action. When Frey obtained his equity membership in the Island Club (now the Club) in 1995, it was purchased in a separate contractual agreement and the membership did not run with the land.

Among his allegations, Frey maintained the Club violated South Carolina's Nonprofit Corporation Act of 1994 ("the NCA") by (1) failing to treat members of the same class the same with regard to their rights and obligations, particularly as to their rights of transfer; (2) improperly restricting transfer rights; (3) failing to allow members to approve fundamental membership changes; (4) improperly refusing to expel Frey and, thus, end his ongoing financial obligations; and (5) failing to have and maintain a fair and reasonable process for the termination of memberships.[6]

The circuit court granted the Club's motion for summary judgment and dismissed Frey's counterclaims. The circuit court awarded the Club damages of $58,744.23 and attorney's fees of $9,132.23, for a total judgment of $67,876.46. The circuit court reasoned that, even if Frey were expelled, he was obligated to continue paying dues, fees, and assessments until the Club reissued his membership pursuant to the Club's organizational documents, and it noted the decision whether to expel a member had been changed from the time Frey became a member and was now solely within the Club's discretion, rather than mandatory. The circuit court found it was irrelevant whether the Club had improperly amended any of the organizational documents regarding expulsion because the obligation to pay dues, fees, and assessments until a membership was reissued was evident in the original 1994 Plan. The circuit court rejected any relief under the NCA, finding "no violation of the statutory provisions relied upon by" Frey. The circuit court reasoned that the NCA recognizes a member of a nonprofit corporation is not relieved of "obligations incurred or commitments made" to the corporation prior to the member's resignation, suspension, or expulsion, so Frey's obligations were ongoing despite his suspension.

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[6] *See, e.g.*, S.C. Code Ann. § 33-31-610 (2006) ("All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws."); § *id.* 33-31-611(c) ("Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member."); *id.* § 33-31-620(a) ("A member [of a nonprofit organization] may resign at any time."); *id.* § 33-31-621(a) (providing members of nonprofit corporations may not be expelled or suspended, and no membership in such corporations may be terminated or suspended, "except pursuant to a procedure that is fair and reasonable and carried out in good faith").

See S.C. Code Ann. § 33-31-620(b) (2006) (obligations made prior to resignation); *id.* § 33-31-621(e) (obligations made prior to suspension or expulsion). It also rejected Frey's contention that discovery was prematurely ended by the grant of summary judgment.

Frey appealed (along with his wife, who was then still a party). The Freys and two other couples who were challenging the Club's policies (the Martins and the Quinns) attempted to consolidate their appeals with that of Ronnie and Jeannette Dennis, who had resigned from the Club and also disputed their ongoing membership dues. The court of appeals declined to consolidate the appeals at that time and instead allowed the Dennises' case to proceed first. The court of appeals reversed the circuit court's grant of summary judgment to the Club and remanded the Dennises' case for trial, finding genuine issues of material fact existed as to whether the Dennises were liable for dues accruing after their resignation and whether the Club's organizational terms violated the NCA. *See Callawassie Island Members Club, Inc. v. Dennis*, 417 S.C. 610, 790 S.E.2d 435 (Ct. App. 2016) ("*Dennis I*").[7]

The court of appeals thereafter filed three unpublished opinions ruling on the Martin, Frey, and Quinn appeals, in which it affirmed in part, reversed in part, and remanded the cases to the circuit court. The court of appeals relied on its decision in *Dennis I* and found the grant of summary judgment was error, noting the Club's view would create an unreasonable situation in which the Club could refuse to ever allow a member to terminate his or her membership.[8]

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[7] There are three appeals involving the Dennises that will be discussed herein. To distinguish them, the appeals shall be denominated *Dennis I* (the initial decision by the court of appeals reversing the circuit court's grant of summary judgment), *Dennis II* (this Court's decision reversing the court of appeals and reinstating summary judgment, but remanding the case to the court of appeals to rule on the remaining issues challenging summary judgment), and *Dennis III* (the decision of the court of appeals on remand, which reversed the summary judgment order).

[8] *See Callawassie Island Members Club, Inc. v. Martin*, Op. No. 2018-UP-178, 2018 WL 2059555 (S.C. Ct. App. filed May 2, 2018); *Callawassie Island Members Club, Inc. v. Frey*, Op. No. 2018-UP-179, 2018 WL 2059557 (S.C. Ct. App. filed May 2, 2018); *Callawassie Island Members Club, Inc. v. Quinn*, Op. No. 2018-UP-180, 2018 WL 2059558 (S.C. Ct. App. filed May 2, 2018).

During this interval, this Court issued a writ of certiorari to review the decision in *Dennis I*. We reversed in *Dennis II*, thereby reinstating summary judgment for the Club,[9] but we remanded the case to the court of appeals to rule on the Dennises' remaining issues challenging summary judgment that were not ruled upon by the court of appeals after it found other issues dispositive. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018) ("*Dennis II*").

After this Court's decision in *Dennis II*, the court of appeals granted rehearing in the *Frey*, *Martin*, and *Quinn* cases, consolidated the appeals, and issued the opinion that is now before this Court pursuant to Frey's petition for a writ of certiorari. *See Callawassie Island Members Club, Inc. v. Martin*, Op. No. 2019-UP-393, 2019 WL 6897780 (S.C. Ct. App. filed Dec. 18, 2019). In this revised decision, the court of appeals affirmed the grant of summary judgment to the Club, along with damages and attorney's fees, and determined there was no evidence the Club's membership provisions violated the NCA. The court of appeals indicated it felt constrained to reach this result, however, based on the precedent from this Court in *Dennis II*. *See, e.g.*, *Martin*, 2019 WL 6897780 at *4 ("Because the governing documents at issue in [*Dennis II*] are the same documents at issue in the instant cases, we affirm the grant of summary judgment to the Club on its claims against Appellants."); *id.* at *6 ("In light of the supreme court's holding in [*Dennis II*], we have no choice but to hold the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by the Act.").

II. STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); *see also* Rule 56(c), SCRCP (stating summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

[9] We note the parties and the courts have used a variety of shortened monikers to identify the parties over the course of this litigation, and in *Dennis II* the Club was referred to as "the Members Club."

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d 857 at 860 (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)).

This Court applies de novo review to questions of law, so it need not defer to the determination of the court below. *See Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (stating "[t]he interpretation of a statute is a question of law," and "[t]his Court may interpret statutes, and therefore resolve this case, 'without any deference to the court below'" (citations omitted)); *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (observing actions for breach of contract and "[w]hether a contract is against public policy or is otherwise illegal or unenforceable" are generally questions of law that are reviewed de novo by an appellate court (citations omitted)).

III. DISCUSSION

Frey, the sole remaining petitioner here,[10] challenges the propriety of summary judgment in this matter. Frey argues that in revising its original decision, the court of appeals misconstrued this Court's precedent in *Dennis II*; disregarded established principles of contract law, the NCA, and public policy; improperly denied his counterclaims and discovery requests; and deprived him of appellate review of the issue of attorney's fees.

As to the precedent involving the Dennises, Frey argues his formal suspension—and the expulsion that should have followed—are distinguishable from the situation involving the Dennises, which concerned different provisions in the governing documents and the NCA governing resignation. Frey states members who are expelled, unlike those who resign, are banned from the Club for life and, thus, can never remain members. However, the Club unilaterally altered the expulsion provision to make it discretionary rather than mandatory, which violated the terms of the organizational documents and substantially affected his financial liability without notice to him or the membership at large.

Frey contends summary judgment is particularly inappropriate in light of material questions concerning the Club's potential contractual and NCA violations.

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[10] Frey's case is one of dozens pending in the state and federal courts involving disputes between the Club and its members over the Club's membership policies.

For example, Frey asserts that, even though he was suspended by the Club, it continued to impose ongoing dues and fees in reliance on provisions in the organizational documents that stated membership dues terminated when the Club "reissued" a membership. Frey states other provisions in the organizational documents, however, simultaneously required the Club to formally expel a suspended member after four months of nonpayment. Upon expulsion, Frey maintains his equity membership should have terminated and his membership certificate should have been reissued by the Club in accordance with established protocols, thus ending any further financial obligations. Frey maintains the Club would have been more than adequately compensated for any time that elapsed before his membership was reissued because the organizational documents allowed the Club to impose a forfeiture in these circumstances up to the amount of a member's capital contribution to the Club.

Frey asserts Club membership is a contractual relationship that is distinct from the ownership of his property. Membership was optional for Callawassie Island residents when he joined, so Frey states it was improper for the Club to change the operational terms of their agreement to force him to remain a dues-paying member at ever-increasing membership rates, with no end in sight, while also selectively allowing other members to quietly exit the Club. Frey opines the perpetual fees are "too steep a price to pay for croquet and mah-jongg."

Frey notes that, because only the Club can reissue a membership, he cannot exit the Club by simply selling his property. As a result, Frey argues, he is effectively barred from exiting the Club unless the Club deigns to reissue his membership—which it has never done in the decade-plus since his suspension, and perhaps never will—prompting the court of appeals in *Dennis I* to liken the Club to the "Hotel California." *See Dennis I*, 417 S.C. at 618, 790 S.E.2d at 439 (observing Club members could "be trapped like the proverbial guests in the Eagles' hit *Hotel California*, who are told 'you can check-out anytime you like, but you can never leave'" (citation omitted)). Frey contends the Club's conduct and membership policies in this regard cannot comport with any rational public policy.

The Club, in contrast, maintains it can continue imposing dues and fees on a former member such as Frey because the Club's organizational documents have always provided that these expenses shall continue until a membership is reissued; it has never reissued Frey's membership; and the terms of the Club's rules were changed to no longer require the expulsion of a member for nonpayment. The Club asserts that, because it is no longer required to expel Frey, dues and fees can continue

to accrue. The Club maintains it has the authority to unilaterally impose a change in the Club documents, its actions do not violate the NCA or any other principle of law, and it has not breached any contractual provisions with Frey. The Club maintains summary judgment was appropriate and the case was not ended prematurely.

A. Impact of *Dennis II*

As an initial matter, we agree with Frey that the *Dennis II* decision, standing alone, is not determinative of his case. In altering its original disposition, the court of appeals believed our decision in *Dennis II* was conclusive of the issues concerning the Club's membership policies, although the court of appeals notably expressed its reluctance in reaching this result. This Court's decision in *Dennis II*, however, concerned whether the court of appeals erred in holding specific portions of the Club's organizational documents regarding resignation were ambiguous and in interpreting a portion of the NCA that is applicable to resignations. Frey, in contrast, was formally suspended by the Club. This status triggers different provisions in the Club's organizational documents. *See, e.g.*, *Dennis II*, 425 S.C. at 204, 821 S.E.2d at 673 ("Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered."). In this case, Frey argues his suspension should have resulted in an automatic expulsion, which would, in turn, render him permanently ineligible for membership in the Club.

In addition, Frey raises arguments about the resulting effect of perpetual liability resulting from the Club's unilateral decision to change substantive provisions of the Club's rules, in direct contravention to other organizational documents. In *Dennis II*, however, we specifically acknowledged that we were not addressing the potential for perpetual liability at that time, so a conclusive holding was not made in that regard. *Id.* at 202, 821 S.E.2d at 671–72 ("We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts.").

Moreover, we agree with Frey that, even if some points involve established matters of law, the grant of summary judgment in his case prematurely ended the parties' discovery process. We believe questions about the application of the law to the relevant facts, which shall be discussed herein, preclude the grant of summary judgment. *See generally Wade v. Berkeley Cnty.*, 330 S.C. 311, 316, 498 S.E.2d 684, 687 (Ct. App. 1998) ("Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law.").

Lastly, we note the case involving the Dennises did not actually end in summary judgment with the issuance of *Dennis II*. Although this Court reinstated summary judgment after finding no ambiguity in the organizational documents' terms regarding resignation, we remanded the matter to the court of appeals to address the Dennises' remaining issues challenging summary judgment that had not been addressed by the court of appeals after it found other points to be dispositive. *See Dennis II*, 425 S.C. at 195–96, 821 S.E.2d at 668 (observing "the court of appeals found it unnecessary to address all issues raised before it, so we [remand] this case to the court of appeals to address the other issues").

On remand, the court of appeals considered the Dennises' additional issues and affirmed in part, reversed in part, and remanded the matter for trial. *Callawassie Island Members Club, Inc. v. Dennis*, 429 S.C. 493, 839 S.E.2d 101 (Ct. App. 2019) ("*Dennis III*"). In relevant part, the court of appeals reversed the grant of summary judgment after concluding "a genuine issue of fact exists as to whether the Club violated the [NCA] by allowing some [C]lub members to concede their memberships and not others." *Id.* at 502, 839 S.E.2d at 106. Thereafter, this Court denied cross petitions by the Dennises and the Club for a writ of certiorari to review *Dennis III*. *See Callawassie Island Members Club, Inc. v. Dennis*, Appellate Case No. 2020-000670 (S.C. Sup. Ct. Order filed Jan. 22, 2021) (order denying cross petitions for a writ of certiorari). As a result, the matter involving the resignation of the Dennises was ultimately remanded for trial.

B. Propriety of Summary Judgment

As noted, the case involving the Dennises ultimately ended in the reversal of summary judgment after the court of appeals (1) found genuine issues of material fact existed regarding whether some Club members were allowed to concede their memberships, while others were not; and (2) concluded it was also up to the trier of fact to determine whether the Club's conduct violated provisions of the NCA. *See Dennis III*, 429 S.C. at 502, 839 S.E.2d at 106.

In reaching this conclusion, the court of appeals observed in *Dennis III* that section 33-31-610 of the NCA generally requires all members to have the same rights and obligations with respect to matters such as the transfer of membership. *See id.* at 499, 839 S.E.2d at 104 (citing section 33-31-610); *see also* S.C. Code Ann. § 33-31-610 (2006) ("[A]ll members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the

same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.").

In addition, the court of appeals observed that subsection 33-31-611(c) of the NCA provides that where transfer rights have been provided in the articles or bylaws, the addition of restrictions on those rights must be approved by the members of the nonprofit corporation, i.e., the Club's members. *See Dennis III*, 429 S.C. at 499, 839 S.E.2d at 104–05 (citing subsection 33-31-611(c)); *see also* S.C. Code Ann. § 33-31-611(c) (2006) ("Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.").

Most importantly, the court of appeals held in *Dennis III* that the circuit court erred in treating the issue concerning violation of the NCA as a question of law, when it is "more appropriately an issue to be determined by a factfinder." *Dennis III*, 429 S.C. at 500, 839 S.E.2d at 105.

We similarly hold that Frey's case presents a genuine issue of material fact as to whether the Club violated the NCA by failing to afford each of its members the same rights and obligations as to their transfer rights and in making changes that affected those rights and obligations without the vote of the affected members.

There is evidence in the record that the Club selectively allowed some members to concede their memberships, while others, such as Frey, found themselves lingering on the elusive Resale List controlled by the Club. For example, a letter from the Club's Treasurer, J. Richard Carling, dated February 19, 2007, advised a couple (the Carpenters) that they had previously been informed their membership had been suspended for nonpayment and that the Club's rules provided anyone who was suspended "shall" be subject to expulsion and required to turn over his or her certificate of membership for reissuance by the Club to a new member:

> As you know, your membership in the Callawassie Island Members Club, Inc. **was suspended** by the Board of Directors in accordance with Section 13.3.1 of the Callawassie Island Members Club, Inc. General Club Rules **for failure to pay dues**, fees, assessments and charges associated with your account.

> Please refer to Paragraph 13.1.1 of the Club Rules that states "any member whose account is not settled within the **four (4) months period following suspension shall be expelled from the club**." Paragraph 14.1.5 states that "Any Member of the Club **who has been expelled shall not again be eligible for membership** nor admitted to Club Facilities under any circumstances. An expelled member shall be so notified by registered mail and **shall have the obligation to surrender his or her membership certificate for reissuance by the Club to a new member**.
>
> As a result of current management changes we would like to offer delinquent members another opportunity to bring their accounts current. This correspondence serves as written notification that your account needs to be settled by March 1, 2007.
>
> If you decide to pass on this opportunity, and do not bring your account up to date within ten (10) days of this correspondence, you will be expelled from membership in the Callawassie Island Members Club, Inc., and the following procedures will be put in motion to collect the debt [describing the commencement of a debt collection action].

(Emphasis added.) Frey notes the Club has admitted that it has made offers to other members that allowed them to concede their memberships and forfeit the return of their equity payments in exchange for a termination of their obligations. That such offers were made is readily apparent from a 2014 affidavit from a member of the Club's board of directors, Harman Switzer, although the Club argues some of those offers were made under distinguishable circumstances. The record contains a sampling of offers made to other members, some of which included the admonition that the recipients must keep any such transactions "confidential." In addition, there is evidence from a Club employee who was the membership coordinator and managed the Resale List that the Club secretly allowed some members to concede and/or resign memberships for years, reportedly due to the extremely slow progression of the Club Resale List. By the terms of the organizational documents,

the Club had an agreed-upon protocol for reissuing memberships.[11] Consequently, the manner in which the Club made its decisions regarding the reissuance of memberships is an appropriate topic for further development at trial.

Membership in Callawassie's social organization was **not** a requirement to own a residence on Callawassie Island when Frey became a member, and neither was perpetual membership. Frey argues the problems that arose in this case came about because the Club was having trouble selling all of its memberships. It appears the protocol established in the organizational documents for the reissuance of memberships was either inadequate or subverted in order to favor certain members. It is unclear why the Club has not reissued Frey's membership following his suspension from the Club over a decade ago. Frey contends the Club did reissue memberships for other residents on a selective basis that was not made available nor disclosed to all members, thereby unfairly subjecting him to disparate treatment, and the Club has effectively attempted to impose membership dues and fees in perpetuity in order to make up for the Club's shortage of new members. At a minimum, Frey's allegations in this regard present questions of fact that should not be decided by a court as a matter of law.

Under the Club's theory of the case, even though membership at the time Frey joined was strictly optional, a member can never actually terminate his or her membership following a delinquency after the Club unilaterally changed the terms of the organizational documents. The organizational documents of the Island Club and the Club both stated dues obligations would continue until a membership was reissued, but at the time Frey joined this reissuance provision operated in tandem with other provisions that stated a member who was delinquent could be suspended

[11] Until all of the original memberships were sold, every fourth equity membership was to come from the Resale List of resigned memberships. The memberships were to be reissued on a first-come, first-served basis (subject to the Callawassie Island Partnership's right of first refusal). Members who resigned were generally liable for dues until the Island Club reissued their equity memberships to new members. Upon reissuance, the member was entitled to receive the greater of (1) the membership contribution that the resigned member paid, or (2) eighty percent of the membership contribution paid by the purchaser of the resigned member's membership.

(which Frey was) and that after four months any suspended member **must** be expelled and their payments forfeited.[12]

We find the alteration of one part of the equation, i.e., the provision for expulsion and the forfeiture of all payments, is evidence that may support Frey's claim that the Club has effectively made it impossible for members to terminate their obligations if the Club chooses not to reissue a membership. This is, arguably, a material, substantive change that alters the parties' original documents and adversely affects the rights of the members. Consequently, it required a majority vote of the affected equity members pursuant to the terms of the original organizational documents. The Club does not deny that it unilaterally made this change, but it argues it was free to do so without the consent of the equity members. Under this scenario, a suspended member could theoretically be forced to pay membership dues in perpetuity.

Turning to the opinion of the court of appeals in this matter, however, we note that it found "the evidence [did] not raise a genuine issue of material fact regarding whether the governing documents were properly changed and whether the mandatory expulsion provision was still in effect at the time of [Frey's] suspension[] from the Club." *Callawassie Island Members Club, Inc. v. Martin*, Op. No. 2019-UP-393, 2019 WL 6897780, at *5 (S.C. Ct. App. filed Dec. 18, 2019). The court of appeals found Frey incorrectly relied "on language in the Plan rather than the amendment provision in the Rules." *Id.* The court of appeals stated the 2007 and 2009 General Club Rules now provide as follows:

> [T]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications **shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships**.

[12] In comparison, when the Club has suspended a member for improper conduct, the suspension is specifically limited to one year. Thus, if Frey had been suspended for "misconduct," there would have been some type of limitation on the length of the suspension, whereas the Club apparently now has no limit on the length of time a member may be suspended and obligated to continue paying dues and expenses due to the delinquency.

Id. (emphasis added). We disagree with the court of appeals to the extent it finds the 2007 and 2009 General Club Rules controlling on the issue of modification. As emphasized in the language quoted above, the General Club Rules were always "subject to and controlled by" the Plan and the Bylaws. The Plans and Bylaws originally required a majority vote of the equity members in these circumstances, and the Club could not subvert this protection on voting rights by making a unilateral change in the General Club Rules for its own benefit that materially and adversely affected the financial interests of equity members like Frey. Provisions that surreptitiously purport to permanently lock in Club members in this manner violate the NCA.

For all the foregoing reasons, we agree with Frey that the court of appeals erred in affirming the circuit court's grant of summary judgment to the Club, along with the attendant awards of damages and attorney's fees. *See generally Camburn v. Smith*, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003) ("An award of attorney's fees will be reversed [when] the substantive results achieved by counsel are reversed on appeal."); *Dennis III*, 429 S.C. at 501–02, 839 S.E.2d at 106 (holding, upon remand, that an award of attorney's fees would be reversed where the grant of summary judgment to the Club was reversed). Because Frey's counterclaims are inextricably linked to the issues on appeal and were prematurely ended in this case, we likewise reverse the grant of summary judgment to the Club in this regard.

On remand, the parties shall be permitted to ask the circuit court for any final discovery material that they believe is pertinent to fully address the issues on remand before proceeding to trial. *Cf. Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 113, 410 S.E.2d 537, 544 (1991) (acknowledging that while more than three years had elapsed between the filing of the actions and the grant of partial summary judgment, the plaintiffs had acted with due diligence and should not be precluded from having a reasonable time to procure discovery on remand for trial).

IV. CONCLUSION

We reverse the decision of the court of appeals and remand Frey's case to the circuit court for further proceedings.

REVERSED AND REMANDED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Randall Seels, as the Personal Representative for the Estate of Olivia Seels Smalls, Respondent,

v.

Joe Truman Smalls, Petitioner.

Appellate Case No. 2021-000044

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Berkeley County
Jack A. Landis, Family Court Judge

Opinion No. 28103
Heard March 16, 2022 – Filed August 3, 2022

AFFIRMED

Thomas Ray Sims Sr., of Orangeburg, for Petitioner.

Diane C. Current, of Current Law Firm, P.A., and Donald B. Clark, of Donald B. Clark, L.L.C., both of Charleston, for Respondent.

CHIEF JUSTICE BEATTY: This Court granted a petition for a writ of certiorari to review the decision of the court of appeals in *Seels v. Smalls*, Op. No.

2020-UP-275, 2020 WL 5814601 (S.C. Ct. App. filed Sept. 30, 2020), which held the family court properly retained jurisdiction to rule on an action seeking the equitable apportionment of marital property after one of the parties, Olivia Seels Smalls ("Wife"), died during the pendency of the action. We affirm.

I. FACTS

Wife and her husband, Joe Truman Smalls ("Husband"), were married in 1978 and had three children. The couple accumulated significant assets, including the marital home located in Goose Creek, Berkeley County; eighteen rental properties; and multiple retirement, checking, savings, and investment accounts. Both parties worked during the marriage and contributed to the acquisition of the marital assets.

The parties separated on or about July 2, 2014 when Wife left the marital home. On October 10, 2014, Wife filed the current action in the family court seeking an order that would, *inter alia*, (1) allow her to live separate and apart from Husband *pendente lite* and permanently, (2) restrain Husband from harassing her or cancelling her health insurance, (3) permit her to enter the marital home to retrieve her personal belongings, (4) provide separate support and maintenance and/or alimony *pendente lite* and permanently, and (5) equitably apportion the marital property.

Wife alleged she was in poor health and had been subjected to an extended pattern of abusive behavior from Husband, which escalated after she underwent surgery for lung cancer in 2013. Wife also alleged Husband committed adultery at various times during their marriage. Husband filed an answer denying the allegations and asserting counterclaims. He likewise sought a divorce and equitable apportionment of the marital assets. The parties engaged in mediation, but Wife suffered a recurrence of cancer and they never formally entered into a signed agreement resolving their dispute.

Wife passed away unexpectedly on December 17, 2015. Wife's brother, Randall Seels ("Seels"), was subsequently appointed the personal representative of Wife's estate. Seels moved to be substituted as the plaintiff in the case. Husband, however, sought dismissal of the action, arguing the entire matter had abated upon Wife's death.

By order filed April 26, 2016, the family court granted the motion to substitute Seels as the plaintiff and ruled the claim for equitable apportionment, unlike claims for divorce or support, did not abate upon Wife's death. The family court explained:

> South Carolina case law provides that, although the issues of divorce and support are abated if one spouse dies during the pendency of the case, the issue of property division is not abated, each party's interest in the marital property becomes vested and fixed upon the filing of the marital litigation and the Family Court retains jurisdiction to identify and apportion the marital property[.]

Thereafter, following a hearing on several motions filed by Seels, the family court issued an order in November 2016 that set a schedule to complete discovery, required the parties to attend mediation, and asked the parties to identify the potential witnesses for trial (should mediation fail). The family court noted it had rejected Husband's oral objection that the family court lacked subject matter jurisdiction because Wife died before a written agreement was reached between the parties.

The family court heard the case on the merits in May 2017. On September 28, 2017, it issued a final order equitably apportioning the parties' marital property into 50/50 shares. The court again noted that it had denied Husband's motions to dismiss the matter based on a purported lack of subject matter jurisdiction.

Husband appealed, and the court of appeals affirmed the family court's rulings regarding jurisdiction and equitable apportionment. *Seels v. Smalls*, Op. No. 2020-UP-275, 2020 WL 5814601 (S.C. Ct. App. filed Sept. 30, 2020). This Court granted Husband's petition for a writ of certiorari, which challenged only whether the family court had subject matter jurisdiction to rule on the issue of equitable apportionment.

II. STANDARD OF REVIEW

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Majors v. S.C. Sec. Comm'n*, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007). A judgment from a court that does not have subject matter jurisdiction is void ab initio. *Kosciusko v. Parham*, 428 S.C. 481, 492, 836 S.E.2d 362, 368 (Ct. App. 2019).

"The question of subject matter jurisdiction is a question of law." *Byrd v. McDonald*, 417 S.C. 474, 478, 790 S.E.2d 200, 202 (Ct. App. 2016) (citation omitted). "The jurisdiction of a court is determined by the sovereign creating it," so reference must be made to local law, such as the constitution and the laws of the

state. *Peterson v. Peterson*, 333 S.C. 538, 547–48, 510 S.E.2d 426, 431 (Ct. App. 1998) (citation omitted).

The subject matter jurisdiction of the family court and the probate court are set forth in the South Carolina Code. *See generally* S.C. Code Ann. § 63-3-530 (2010 & Supp. 2021) (family court); S.C. Code Ann. § 62-1-302 (2022) (probate court). Consequently, the current appeal necessarily involves a question of statutory interpretation. *See Singh v. Singh*, 434 S.C. 223, 229, 863 S.E.2d 330, 333 (2021) (recognizing "family courts are statutory in nature and therefore possess only that jurisdiction specifically delegated to them by the South Carolina General Assembly"); *Judy v. Judy*, 393 S.C. 160, 169, 712 S.E.2d 408, 412 (2011) (observing the probate court is not a constitutional court and has only such jurisdiction as may be provided by the General Assembly, consistent with article V, section 12 of the South Carolina Constitution); *see also* S.C. Const. art. V, § 12 ("Jurisdiction in matters testamentary and of administration . . . shall be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this article."). The proper interpretation of a statute presents a question of law. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Questions of law involving subject matter jurisdiction and statutory interpretation are reviewed de novo, without deference to the lower courts. *See id.* ("[T]his Court reviews questions of law of law de novo."); *see also Singh*, 434 S.C. at 228, 863 S.E.2d at 332 ("Generally, appellate courts review the decision of the family court de novo, with the exception of evidentiary and procedural rulings.").

III. DISCUSSION

As previously noted, Wife initiated this action in the family court for, *inter alia*, equitable apportionment of the marital assets. It is undisputed that the family court had subject matter jurisdiction over this issue at the time the pleadings were filed. Husband, however, contends the court of appeals erred in holding the family court retained its exclusive jurisdiction to equitably apportion the marital property because the action abated upon Wife's death and the probate court acquired exclusive original jurisdiction over her assets.

Seels asserts, in contrast, that the court of appeals correctly followed existing precedent in affirming the family court's ruling that claims for equitable apportionment do not abate upon the death of a party. Seels maintains the family court retained its jurisdiction to substitute the personal representative of Wife's estate

for Wife and issue a ruling identifying and apportioning the marital property. Seels states that, once this process was completed, the probate court, in exercising its exclusive original jurisdiction over Wife's estate, would then be positioned to make the decisions regarding the ultimate disposition of any of Wife's property that was included in her estate. We agree with Seels.

We shall first examine the statutes governing the jurisdiction of the family court and the probate court, as well as provisions allowing concurrent jurisdiction, before turning to a consideration of principles of statutory interpretation and existing precedent.

A. Family Court's Jurisdiction

In section 63-3-530 of the South Carolina Code, the South Carolina General Assembly has statutorily vested the family court with "exclusive jurisdiction" over "domestic matters," including actions for the equitable apportionment of marital property:

> (A) The family court has **exclusive jurisdiction**:
>
> . . . .
>
> (2) to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and **for settlement of all legal and equitable rights of the parties** in the actions in and **to the real and personal property of the marriage** and attorney's fees, if requested by either party in the pleadings[.]

S.C. Code Ann. § 63-3-530(A)(2) (2010) (emphasis added). Jurisdiction to identify and determine a party's rights to marital property is just one of forty-six areas of exclusive jurisdiction enumerated in subsection (A).

The family court's exclusive jurisdiction over equitable apportionment extends to marital property; it has no jurisdiction over nonmarital property. S.C. Code Ann. § 20-3-630(B) (2014). "Marital property" is defined as "all real and personal property [that] has been acquired by the parties during the marriage and [that] is owned **as of the date of filing** or commencement of **marital litigation** as provided in Section 20-3-620 regardless of how legal title is held," except for certain

classes of property that constitute nonmarital property (e.g., inherited items, gifts from a party other than the spouse, property acquired prior to marriage, property excluded by contract). *Id.* § 20-3-630(A) (emphasis added).

The family "court shall make a final equitable apportionment between the parties of the parties' marital property upon request by either party in the pleadings" that seek a divorce, separate support and maintenance, or the disposition of the property when a prior court lacked jurisdiction, or "in other marital litigation between the parties." *Id.* § 20-3-620(A).

Wife's initiation of an action for divorce and equitable apportionment qualifies as "marital litigation." *See id.*; *see also Brown v. Brown*, 295 S.C. 354, 358, 368 S.E.2d 475, 477 (Ct. App. 1988) ("Marital litigation is litigation which seeks to alter or terminate the marital status of the parties.").

Section 20-3-610 provides each spouse has a "vested" right in the "marital property," which is defined—and subject to apportionment "by the family courts of this State"—at the moment the marital litigation is filed:

> During the marriage a spouse shall acquire, based upon the factors set out in Section 20-3-620, **a vested special equity and ownership right in the marital property** as defined in Section 20-3-630, which equity and ownership right are **subject to apportionment** between the spouses **by the family courts** of this State **at the time marital litigation is filed** or commenced as provided in Section 20-3-620.

S.C. Code Ann. § 20-3-610 (2014) (emphasis added).

B. Probate Court's Jurisdiction

The subject matter jurisdiction of the probate court is outlined in section 62-1-302, which provides in relevant part that the probate court has "exclusive original jurisdiction" over the "estates of decedents, including . . . determination of property in which the estate of a decedent . . . has an interest":

> (a) To the full extent permitted by the Constitution, and **except as otherwise specifically provided**, the probate

> court has **exclusive original jurisdiction** over all subject matter related to:
>
> > (1) **estates of decedents, including** the contest of wills, construction of wills, **determination of property in which the estate of a decedent** or a protected person **has an interest**, and determination of heirs and successors of decedents and estates of protected persons, **except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters**, including partition, quiet title, and other actions **pending** in the circuit court[.]

S.C. Code Ann. § 62-1-302(a)(1) (2022) (emphasis added).

C. Provisions Regarding Concurrent Jurisdiction

The South Carolina General Assembly has provided for several areas of concurrent jurisdiction among the family court, the probate court, and the circuit court. Section 62-1-302, the probate court's jurisdictional statute, contains several, including the one quoted above in subsection (a)(1) regarding the concurrent jurisdiction of the probate court and the circuit court. *See id.*

Concurrent jurisdiction is also referenced in subsection (c) of the same statute, which provides for the concurrent jurisdiction of the probate court and the family court over the following:

> > (c) The probate court has jurisdiction to hear and determine issues relating to [1] paternity, [2] common-law marriage, and [3] interpretation of marital agreements **in connection with estate**, trust, guardianship, and conservatorship actions **pending before it, concurrent with that of the family court** pursuant to Section 63-3-530 [setting forth the family court's subject matter jurisdiction in domestic matters].

Id. § 62-1-302(c) (emphasis added).

In addition, the family court's jurisdictional statute (section 63-3-530) contains a similar provision giving the probate court concurrent jurisdiction with the family court in only three specified instances involving paternity, common-law marriage, or the interpretation of a marital agreement:

> (B) Notwithstanding another provision of law, the family court and the probate court have **concurrent jurisdiction** to hear and determine matters relating to [1] paternity, [2] common-law marriage, and [3] interpretation of marital agreements; **except that the concurrent jurisdiction of the probate court extends only to matters dealing with the estate, trust, and guardianship and conservatorship actions before the probate court**.

S.C. Code Ann. § 63-3-530(B) (2010) (emphasis added).[1]

D. Statutory Interpretation & Precedent

Because the Court is faced with several statutes potentially impacting the determination of jurisdiction in this matter, the Court must apply rules of statutory interpretation in accordance with established principles.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The plain language of a statute is the best evidence of the legislature's intent. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012).

It is also a long-standing principle of statutory analysis that the implied repeal of statutes is not favored. *Hodges*, 341 S.C. at 88, 533 S.E.2d at 583. Rather, statutes touching upon the same subject matter must be read in harmony to give effect to each whenever possible, as it is presumed that the legislature is familiar with prior legislation and, if it intended to repeal an existing law, it would expressly do so. *Id.* at 88–89, 533 S.E.2d at 583. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Id.* at 87, 533 S.E.2d at 582 (citation omitted).

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[1] This Court abolished common-law marriage prospectively in *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (2019).

In construing the interplay of the foregoing statutes, Husband argues section 62-1-302 gives the probate court exclusive original jurisdiction over Wife's marital property because the family court action was abated upon Wife's passing and should have been dismissed. Husband asserts a case relied on by both the family court and the court of appeals, *Hodge v. Hodge*, 305 S.C. 521, 409 S.E.2d 436 (Ct. App. 1991), is distinguishable because (1) the death of the party in *Hodge* occurred later in the proceedings (on appeal), and (2) *Hodge* is outdated as the statutory law cited therein was later changed by the General Assembly. We disagree with Husband on both points.

In *Hodge*, a wife brought an action for separate support and maintenance and equitable apportionment. The family court identified and apportioned the marital property, and both spouses appealed. The husband died while the appeal was pending, and his estate was substituted as a party. The court of appeals (the "*Hodge* court") considered "the issue of whether a spouse's vested interest in marital property arising from marital litigation is divested by the death of the litigant's spouse." *Id.* at 522, 409 S.E.2d at 437.

The *Hodge* court stated the "linchpin" of its reasoning was the General Assembly's use of the word "vested" in section 20-7-471 (now codified as section 20-3-610), which states the filing of marital litigation gives rise to a "vested" equity and an ownership right in marital property that are subject to apportionment by the family court at the time the marital litigation is filed. *Id.* at 524, 409 S.E.2d at 438–39 (citing the former S.C. Code Ann. § 20-7-471 (Supp. 1990)).

In considering whether the family court matter was abated by one spouse's death, the *Hodge* court relied on the statute setting forth the subject matter jurisdiction of the family court in domestic matters, section 20-7-420 (now reorganized as section 63-3-530), which provides the family court has "exclusive jurisdiction" over the settlement of legal and equitable rights of the parties to real and personal marital property in the course of marital litigation. *Id.* at 525, 409 S.E.2d at 439 (citing S.C. Code Ann. § 20-7-420 (Supp. 1990)).

The *Hodge* court stated: "Since we hold that the wife's interest in the marital property was vested and therefore fixed by the institution of marital litigation, we hold that the only court which has jurisdiction to divide the marital estate is the Family Court, subject, of course, to appeal." *Id.* The *Hodge* court concluded the "action did not abate with respect to the issues relating to the equitable division of vested marital property." *Id.* The Hodge court observed that, although its decision

"is necessarily based upon the statutory law of South Carolina, [the] decision [also] comports with the rule applied by the vast majority of the courts of this nation." *Id.*

We agree with the assessment of the court of appeals in the current matter that the timing of the husband's death in *Hodge* was not outcome determinative, and the simple reorganization of the applicable statutes in the South Carolina Code did not affect their underlying substance. Vested property rights are fundamental rights that can survive the death of a party, and they inure to the benefit of the party's estate.

This result accords with other South Carolina precedent, which has recognized that pending actions for divorce and support abate upon the death of a spouse, while pending actions regarding the "vested" interest of each spouse in the marital property do not and remain, instead, within the exclusive purview of the family court. *See generally Louthian & Merritt, P.A. v. Davis*, 272 S.C. 330, 332, 251 S.E.2d 757, 758 (1979) ("It is held by the overwhelming weight of authority that an action for divorce, being purely personal, terminates on the death of either spouse, and where the action for divorce is commenced, and one of the parties dies thereafter but before the entry of a final decree, the action abates and the jurisdiction of the court to proceed with the action is terminated."); *Brown v. Butler*, 347 S.C. 259, 264–65, 554 S.E.2d 431, 433–34 (Ct. App. 2001) (holding the family court did not have jurisdiction over the wife's action to set aside an allegedly fraudulent conveyance of property by her deceased husband, where the action was brought during the husband's lifetime but the purpose of the case was not to apportion marital property); *Hillman v. Pinion*, 347 S.C. 253, 257, 554 S.E.2d 427, 429 (Ct. App. 2001) ("This court has held that the death of one party to an action does not abate an action for equitable distribution." (citing *Hodge*, 305 S.C. at 525, 409 S.E.2d at 439)); *Bayne v. Bass*, 302 S.C. 208, 209, 394 S.E.2d 726, 726–27 (Ct. App. 1990) (holding where a ruling granting a divorce was announced on the bench but the order was not yet signed and filed by the family court judge, the action abated upon the death of the wife because, until an order is filed with the clerk of court, it is subject to change by the judge and is not final).

The distinction is based on the historical recognition by courts that claims that are purely personal in nature abate upon the death of a party, whereas claims that primarily concern property interests do not—and a personal representative may, therefore, be substituted on behalf of the decedent's estate—because such actions can still achieve their primary purpose. *See, e.g.*, *Olofson v. Olofson*, 625 S.W.3d 419, 429–30 (Mo. 2021) (en banc) (making this distinction). In addition, the *Hodge* court cited the tendency of many jurisdictions to allow actions regarding property

issues to continue despite the death of a party. *See Hodge*, 305 S.C. at 525, 409 S.E.2d at 439 (first citing Francis M. Dougherty, Annotation, *Effect of Death of Party to Divorce Proceeding Pending Appeal or Time Allowed for Appeal*, 33 A.L.R.4th 47 (1984); and then 24 Am. Jur. 2d *Divorce and Separation* § 176–77 (1983)).

The family court's resolution of claims to marital property initiated during the lifetimes of the parties is a necessary complement and predicate to the probate court's proper administration of estates. The Supreme Court of New Mexico has specifically recognized this fact and discussed the need to conclude a matter identifying and apportioning the marital assets before administering the estate of a party, stating: "When a party to a pending divorce action dies before a final divorce decree is entered, the decedent's estate cannot be immediately distributed in probate because the extent of the property owned by the decedent is unknown." *Oldham v. Oldham*, 247 P.3d 736, 744 (N.M. 2011). The New Mexico court explained:

> For example, if a party to a pending divorce dies intestate, the domestic relations court must determine the extent of the decedent's separate property and share of the community property in order to determine what property will pass by intestacy. If a party to a pending divorce dies with a valid will, the domestic relations proceeding must first determine the property over which the decedent can exercise the power of testamentary disposition. If a decedent's will has a residuary clause or pour-over provision, the domestic relations proceeding must determine what property will pass via that residuary clause or pour-over provision. The domestic relations proceedings must therefore be completed first.

Id.

Similarly, in *Stone v. Guaranty Bank & Trust Co.*, 270 S.C. 331, 335, 242 S.E.2d 404, 405 (1978), a case that predates the statutory creation of South Carolina's family court, this Court noted Stone had appealed orders of divorce and contempt, and the executor of his estate had been substituted as a party after his death. Although the Court found Stone's death abated his counterclaim for a divorce and rendered contempt proceedings against him moot, it found Stone's "appeal may continue in favor of his estate to the extent the lower court's order affects the property

rights of the parties." *Id.* at 335–36, 242 S.E.2d at 405–06. The Court stated, "The appeal continues 'for the ascertainment of whether (Mr. Stone's) property has been rightfully diverted from its appropriate channel of devolution.'" *Id.* at 336, 242 S.E.2d at 406 (alteration in original) (citation omitted). In other words, it was necessary to first properly determine Stone's right to marital property because it would impact the distribution of his estate.

Returning to the matter currently before the Court, we hold the court of appeals did not err in finding the family court retained jurisdiction to identify and apportion the marital property of the parties. The statutory provisions concerning the subject matter jurisdiction and procedures of the family court and the probate court can be read in harmony in order to give effect to all provisions.

In summary, section 63-3-530, governing the family court's subject matter jurisdiction, provides in subsection (A)(2) that the family court has "exclusive jurisdiction" to settle all legal and equitable rights regarding marital property. Importantly, in section 20-3-610, the General Assembly has confirmed that each spouse has a "vested special equity and ownership right in the marital property" that is subject to apportionment by the family court at the time marital litigation is filed. Further, the definition of "marital property" in subsection 20-3-630(A) provides "marital property" is all property acquired or owned by the parties as of the date marital litigation is filed, regardless of how it is titled, so marital property essentially springs into existence as a legally defined concept at that moment in time.

As to the probate court, subsection 62-1-302(a)(1) gives that court exclusive original jurisdiction over the estates of decedents, including a determination of the property in which the decedent has an interest. The General Assembly has provided the probate court has concurrent jurisdiction with the family court in three instances—issues regarding paternity, common-law marriage, and the interpretation of marital agreements—to the extent they arise in the context of an estate action. Those circumstance are not present here. *See generally Hodges*, 341 S.C. at 87, 533 S.E.2d at 582 ("The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." (citation omitted)).

In any event, a provision allowing concurrent jurisdiction is not an abrogation of jurisdiction by the family court. If the General Assembly had intended this result, it could have included this point in the plain language of the statutes governing the jurisdiction of the two courts. It did not do so, and principles of statutory

interpretation do not favor implying such a result in the absence of any indicia that this was, in fact, the General Assembly's intent. *See id.* at 88–89, 533 S.E.2d at 583 (noting repeal by implication is not favored).

Because Wife initiated this marital litigation in the family court during the parties' lifetimes, the parameters of the marital property were already fixed and the family court acquired exclusive jurisdiction over the issue of equitable apportionment at that time. *See Gilley v. Gilley*, 327 S.C. 8, 10–11, 488 S.E.2d 310, 312 (1997) ("The general rule is that jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. If jurisdiction once attaches to the person and subject matter of the litigation the subsequent happening of events will not ordinarily operate to oust the jurisdiction already attached." (quoting *Gardner v. Gardner*, 253 S.C. 296, 302, 170 S.E.2d 372, 375 (1969))). Wife's rights had already vested upon the filing of marital litigation, so it became incumbent on the family court to first conclude this matter in its exclusive jurisdiction so the probate court could then exercise its exclusive original jurisdiction over the distribution of Wife's estate.

In addition to the lack of any overt intent by the General Assembly to divest the family court of jurisdiction in these circumstances, we note the General Assembly has not enacted any comparable statutory procedures for the probate court to follow in identifying and equitably apportioning marital property, as it has for the family court. *Cf.* S.C. Code Ann. § 20-3-620(B) (2014) (enumerating an extensive list of fifteen factors for the family court to weigh in making the apportionment). Thus, the family court is in the best position to decide issues affecting marital property in light of the long-standing, detailed statutory procedures governing the family court's exercise of exclusive jurisdiction over this subject matter.

IV. CONCLUSION

South Carolina statutes confer exclusive jurisdiction on the family court to equitably apportion marital property. There is nothing in the statutes governing either the family court or the probate court specifically abrogating that jurisdiction, and implied repeal is not favored. South Carolina precedent has found the death of a party does not abate the issue of equitable apportionment. Further, we note the family court is best suited to decide issues affecting marital property in accordance with long-standing statutory procedures, particularly where no comparable statutory procedures have been enacted for the probate court. Based on the foregoing, we

hold the court of appeals did not err in determining the family court properly retained jurisdiction to rule on the action for equitable distribution and affirm.[2]

AFFIRMED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[2] On appeal to this Court, Husband has challenged only the family court's subject matter jurisdiction. In light of our holding as to jurisdiction, the family court's ruling as to the merits of the equitable apportionment is conclusive.

The Supreme Court of South Carolina

In the Matter of Jeffrey Alton Phillips, Respondent.

Appellate Case No. 2022-001039

ORDER

This Court has received sufficient evidence demonstrating that Respondent poses a substantial threat of serious harm to the public or administration of justice pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

s\ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
July 26, 2022

The Supreme Court of South Carolina

In the Matter of Courtney N. Gilchrist, Respondent.

Appellate Case No. 2022-001042

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

s\ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
July 29, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alicia W. Cohen, Appellant,

v.

Wolanda A. Cohen, Respondent.

Appellate Case No. 2019-001210

Appeal From Charleston County
Michèle Patrão Forsythe, Family Court Judge

Opinion No. 5927
Heard May 12, 2022 – Filed August 3, 2022

REVERSED

William J. Clifford, of William J. Clifford, LLC, of North Charleston, for Appellant.

Alan David Toporek, of Uricchio Howe Krell Jacobson Toporek Theos & Keith, PA, of Charleston, for Respondent.

WILLIAMS, C.J.: In this domestic matter, Alicia Cohen appeals the family court's divorce decree, arguing the court erred in denying her request for alimony and attorney's fees. We reverse.

FACTS/PROCEDURAL HISTORY

On April 2, 2008, Wolanda Cohen (Husband) and Wife married.[1] On April 27, 2017, Wife filed for divorce on the ground of adultery. On June 12, 2017, the family court entered a temporary consent order wherein Husband agreed to pay $3,000 of Wife's attorney's fees and $1,100 per month in alimony. As a result of Husband's failure to comply with discovery requests, to pay temporary support, and to pay Wife's attorney's fees as agreed, Wife filed motions to compel and show cause. Husband eventually complied with the discovery requests and paid the amounts owed to Wife under the temporary consent order.

At the August 21, 2018 divorce hearing, Wife testified she worked as a school teacher throughout the marriage and indicated she had a bachelor's degree and two master's degrees, one of which she earned during the marriage. She explained she obtained her master's degrees in the hope of someday becoming a school principal and had applied for several principal positions. Wife stated she owed only $11,000 on a habitat for humanity home she acquired and had a $407 monthly mortgage payment. She claimed Husband was unemployed for half of their marriage and that he did not support her financially. Husband was injured and unable to work for much of their marriage. She stated that when Husband was working, he would sometimes contribute $800 a month to the marriage but he usually did not contribute anything. She testified that in 2017, Husband was able to earn $80,000 because he had accrued seniority in the International Longshoremen's Association (ILA) and was "high on the ladder." Wife also testified that she did not walk away from the marriage; rather, Husband pursued a relationship with her second cousin and she could not condone or forgive such behavior.

Husband testified that prior to the marriage, he joined the ILA and worked sporadically as a longshoreman in Charleston. He stated he was laid off by the ILA approximately nine times from 2005 to 2018. Husband explained that after he was laid off by the ILA in 2008, he worked a series of jobs before returning to work as a longshoreman in 2010. He further explained that while working as a longshoreman, he was injured twice and did not work for several years as a result.

[1] The parties did not have any children.

He agreed that while he made less money than Wife from 2008 to 2015, he started to earn more money than Wife in 2016.

Husband and Wife both submitted financial declarations to the court. Wife's gross monthly income was $4,713.53, or approximately $56,562 per year. Wife's financial declaration also showed she had a net monthly income of $2,788.49 and net monthly expenses of $3,699.28. Although Wife had a small monthly mortgage payment remaining on the balance of her home, she had substantial monthly installment payments, of which a large portion was federal student loans. Husband reported a gross monthly income of $6,745, or approximately $80,940 per year and a net monthly income of $4,103. He declared total monthly expenses of $4,544, the majority of which was rent and his obligation to pay spousal support under the temporary consent order. Husband also admitted he shares his monthly expenses with a live-in girlfriend.

The family court ruled from the bench and granted the parties a divorce on the ground of adultery but took the issues of property division, alimony, and attorney's fees under advisement. On December 31, 2018, the family court issued an order (Order I) awarding Wife sole ownership of her home and $650 per month in permanent periodic alimony. The family court concluded that although Wife was better educated than Husband and had more stable employment and her future earnings were likely to increase and her expenses decrease, Husband's current income was significantly higher than that of Wife. Finally, the family court ordered Husband to pay $10,500 of Wife's attorney's fees. The family court found that while "[t]he parties each [had] an ability to pay their own [attorney's] fees," Wife's attorney achieved a beneficial result and paying Wife's attorney's fees would not place an undue burden on Husband.

Husband filed a Rule 59(e), SCRCP motion, which the family court granted in part and denied in part. On July 9, 2019, after reconsidering the statutory factors for alimony, the family court filed an order (Order II) finding Wife was not entitled to alimony because, by Wife's admission, Husband did not provide financial support to her during the marriage. The family court also determined Wife was not entitled to attorney's fees because Husband conceded he had no interest in the marital home and the discovery process was not burdensome on either party. This appeal followed.

ISSUES ON APPEAL

I. Did the family court err in denying Wife alimony?

II. Did the family court err in denying Wife attorney's fees and costs?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). On appeal from the family court, this court reviews factual and legal issues de novo, with the exceptions of evidentiary and procedural rulings. *See Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019); *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 596, 813 S.E.2d 486, 486 n.2, 487 (2018) (per curiam). Therefore, this court may find facts in accordance with its own view of the preponderance of the evidence. *Posner v. Posner*, 383 S.C. 26, 31, 677 S.E.2d 616, 619 (Ct. App. 2009). However, this broad scope of review does not prevent this court from recognizing the family court's superior position to evaluate witness credibility and assign comparative weight to testimony. *Lewis*, 392 S.C. at 392, 709 S.E.2d at 655. The appellant maintains the burden of convincing the appellate court that the family court's findings were made in error or were unsubstantiated by the evidence. *Posner*, 383 S.C. at 31, 677 S.E.2d at 619.

LAW/ANALYSIS

I. Alimony

Wife argues the family court erred in denying her permanent periodic alimony in Order II. Specifically, Wife emphasizes she supported Husband while he accrued the ILA seniority that now enables him to earn more money than her. We agree and reverse on this issue.

"Generally, the purpose of alimony is to place the supported spouse, to the extent possible, in the position she enjoyed during the marriage." *Butler v. Butler*, 385 S.C. 328, 336, 684 S.E.2d 191, 195 (Ct. App. 2009). Permanent, periodic alimony is a substitute for support that is normally incidental to marriage. *Johnson v. Johnson*, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). In determining alimony,

> the court must consider and give weight in such proportion as it finds appropriate to all of the following factors:
>
> (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant.

Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001); *see also* S.C. Code Ann. § 20-3-130(C) (2014) (listing the factors to consider in determining an alimony award). "No one factor is dispositive." *Allen*, 347 S.C. at 184, 554 S.E.2d at 425.

We find the family court erred in denying Wife alimony. In denying Wife alimony in Order II, the family court made statements of fact and considered only the disposition of the parties' assets, focusing primarily on Wife's award of the home as nonmarital property, the small mortgage on the home, and the fact that Wife's expenses would be minimal after she paid off the mortgage. The court focusing its alimony analysis on these few considerations was an error as it failed to adequately consider all of the mandatory, statutory factors in determining Wife was ineligible for alimony. *See id.* at 184, 554 S.E.2d at 424 (listing the factors to be considered when making an award of alimony).

Under our evaluation of the statutory factors, we find Wife has a need for alimony. Initially, we note that Wife and Husband's ten-year marriage, while not long-term, was not of such a short duration to overly affect our alimony determination, especially considering other factors militate towards Husband paying alimony. *See Pirri v. Pirri*, 369 S.C. 258, 268–69, 631 S.E.2d 279, 285 (Ct. App. 2006) (finding that barring alimony solely based on an eight-year marriage's length was an error when the parties' standard of living, relative incomes, and the husband's fault in

breaking up the marriage favored awarding wife alimony); *McDowell v. McDowell*, 300 S.C. 96, 100, 386 S.E.2d 468, 470 (Ct. App. 1989) (affirming a family court's alimony award to a husband when the factors supported the court's decision despite the marriage lasting only two and a half years). Furthermore, even though Husband was injured at work several times throughout the marriage and was laid off several times following the 2008 recession,[2] his income is greatly higher than Wife's after accruing seniority with the ILA. Although Wife is more educated than Husband and has intentions of becoming a school principal,[3] Husband's current and future earning capacity significantly outweighs that of Wife.

Turning to the parties' financial declarations, Wife shows a financial need for alimony as her monthly expenses far exceed her monthly net income. While the family court relied heavily on the fact that Wife received the marital home and would have a decrease in expenses when the relatively small mortgage was paid off, the $407.28 decrease in expenses associated with the mortgage still leaves Wife with a monthly deficit of $503.51. Wife also has a principal balance of $207,039.86 in federal student loans. Despite Wife's testimony that her total student loan balance will be forgiven after five more years of employment in a Title I or science-based education program, this is speculative and not guaranteed, meaning any reduction in monthly expenses associated with the loans' forgiveness is tentative. *See Heath v. Heath*, 295 S.C. 312, 315, 368 S.E.2d 222, 224 (Ct. App. 1988) (stating a Husband's future earning potential was inherently speculative and remanding for the trial court to consider the parties' current financial situations). On the other hand, given his seniority with the ILA, Husband has the ability to pay Wife alimony. Husband's 2017 income tax return reported a gross income of $80,942. His financial declaration reflects a monthly net income of $4,103 and total monthly expenses of $4,544 that primarily consists of rent and his $1,100 temporary support to Wife. While Husband's financial declaration shows a deficit, it quickly changes to a surplus when the original $650 alimony obligation in Order I is substituted for the $1,100 temporary support obligation.

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[2] Wife testified that Husband did not work for half of their marriage.

[3] Wife obtained a Bachelor's of Science degree, a Master's in Education degree, and a Master's in Supervision degree from South Carolina State University. Husband completed one semester of college from South Carolina State University and did not acquire a degree.

Finally, Wife supported Husband through his injuries and a great economic downturn using her education and stable employment as a school teacher. Wife's support allowed Husband to heal his injuries, return to work, receive senior status with the ILA, and realize a substantial pay increase. Wife now shows a need for alimony and would not require alimony but for Husband's adulterous relationship. Wife should not be penalized now, and left in need, because she supported Husband for the majority of their marriage, especially considering Husband's ability to contribute financially to the marriage transpired at the end of the marriage and after his adulterous relationship. Because Wife shows a need for alimony, Husband has the ability to pay alimony, and the other factors militate towards awarding Wife alimony, we find the family court erred in denying Wife alimony. *See* § 20-3-130(C) (stating the court must consider and give weight in such proportion as it finds appropriate to the alimony factors). Therefore, we reverse on this issue and reinstate Husband's alimony obligation found in Order I.

II. Attorney's Fees

Wife argues she is entitled to attorney's fees because Husband's adultery caused the divorce and Husband's failure to comply with discovery requests and the temporary consent order extended the litigation. Husband argues the family court properly denied Wife's request for attorney's fees because most of his litigation misconduct occurred while he was pro se. We reverse on this issue.

"The [family] court, . . . after considering the financial resources and marital fault of both parties, may order one party to pay a reasonable amount to the other for attorney fees . . . ." S.C. Code Ann. § 20-3-130(H) (2014).

> In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living.

E.D.M. v. T.A.M., 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). Misconduct or uncooperativeness during the course of litigation can be a factor in awarding attorney's fees. *Rogers v. Rogers*, 432 S.C. 168, 194, 851 S.E.2d 447, 461 (Ct. App. 2020).

We find the family court erred in denying Wife attorney's fees in Order II. The family court determined Wife was not entitled to attorney's fees because Husband conceded he had no interest in the marital home and there was not "a great deal of discovery done in this case." This analysis fails to evaluate any of the factors courts should weigh when determining whether to award attorney's fees.

We find Wife is entitled to a reasonable sum for the costs she incurred in maintaining this action for divorce. First, but for Husband's infidelity, Wife would not have incurred the expenses associated with hiring an attorney. *See* § 20-3-130(H) (stating the family court may consider the marital fault of both parties in ordering one party to pay attorney's fees). Second, Husband forced Wife to incur additional fees during the litigation through his uncooperativeness with Wife's discovery requests and the court's temporary consent order. This misconduct forced Wife to file motions to compel and a rule to show cause to complete discovery and receive her temporary support. Despite Husband's argument that much of his misconduct occurred while he was a pro se litigant, he was on notice of the litigation and the court's temporary consent order. Pro se litigants have a duty to remain up-to-date on the progress of their case and comply with court orders. *Hill v. Dott*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) ("[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." (alteration in original) (quoting *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988))).

Further, Wife's attorney's fees were $17,719—a substantial portion of her annual income and value of her other property. Bearing the burden of the entire fee would drastically reduce her standard of living and force her to live well below her means. Also, because we now reinstate Husband's alimony obligation, Wife's attorney obtained a beneficial result from the litigation in securing her alimony and in preventing Husband from gaining special equity in Wife's real property. Contrarily, Husband is now in a senior position with the ILA and earns a substantial amount more than Wife. With his large salary increase, Husband has a greater ability to pay his, and a portion of Wife's, attorney's fees, without the fees affecting his standard of living. The fees would not be an undue burden on Husband if paid in monthly installments as contemplated in Order I. Moreover, Husband's monthly expenses are shared with a cohabitating girlfriend. Because

Wife would not have incurred litigation expenses but for Husband's adultery, she was burdened with more fees because of Husband's uncooperativeness, Husband has a better ability to pay a portion of Wife's attorney's fees, and the fee is less likely to affect Husband's standard of living, we find Wife is entitled to Husband paying a portion of her attorney's fees. Therefore, we reverse on this issue and reinstate Wife's attorney's fees from Order I.

CONCLUSION

Accordingly, the family court's Order II is reversed regarding alimony and attorney's fees, and we now reinstate Order I.

REVERSED.

KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Richard Rosenbaum, Appellant.

Appellate Case No. 2018-002240

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5928
Heard February 9, 2022 – Filed August 3, 2022

AFFIRMED

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

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, and Assistant Attorney General Jonathan Scott Matthews, Jr., all of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

GEATHERS, J: In his appeal from a voluntary manslaughter conviction, Appellant James R. Rosenbaum argues the circuit court erred by (1) denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act (the Act); (2) allowing the State to introduce evidence of Appellant's prior

victimhood of sexual assault as well as his jailhouse statements as probative evidence of a racial motive for the alleged crime; and (3) improperly instructing the jury regarding evidence of his codefendant's guilt. We affirm.

FACTS/PROCEDURAL HISTORY

In 2016, Appellant was indicted in Horry County for the murder of Roy Davis (Victim), after Victim was beaten to death with a baseball bat in the home of Appellant. On July 16–17, 2018, a hearing was held to determine whether Appellant and his codefendant, Dianne Durkin, were entitled to immunity under the Act. The circuit court held a hearing and denied immunity. Then, on December 3–10, 2018, a jury trial was held. Immediately before closing arguments began, Durkin entered a guilty plea to voluntary manslaughter pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). The jury ultimately found Appellant guilty of voluntary manslaughter, and he was sentenced to fifteen years of incarceration.

At the time of the incident, Durkin and Appellant had been romantically involved for about two years. She and Appellant moved to Horry County in 2015, and both had histories of drug abuse. Durkin testified that she met Victim in August 2015, while she and Victim were both using drugs with a mutual friend. Victim allegedly told Durkin that he could get her a job at the farm where he was employed. Durkin testified she did not see Victim again until the night of his death, July 11, 2016, when she visited the farm to ask the farm's owner for a job. Durkin stated that she had given Victim a ride on that day and, soon after, Victim came to her home seeking another ride. She then said she gave him a glass of water and returned to a backroom to fold laundry.

Durkin then alleged that when she returned to the kitchen, Victim was "completely naked," and when she asked him to leave, he refused to do so and struck her in the face before tackling her onto a mattress that was in the kitchen. Appellant testified that he went to the gym prior to the incident, but left after the parking lot was too full. Appellant alleged that upon returning home, he heard Durkin screaming from the inside. He then put on fighting gloves he had in his car, grabbed a baseball bat[1] from outside, ran inside the house, and began attacking Victim. Durkin alleged that she got ahold of the bat at one point and struck Victim in the legs and groin. At another point during the incident, Victim became "freaked out"

[1] Durkin and Appellant alleged that the metal baseball bat was kept on the back porch to hit balls to their dog, but they did not own a dog at the time of the incident.

and attempted to flee the home, but Appellant pressed him against the wall and trapped him, at which point Durkin began kicking Victim. Appellant and Durkin also shot Victim with a pellet gun and ended up beating Victim with the baseball bat until he succumbed to his wounds and died. At some point during the struggle, Durkin called 9-1-1 to report the incident.

Audio from Durkin's rambling, bizarre, and, at times, incoherent 9-1-1 call was used as evidence at both the immunity hearing and trial. Throughout the call, Durkin and Appellant seem to be in control of the situation and are heard throughout the audio shouting at Victim. While shouting at Victim, Appellant is clearly heard on the audio calling Victim a "f***ing n***er." Victim is heard screaming in pain and begging for mercy, at one point stating, "I can't move, I can't move." Under cross-examination, Appellant testified that he was on top of Victim as Victim was heard saying "I can't move, I can't move." Victim was still being beaten when the 9-1-1 call was connected, and the sound of the metal bat striking Victim was so distinct that the 9-1-1 operator, without being informed that a bat was being used, specifically asked about the use of a bat.

Relying on the aforementioned testimony of Appellant and Durkin, as well as Durkin's 9-1-1 call audio, the circuit court ruled that Appellant and Durkin failed to prove by a preponderance of the evidence they were entitled to immunity. The circuit court explained that no evidence as to Victim's specific cause of death was entered at the hearing and it was the defendant's burden to prove his entitlement to immunity at the hearing, which included the presentation of necessary evidence.

At trial, more evidence was presented in addition to nearly identical testimony by Durkin and Appellant, as well as the 9-1-1 audio.

Corporal Mark Johnson with the Horry County Police Department testified that he arrived on the scene on the night of Victim's death in response to the 9-1-1 call. Upon arriving at the scene, Cpl. Johnson observed a "tremendous amount of blood" throughout the home and noticed Victim's head appeared mutilated, with "brains hanging out of his head." Cpl. Johnson also noted that Appellant and Durkin appeared unharmed. Later that evening, at the detention center, Appellant discovered a small laceration on his leg that was determined by the attending physician to be minor and treated by placing a "Band-Aid" on it.

After analyzing the blood from the incident, Paulette Sutton, an expert in bloodstain pattern analysis, testified at trial that several stains along the walls of

Appellant's home showed evidence of blood clotting, which indicated that Victim was injured in such a way to cause bleeding, and those wounds were clotting between ten and fifteen minutes of the wounds being inflicted. Those clots were then transferred to the walls around Victim after he was struck with enough force to detach the clots from his wounds and send them flying towards nearby surfaces, indicating very heavy blows. Sutton also concluded that nearly all of the blood at the scene was from Victim.

The State also presented evidence that Durkin and Victim had a previous relationship based on sex and drugs. Randy Hucks, the owner of the farm where Victim was employed, testified that he was aware that Victim and Durkin had a sexual relationship. Additionally, the State called Bridget Briles and Lynndale Lewis who were incarcerated with Durkin and Appellant, respectively, while awaiting trial and heard each of them make incriminating statements concerning the relationship between Durkin and Victim and their involvement in Victim's death.

Briles testified that she was incarcerated with Durkin for several days. During that time, Durkin told Briles that she had known Victim for approximately two years, during which time they often used drugs together and had sexual intercourse. Durkin also told Briles that she wished she had bleached the house and just thrown "his body into a river," and if she had done so, she "would have never been caught for it."

Lewis testified that during his time incarcerated alongside Appellant, Appellant stated that he had stayed at the VA hospital for some period of time and, upon release, was jealous and angry after hearing information[2] regarding Victim. Lewis also testified that Appellant told him that on the night of the incident, Appellant was waiting for Victim to come to his house and planned to "roll up on him." Appellant detailed that he had fighting gloves he used on Victim and beat Victim with a baseball bat. This information conflicted with Appellant's testimony that he had gone to the gym and just happened to return home in time to rescue Durkin from the alleged sexual assault. Appellant's story was further contradicted by the introduction of cell phone location evidence by the State's witness, Aaron Edens, a former FBI agent and expert witness in forensic cell phone examinations. After reviewing Google data, Edens testified that Appellant's cell phone indicated that he was approximately 250 feet from his home at four specific times during the

[2] The specific "information" referenced is not revealed in the testimony. Lewis stated that "[Appellant had] heard some news and all that had angered him and made him very jealous" of Victim.

evening of the incident: 8:45 p.m., 8:48 p.m., 8:50 p.m., and 8:52 p.m. These times correspond to when Appellant alleged he was at the gym.

The State also presented evidence indicating that the killing may have been racially motivated. First, Appellant can be heard referring to Victim as a "f***ing n***er" during the 9-1-1 call audio. Second, Appellant admitted under cross-examination that while serving in the military, he was raped by two African-American men. Finally, at the detention center, Appellant informed the guards that he did not want to share a cell with any African-American inmates. When confronted with this statement at trial, Appellant testified that he requested not to be housed with any African-Americans because he feared being put into a cell with a member of Victim's family. No evidence was presented that Victim had any incarcerated family members at the time of Appellant's housing request.

After the defense rested, the parties presented motions to the court. Appellant's counsel asked whether the circuit court judge would charge the jury that testimony used against one defendant cannot be used against the other defendant. The circuit court judge noted that the witnesses who testified about Durkin's statements, such as Briles, had already removed any mention of Appellant from their testimony, so no confrontation clause issue occurred and no instruction was necessary. Before the jury was charged, Durkin pleaded guilty to voluntary manslaughter. In response to this change in circumstances, the circuit court judge amended his proposed jury charges by removing any reference to "the hand of one is the hand of all," and any language relating to "aiding and abetting." The judge also added the following language:

> [T]he case against the Defendant, Diane Marie Durkin, has been resolved. The case against the Defendant, [Appellant], and the evidence of and the law concerning him should be considered separately and individually from the evidence and law concerning the Defendant, Diane Marie Durkin. Any thoughts you may have concerning the case against the Defendant, Diane Marie Durkin, should not control your verdict as to the Defendant, [Appellant].

Neither the State nor Appellant objected to this remedial instruction, and the charge was given as proposed to the jury without objection.

ISSUES ON APPEAL

I. Did the circuit court err in denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act?

II. Did the circuit court err in allowing the State to introduce evidence of Appellant's prior victimhood of sexual assault as well as his jailhouse statements as probative evidence of a racial motive for the alleged crime?

III. Did the circuit court err in instructing the jury regarding evidence of Appellant's codefendant's guilt?

STANDARD OF REVIEW

In criminal matters, this court reviews errors of law only. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 199 S.E.2d 61, 65 (1973)). Indeed, this court is bound by the lower court's findings of fact, unless such findings are clearly erroneous. *Id.*

"This court reviews the trial court's pretrial determination of immunity for an abuse of discretion." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014) (citing *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013)). The admission or exclusion of evidence is also subject to an abuse of discretion standard of review. *See State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion . . . ."). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007). "In other words, the abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility." *Douglas*, 411 S.C. at 316, 768 S.E.2d at 237–38.

LAW/ANALYSIS

I. Immunity from Prosecution

Appellant argues that the circuit court erred in failing to grant him immunity from prosecution pursuant to the Act. We disagree and hold that immunity was properly denied. Therefore, we affirm the circuit court's ruling on this issue.

"[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). This court reviews pretrial determinations of immunity under an abuse of discretion standard of review.[3] *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). In determining the validity of an immunity hearing's outcome, "this court cannot 'reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility.'" *State v. Oates*, 421 S.C. 1, 17, 803 S.E.2d 911, 920 (Ct. App. 2017) (alteration in original) (quoting *Douglas*, 411 S.C. at 316, 768 S.E.2d at 238). The Act states, in pertinent part,

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

[3] During an immunity hearing, it is the defendant's burden to prove his entitlement to immunity under the Act by a preponderance of the evidence. *See Duncan*, 392 S.C. at 411, 709 S.E.2d at 665.

> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred
>
> . . . .
>
> (C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440 (A), (C) (2015). The immunity provided for in the Act is "predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court." *Curry*, 406 S.C. at 372, 752 S.E.2d at 267. If a defendant does not demonstrate these elements by a preponderance of the evidence, then the claim of self-defense "presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution." *Id.* Under our jurisprudence, a defendant seeking immunity under the Act must prove he was acting in self-defense by showing: (1) he was without fault in bringing on the difficulty; (2) he was in imminent danger of death or serious bodily injury or believed he was in such danger; and (3) if the defense is based on an actual belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have held the same belief.[4] *Id.* at 371 n.4, 752 S.E.2d at 266 n.4. When acting in self-defense, a person's right to use deadly force under the Act is not unlimited—a person may not

[4] The fourth element of self-defense at common law, the duty to retreat, is excused under the Act. *Curry* at 373–74, 752 S.E.2d at 267–68.

use deadly force against another if there is no longer an imminent threat of serious harm. *See Oates*, 421 S.C. at 16–17, 803 S.E.2d at 919–20.

In the present case, the evidence presented during the immunity hearing was at times contradictory. Durkin testified that she knew Victim prior to the date of the incident, lent him money, and drove him to pick up drugs, yet she later admitted to telling officers she never met Victim prior to the night of his death. Evidence was presented at the hearing indicating Victim was incapacitated during the attack and not a threat to Appellant and Durkin. Indeed, Durkin admitted that during the melee, Victim no longer posed a threat and attempted to flee but was detained by Appellant and Durkin.

In *State v. Douglas*, this court upheld a finding of immunity after the respondent (Douglas) used deadly force during a physical altercation. *See generally Douglas*, 411 S.C. at 312, 768 S.E.2d at 235–36 (Ct. App. 2014). In *Douglas*, the circuit court relied on evidence proffered by the defense showing that Douglas had been assaulted and sustained serious bodily injury prior to shooting the victim, noting that

> [Douglas] fared much worse in the altercation prior to the fatal shot, and because [Victim] had no incapacitating wounds prior to that shot, [Douglas's] claimed belief that serious additional injury was about to be inflicted upon him if he did not act to protect himself was reasonable, and is supported by the evidence in this case.

Id. at 320, 768 S.E.2d at 240. During the incident in the present case, Victim was beaten to death to the point that Appellant's mobile home was covered in blood; meanwhile, Appellant merely sustained a small cut on his leg (requiring a "Band-Aid" for treatment), and Durkin sustained a black eye and a small rip on her shirt. The facts presented in the case at bar are the inverse of those presented in *Douglas*. In *Douglas*, the person seeking immunity under the Act had sustained injuries, while his Victim did not (prior to the fatal shot). Conversely, in the present case, Appellant sustained a superficial injury, while Victim was beaten to death after he tried to flee and was admittedly no longer a threat to Appellant.

Based on the foregoing, the circuit court did not abuse its discretion in denying immunity to Appellant under the Act.

II. The State's Evidence

Appellant contends the circuit court erred by admitting evidence of his sexual assault as well as his jailhouse statements in which he stated he did not want to be housed with African-Americans. Both statements were admitted as probative evidence of his motive to kill Victim. We disagree with Appellant's contention and hold that the admission of such evidence was not erroneous; therefore, we affirm the circuit court's ruling on this issue.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). This court should find an abuse of discretion occurred in instances ". . . when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). If evidence is not relevant, it is not admissible; however, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. If a piece of evidence could assist the jury in arriving at the truth of an issue, such evidence is relevant and should be admitted during trial "unless otherwise incompetent." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Particularly, "[a]dmissibility of evidence regarding racial bias generally is within the trial judge's discretion, and the decision necessarily must be done on a case-by-case basis[,] balancing probity with the potential for unfair prejudice." Warren Moïse, *Race in the Courtroom*, 29 S.C. LAW., at 15, 16 (May 2018) (citing Rule 403, SCRE).

"When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will *turn on the facts of each case*." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (emphasis added). "The evaluation of probative value cannot be made in the abstract, but should be made in the *practical context of the issues at stake in the trial of each case*." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014) (emphasis added). "Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion . . . ." *Gray*, 408 S.C. at 616, 759 S.E.2d at 168 (quoting *United States v. Mohr*, 318 F.3d 613, 619–20 (4th Cir. 2003)). Thus, only after balancing the probative value and the danger of unfair prejudice

may the court determine if the danger of unfair prejudice substantially outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Appellant argues that admission of evidence of his sexual assault while in the military and his request to not be placed in a cell with African-Americans was irrelevant to his involvement in the alleged killing; thus, the danger of unfair prejudice from such admission substantially outweighed any probative value. We disagree, as Appellant's potential racial animus was a critical consideration in establishing Appellant's motive to kill Victim.

The State did not proffer the evidence of the sexual assault and/or housing request without first establishing Appellant's potential racial bias. Indeed, Appellant's potential racial bias first surfaced during the 9-1-1 recording when, during the melee, he repeatedly referred to Victim as a "f***ing n***er." The use of racial slurs and epithets are typically strong indicators of racial animus. *See Mohr*, 318 F.3d at 620–21 (4th Cir. 2003) (comment about releasing dog on woman's "black ass" admissible under Rule 404(b) as to intent when it could not be redacted without changing the meaning of the statement); *see also* T.N. Brown et al., *Differentiating Contemporary Racial Prejudice from Old-Fashioned Racial Prejudice*, 1 RACE & SOCIAL PROBLEMS 97–110 (2009). Indeed, "racial insult[s] remain[] one of the most pervasive channels through which discriminatory attitudes are imparted." Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C. L. L. REV. 133, 135 (1982). In *Alcorn v. Anbro Engineering, Inc.*, the Supreme Court of California noted that the racial slur "n***er" is particularly abusive and insulting. 468 P.2d 216, 219 n. 4 (Cal. 1970); *see* Delgado*, supra* at 153.

Appellant's use of an offensive racial slur towards Victim laid the foundation for the State's introduction of evidence of Appellant's sexual assault and housing request. Considered together, it is reasonable that a jury could conclude that Appellant's actions were racially motivated. Appellant testified that his sexual assault in 1980 was still impacting him at the time of trial, as he suffered from post-traumatic stress disorder from the incident. Further, Appellant's statement at the detention center was made merely hours after the killing and indicated that a primary concern of his was not to share a cell with any African-Americans. Appellant justified this request by stating that he feared being incarcerated with family members of Victim. Yet, there is no evidence showing that Appellant knew or had reason to know of any family members of Victim who were in jail. *See* Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276,

276–77 (Aug. 2007) (arguing that due to harmful racial stereotypes, Blacks are consistently and inaccurately stereotyped as criminals).

The State had the burden to prove Appellant's actions were not in self-defense, but rather constituted an unjustified effort to harm Victim (or that Appellant's actions involved a degree of force exceeding that necessitated by the situation). Thus, the State presented the aforementioned evidence of potential racial animus held by Appellant, which made it more probable that Appellant's actions were not self-defense. The evidence presented was important for evaluating the appropriateness of Appellant's actions by establishing a potential motive; thus, its probative value was not substantially outweighed by the potential of unfair prejudice. Indeed, after weighing this probity with the risk of unfair prejudice, the circuit court properly admitted testimony regarding Appellant's sexual assault and detention center housing request.

In this case, the question of identity is not at issue: all parties agreed that Appellant and Durkin were the actors involved in Victim's death. Therefore, the establishment of guilt hinged upon the *motive* of Appellant's actions—self-defense or unjustified actions to cause the death of Victim. Establishing a racial motive in this case was significant for the State because the State had the burden to prove Appellant's actions were not in self-defense, but rather constituted an unjustified effort to harm Victim. *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (2004) ("Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)); *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("evidence of motive is admissible as relevant and need not be necessary to the State's case" (citing *State v. Bell*, 302 S.C. 18, 29, 393 S.E.2d 364, 370 (1990))). Therefore, the probative value was not substantially outweighed by the danger of unfair prejudice.

For the foregoing reasons, the circuit court did not abuse its discretion in admitting the evidence of Appellant's sexual assault or detention center housing request.

III. Jury Instruction

Appellant argues that the circuit court failed to give the instruction he requested and instead gave an instruction that highlighted his guilt and confused the

jury. The record indicates the circuit court issued a proper jury charge as to the evidence concerning Durkin. This issue was not properly preserved for appellate review as the Appellant failed to object to the jury charge provided by the judge. Thus, we affirm the circuit court's ruling on this issue.

In order for an issue to be preserved for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the [circuit] court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the [circuit] court with sufficient specificity." *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). Indeed, should a party fail to properly object, the party is procedurally barred from raising the issue on appeal. *State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005).

In this matter, Appellant's challenge to the circuit court's jury charge is not preserved for appellate review. No objection was made to the charge proposed by the circuit court in response to Durkin's plea, nor was any objection made after the charge was presented to the jury. As a result, Appellant's argument regarding the adequacy of the charge is not preserved for appellate review.

Even assuming that the issue was preserved for this court's review, we would still affirm, as the circuit court properly charged the jury. In *Bruton v. United States*, the Supreme Court held that during a joint trial, admission of a non-testifying codefendant's statement expressly inculpating the defendant violates the inculpated defendant's rights under the Confrontation Clause. 391 U.S. 123, 135–37 (1968). The Court's reasoning was that even if a limiting instruction were to be used, it would still be insufficient to remove any prejudice to the defendant in such a situation. *Id.* Notably, in *Richardson v. Marsh*, the Supreme Court narrowed the rule it previously set forth in *Bruton*. 481 U.S. 200, 207–08 (1987). In that case, the Court held the rule outlined in *Bruton* is not applicable in instances where a codefendant's statement is "not incriminating on its face," and becomes so "only when linked with evidence introduced later at trial." *Richardson*, 481 U.S. at 206. The *Richardson* court also indicated *Bruton* may be complied with by redaction when the statement is incriminating on its face. *Id.* at 208–09.

The statements made by Appellant's codefendant (Durkin) were properly admitted at trial, as Durkin's statements did not implicate Appellant on their face. Pursuant to *Richardson*, the circuit court allowed Durkin's self-incriminating statements into evidence only after any reference to Appellant was removed.

Appellant's only contention is that the circuit court should have given a curative instruction in its jury charge providing that the statements of one defendant cannot be used against the other. At trial, the circuit court instructed any witnesses testifying to statements from a defendant to omit any reference to his or her codefendant; thus, no statements were admitted that required curative instructions.

Due to the circuit court's strict adherence to *Bruton* and *Richardson*, no Confrontation Clause violation occurred in the present matter.

CONCLUSION

The circuit court did not abuse its discretion by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act or by allowing the State to introduce evidence of Appellant's prior victimhood of sexual assault as well as his jailhouse statements. Further, the circuit court properly charged the jury as to the evidence regarding Durkin. Therefore, Appellant's conviction is

AFFIRMED.

HILL, J. and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: Robert Horne, as Personal Representative of the Estate of Gus A. King, and Laura King, Appellants,

In Re: Gus A. King, Claimant, Appellant,

v.

Pierside Boatworks, Employer, and PMA Insurance Group, Carrier, Respondents.

Appellate Case No. 2018-001294

Appeal From The Workers' Compensation Commission

Opinion No. 5929
Heard May 11, 2022 – Filed August 3, 2022

REVERSED AND REMANDED

J. Gary Christmas and Reese M. Stidham, IV, of Christmas Injury Lawyers, LLC, and Paul J. Doolittle, of Anastopoulo Law Firm, LLC, all of Mount Pleasant, for Appellant Gus A. King. Allison P. Sullivan, of Bluestein Thomas Sullivan, LLC, of Columbia, for Appellants Robert Horne and Laura King. Andrew N. Safran, of Andrew N. Safran, LLC, of Columbia, for all Appellants.

Richard Daniel Addison, of Hall Booth Smith, PC, of Mount Pleasant, for Respondents.

THOMAS, J.: Robert Horne, as Personal Representative for the Estate of Gus A. King, Laura King, and Gus A. King (collectively, Appellants) appeal an order of the Workers' Compensation Commission (the Commission). Appellants argue the Commission erred in finding the agreement the parties signed at mediation was not enforceable. We reverse and remand.

FACTS

On November 18, 2011, Gus A. King (King) was injured while at work. On May 20, 2014, the Commission awarded him permanent and total disability benefits, which were paid in a lump sum on September 10, 2014, and medical benefits for the remainder of his life. On June 2, 2016, Pierside Boatworks and PMA Insurance Group (collectively, Respondents) and King attended mediation. Mediation was successful, and the parties agreed to settle King's claim regarding his future medical benefits and signed a document titled "Agreement Following Mediation Conference" (the Agreement). The Agreement was signed by King, King's attorney, Respondents, Respondents' attorney, and the mediator. On the same day, the mediator filed a Form 70, stating the issues were settled at mediation and Respondents "shall submit the Final Agreement [and] Release, Consent Order, Form 16A, or other appropriate documentation regarding the agreement to the Commission."

Seven days after mediation, on June 9, 2016, King died in an unrelated car accident. The same day, Respondents sent King's attorney a letter with the settlement check, indicating they were in the process of finalizing the Agreement and Final Release but "wanted to get [the] check to [him] so that [he could] place [it] in [his] trust account pending completion of th[e] settlement." Respondents stated the check "represent[ed] a full and final settlement of all claims" and requested King's attorney hold the check until the Commission informed them the Agreement and Final Release were approved.[1] Five days later, Respondents informed King's attorney they had stopped payment on the check and put the settlement on hold while they considered how King's death affected the "un-finalized settlement." Respondents later withdrew from the settlement because

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[1] We do not agree that an approval of the Agreement by the Commission was necessary.

they believed King's claim abated at his death. Respondents never filed an Agreement and Final Release with the Commission.

King's attorney moved to file the Agreement. At the Commission's direction, he filed a Form 50, in which he requested the Agreement be filed and enforced by the Commission. Horne, on behalf of King's estate, and Laura, as King's beneficiary, also filed a Form 50, arguing the Agreement should be enforced. Respondents filed a Form 51, stating they "reached a tentative agreement on settling" King's rights to future medical care costs related to his compensable injuries, but they never completed, signed, or filed a formal order or consent order; therefore, King's claim ended upon his death.

The parties filed briefs and memoranda of law prior to a hearing. After the hearing, the Single Commissioner concluded the Agreement was not enforceable because King never executed or signed an Agreement and Final Release, resulting in one never being filed with the Commission in accordance with section 42-9-390 of the South Carolina Code (2015) and state regulations. The Single Commissioner found a mediation agreement was not synonymous with an Agreement and Final Release and state regulations regarding mediation did not indicate a mediation agreement was binding once signed. She relied on *Mackey v. Kerr-McGee Chemical Co.*, 280 S.C. 265, 312 S.E.2d 565 (Ct. App. 1984), which found a party could withdraw from an agreement until it was approved by the South Carolina Industrial Commission.

Appellants appealed the Single Commissioner's order to the Commission, arguing the Single Commissioner erred in several aspects. The Commission affirmed the Single Commissioner's order in full and adopted the Single Commissioner's findings of fact and conclusions of law. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions of the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2021); *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007). "Although we may not substitute our judgment for that of the full [C]ommission as to the weight of the evidence on questions of fact, we may reverse where the decision is affected by an error of law." *Grant*, 372 S.C. at 200, 641 S.E.2d at 871. Our "[r]eview is limited to deciding whether the

[C]ommission's decision is unsupported by substantial evidence or is controlled by some error of law." *Id.* at 201, 641 S.E.2d at 871.

LAW/ANALYSIS

Appellants argue the Commission erred in finding the Agreement the parties signed at mediation is not enforceable. We agree.

Section 42-9-390 of the Workers' Compensation Act, which discusses voluntary settlements, currently provides:

> Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. The *employer must file a copy of the settlement agreement with the commission* if each party is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with the commission and approved by one member of the commission.

S.C. Code Ann. § 42-9-390 (2015) (emphasis added).

Prior to a 2007 amendment, section 42-9-390 provided:

> Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. A copy of the settlement agreement *must be filed by the employer with and approved by only one member of the commission* if the employee is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with and approved by four members of the commission.

S.C. Code Ann. § 42-9-390 (Supp. 2006) (emphasis added). The relevant difference between the pre-amendment version of the statute and the present one is that the current version no longer requires the Commission's approval of a settlement agreement when both parties are represented by counsel. It simply requires the employer to file a copy of the settlement agreement with the Commission.

In *Mackey*, a 1984 case decided prior to the 2007 amendment to section 42-9-390, this court held the workers' compensation settlement agreement in that case was not binding until it had been approved by the Industrial Commission, and thus, prior to such approval, Mackey could unilaterally repudiate the settlement offer that had been accepted by his attorney. 280 S.C. 265, 269-70, 312 S.E.2d 565, 567-68 (Ct. App. 1984). The court noted "[a]lthough voluntary settlements between the employer or its carrier and the claimant are encouraged under [worker's] compensation law, § 42-9-390 specifically requires approval by the Commission of such settlements." *Id.* at 268, 312 S.E.2d at 567 (second alteration in original).

Appellants argue the Commission erred in finding the Agreement is not enforceable because the amended version of section 42-9-390 no longer requires the Agreement be approved by the Commission if both parties are represented by counsel. They maintain the mandatory filing of the agreement simply ends the case. Appellants note the mediator's filing of the Form 70, which reports the result of mediation, lends support to their argument. Appellants assert the Commission erred in finding *Mackey* controlled because *Mackey* dealt with the previous version of the statute and is factually distinguishable.

We agree with Appellants and find that because the amended version of section 42-9-390 no longer requires Commission approval of settlement agreements if both parties are represented by counsel, the Agreement in this case only had to be filed with the Commission by Respondents, which was simply a perfunctory act. Although the statutory amendments to section 42-9-390 were made 23 years after *Mackey* was decided, we presume the legislature was aware of *Mackey* when removing the requirement of approval by the Commission and intended to promote the use of settlement agreements. *See* S.C. Code Ann. § 42-9-390 ("Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer . . . .").

From the record, it appears to us the only reason Respondents did not file the Agreement with the Commission was because King unexpectedly died. Neither side provided testimony or evidence that either side had expressed a desire to withdraw from the Agreement after it was signed by all parties. In fact, King's attorney filed a motion requesting permission to file the Agreement and a Form 50 requesting the Agreement be filed with and enforced by the Commission. The Agreement language provided the case was "fully and completely resolved by agreement." The same day the parties signed the Agreement, the mediator filed a Form 70, stating the issues were settled and Respondents will submit "documentation regarding the agreement to the Commission." Respondents had already written the $1,000,000 settlement check to King on June 4 and mailed it to King's attorney. Although the accompanying letter stated Respondents were "in the process of finalizing the Agreement and Final Release," it also provided the check amount represented "a full and final settlement of all claims in this matter." Thus, there was nothing left for the parties to decide. We find the parties substantially complied with the statute, and their actions satisfied the reasonable objectives of the of the amended statute. *See S.C. Dep't of Consumer Affs. v. Cash Cent. of S.C. LLC*, 435 S.C. 192, 206, 865 S.E.2d 789, 796 (Ct. App. 2021), *cert. pending* ("Substantial compliance has been defined as 'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.'" (quoting *Brown v. Baby Girl Harper*, 410 S.C. 446, 453 n.6, 766 S.E.2d 375, 379 n.6 (2014)); *Thrash v. City of Asheville*, 393 S.E.2d 842, 845 (N.C. 1990) ("Substantial compliance means compliance with the essential requirements of the Act."); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 164-65, 547 S.E.2d 862, 866 (2001) (looking to the "clear language and the express purpose" of an act to determine whether substantial compliance occurred); *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (viewing the purpose of a statute in determining whether substantial compliance occurred). Further, we find legislative intent disfavoring abatement in section 42-9-280 of the South Carolina Code (2015), which provides:

> When an employee receives or is entitled to compensation under this title for an injury covered by the second paragraph of Section 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin

> dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

See generally McMahan v. S.C. Dep't of Educ.-Trans., 417 S.C. 481, 492, 790 S.E.2d 393, 399 (Ct. App. 2016) ("We find it would be absurd to preclude McMahan's widow from receiving compensation to which she is otherwise entitled solely because McMahan happened to die before the parties adjudicated McMahan's workers' compensation claim with finality."); *id.* (applying section 42-9-280 and holding "any different conclusion would run afoul of legislative intent"). Finally, we note that "[w]orkers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015). Therefore, we find Respondents were required to file the Agreement with the Commission regardless of King's untimely death.

CONCLUSION

Accordingly, we reverse and remand to the Commission to enforce the Agreement.

GEATHERS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kyle Maurice Robinson, Appellant.

Appellate Case No. 2019-001256

Appeal From York County
William A. McKinnon, Circuit Court Judge

Opinion No. 5930
Heard June 16, 2022 – Filed August 3, 2022

AFFIRMED

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

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., and Assistant Attorney General Jonathan Scott Matthews, all of Columbia; and Solicitor Kevin Scott Brackett, of York, all for Respondent.

WILLIAMS, C.J.: In this criminal appeal, Kyle Maurice Robinson argues the trial court erred in failing to grant his motion for a directed verdict. Specifically, Robinson argues that under subsection 16-3-600(C)(1)(a)(i) of the South Carolina Code (2015), the State failed to produce any evidence proving he injured a minor

and therefore failed to prove an essential element of assault and battery in the first degree. We affirm.

FACTS/PROCEDURAL HISTORY

On July 27, 2017, a sixteen-year-old minor (Minor) was at home watching her younger sister while her mother and live-in grandparents were at work. In the late afternoon, Minor and her sister were playing cards when they noticed a car parked in front of their house. Minor went to the front door to see who was in the car. It was Robinson, and he exited the car and asked Minor if his daughter was there.[1] Minor informed Robinson his daughter was not home, and Robinson asked if he could use Minor's bathroom.

Minor agreed and claimed that when she pointed to the bathroom, Robinson requested she walk with him. When she escorted Robinson to the bathroom, he grabbed her by the shirt, pulled her into the bathroom, and backed her into a corner after she refused to enter the bathroom with him voluntarily. Minor testified that as Robinson backed her into the corner, he had his left hand around her neck to press her against the wall but he was not choking her. Minor admitted having Robinson's hand around her neck was uncomfortable but it was not squeezing her, just holding her in place. She stated he was groping her breasts with his free hand. After Minor yelled, "Get the f*** off of me," Robinson released her neck, began "tugging" at her shorts, and exclaimed "I have $60 if you let me do you."

Minor testified that during the altercation, she noticed Robinson was sweating profusely and appeared to be intoxicated. Robinson ended the molestation when he heard Minor's younger sister walking down the hall. Minor's sister stated that she heard Minor exclaim "Stop, stop" from the bathroom. Robinson then ran out of the bathroom, exited the house, and drove off. Several minutes later, Minor's brother returned home, and the two of them called their mother after Minor told him what happened. Upon arrival, Minor's mother called the police, and they arrested Robinson within walking distance of Minor's home approximately half an hour later. Officer Jerry Sanders testified he observed and photographed Minor's neck at the scene. Officer Sanders stated Minor's neck was uninjured and was not reddened.

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[1] Robinson's daughter was Minor's cousin and also lived in Minor's home.

In December 2017, a York County grand jury indicted Robinson for criminal solicitation of a minor, and in July 2019, it indicted Robinson for assault and battery in the first degree. At trial, after the State rested, Robinson moved for a directed verdict on the first-degree assault and battery charge. Robinson argued that under subsection 16-3-600(C)(1)(a)(i), the State failed to provide evidence that Minor was physically injured from the encounter with Robinson. Specifically, Robinson asserted that to submit the charge to the jury, the subsection required the State prove an actual, physical injury in addition to a nonconsensual touching of an individual's private parts. Read in unison with the remainder of the statute's subsections that define and require a physical injury, Robinson claimed the term "injures" under subsection 16-3-600(C)(1)(a)(i) must be construed to require some physical injury rather than a nebulous, legal injury. Robinson claimed an injury is "any physical harm or irritation or ailment."

The trial court denied Robinson's motion, finding the statute only calls for a legal injury in conjunction with the nonconsensual touching of an individual's private parts. After admitting its confusion as to why the legislature set forth two separate requirements under the first-degree assault and battery subsection, the court stated that lacking further guidance from appellate courts, it would interpret the term "injures" in the traditional legal sense. It found that "nonconsensual touching is a legal injury and does not require some sort of vital injury."

Robinson did not raise a defense at trial, and the jury found him guilty of both charges. The trial court sentenced Robinson to five years' imprisonment for each charge and mandatory registration as a sex offender for each charge. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in refusing to grant Robinson's motion for a directed verdict because the State failed to produce any evidence that Robinson physically injured Minor under subsection 16-3-600(C)(1)(a)(i)?[2]

[2] Robinson did not appeal his conviction for criminal solicitation of a minor and the mandatory registration as a sex offender for that crime.

STANDARD OF REVIEW

When reviewing a motion for a directed verdict, appellate courts view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Harris*, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015). If direct or substantial circumstantial evidence exists that tends to prove the guilt of the accused, appellate courts must affirm the trial court's decision to submit the case to the jury. *Id.*

LAW/ANALYSIS

Robinson claims the trial court erred in refusing to grant his motion for a directed verdict as to his first-degree assault and battery charge because the State failed to prove he injured Minor as required under the statute. He asserts that under subsection 16-3-600(C)(1)(a)(i), the term "injures" requires the State prove an actual, physical injury in addition to nonconsensual touching of the victim's private parts. We disagree and affirm.

This case presents an issue of first impression. This court must define and give effect to the term injures for purposes of first-degree assault and battery. In pertinent part, the statute provides, "A person commits the offense of assault and battery in the first degree if the person unlawfully: (a) *injures* another person, *and* the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent . . . ."
§ 16-3-600(C)(1)(a)(i) (emphases added).

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Id.* Appellate courts do not construe particular clauses of a statute in isolation but read them "in conjunction with the purpose of the whole statute and the policy of the law." *White v. State*, 375 S.C. 1, 7, 649 S.E.2d 172, 175 (Ct. App. 2007). "The legislature's intent should be ascertained primarily from the plain language of the statute." *Landis*, 362 S.C. at 102, 606 S.E.2d at 505. "Words must be given their plain and ordinary meaning

without resorting to subtle or forced construction which limits or expands the statute's operation. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *Id.* (citation omitted).

The Legislature uses inconsistent language throughout Title 16, Chapter 3 of the South Carolina Code to define specific elements required to constitute an offense against an individual's person, especially when the element requires an "injury." For instance, assault and battery by mob requires an "act of violence" be "inflicted by a mob *upon the body* of another person." S.C. Code Ann. § 16-3-210 (2015) (emphasis added). Further, an individual is only guilty of hazing if he intentionally or recklessly commits an act that has a foreseeable potential to cause "*physical harm to a person* for the purpose of initiation or admission" into an organization. S.C. Code Ann. § 16-3-510 (2015) (emphasis added). Even defined terms under the assault and battery statute are inconsistent. *Compare* S.C. Code Ann. § 16-3-600(A)(1) (2015) ("'Great bodily injury' means *bodily injury* which causes . . . ." (emphasis added)), *with* S.C. Code Ann. § 16-3-600(A)(2) (2015) ("'Moderate bodily injury" means *physical injury* that involves . . . ." (emphasis added)).

In spite of these inconsistencies, the plain language of subsection 16-3-600(C)(1)(a)(i) is clear in defining what constitutes assault and battery in the first degree. Despite Robinson's assertion that the statute requires the State prove two separate elements, we find the statute requires one injury stemming from a single act and that the Legislature intended the single act that caused the injury to "involve[] nonconsensual touching of the private parts of a person . . . with lewd and lascivious intent." § 16-3-600(C)(1)(a)(i). Robinson argues that because the Legislature followed the term "injures" with the conjunction "and," it intended to create a conjunctive list that establishes two distinct elements for the State to satisfy to prove assault and battery in the first degree—(1) a physical injury and (2) a separate, nonconsensual touching of the victim's private parts with lewd intent. Contrarily, after a plain reading of the subsection, it is evident the Legislature included "and" to further modify and define the nature of the act that caused the injury it intended to constitute assault and battery in the first degree.

Robinson also argues that because the Legislature defined "great bodily harm" and "moderate bodily harm" to include physical, bodily injury, it also intended "injures" as used in the subsection to require a physical, bodily injury. This

interpretation tortures any plain reading of the statute and would severely limit the statute's breadth. *See Landis*, 362 S.C. at 102, 606 S.E.2d at 505 ("Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation."). The expression of a clear definition requiring a bodily injury for certain categories of assault and battery implies the exclusion of that requirement for the categories that do not have such a clear definition. *See Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 134, 492 S.E.2d 103, 106 (1997) (stating that if the Legislature had intended a result in a statute, it would have said so).

Our interpretation of the subsection—requiring only a single injury occurring from a single nonconsensual touching of an individual's private parts—agrees with the other portions of the statute and is supported by the traditional understanding of assault and battery as delineated by our courts for over a century. Moreover, when read in conjunction with the remaining subsections, this interpretation is aligned with the Legislature's intent in enacting the statute as a whole. *See White*, 375 S.C. at 7, 649 S.E.2d at 175 (stating appellate courts do not construe particular clauses of a statute in isolation but read them "in conjunction with the purpose of the whole statute and the policy of the law"). In each subsection, the Legislature uses varying degrees to define the type of injury that must occur to constitute that level of assault and battery. For instance, to be convicted of assault and battery of a high and aggravated nature (ABHAN), an individual must "unlawfully injure[] another person" and the type of injury is one that meets the definition of "great bodily injury" (as defined in the statute) or the act that caused the injury "is accomplished by means likely to produce death or great bodily injury." *See* S.C. Code Ann. § 16-3-600(B)(1) (2015). Similarly, an individual is guilty of assault and battery in the second degree if he "unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so" and either (1) moderate bodily injury results or could have resulted from the act that caused the injury or (2) "the act involves the nonconsensual touching of the private parts of a person." *See* S.C. Code Ann. § 16-3-600(D)(1) (2015). Each subsection either defines the harm caused by a defendant's act upon the victim's person or the nature of the act itself—e.g. a nonconsensual touching of another's private parts with lewd intentions.

Although we acknowledge the enactment of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act) "abolished all common law assault and battery offenses and all prior statutory assault and battery offenses," our

jurisprudence offers insight as to the requirements of assault and battery in the first degree. *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). Historically, assault was defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another" and a battery was the "successful accomplishment of such [an] attempt." *State v. Jones*, 133 S.C. 167, 179, 130 S.E. 747, 751 (1925), *overruled on other grounds by State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Until the Act was ratified, ABHAN was "an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as . . . *indecent liberties or familiarities with a female*." *Id.* (emphasis added). Under the aggravating circumstance of indecent liberties, our supreme court upheld a defendant's conviction for ABHAN when the defendant caused a female victim to stop her car, then reached in with both hands to grab her saying, "I want you," and brushed her neck with his hand as she sped away. *State v. Williams*, 257 S.C. 257, 264, 185 S.E.2d 529, 532 (1971). In *State v. Cunningham*, the supreme court upheld a defendant's conviction for ABHAN when the defendant grabbed the victim by the wrist, threw her onto her bed, held her hands together while removing her underwear, and attempted to have sex with her. 253 S.C. 388, 392, 171 S.E.2d 159, 161 (1969). Finally, in *State v. Rouse*, our supreme court affirmed the trial court's denial of the defendant's motion for a directed verdict and affirmed his conviction for ABHAN when the evidence showed the defendant made brief physical contact with the victim "in an offer of sexual intercourse" and "made indecent sexual demonstrations with the exposed private parts of his body." 262 S.C. 581, 584–85, 206 S.E.2d 873, 874–75 (1974). None of these cases contained evidence that the victims' persons were physically harmed or violently injured.

Here, we find Robinson's actions fall squarely within the definition of assault and battery in the first degree under our interpretation of the subsection. Minor testified Robinson backed her into a corner while holding her in place with his left hand. She also claimed that while she was forced against the wall, Robinson groped her breasts with his free hand. After screaming for Robinson to get off of her, Robinson let go of Minor's throat, attempted to remove her shorts, and offered her money to have sex with him. As evidenced by Minor's exclamation for Robinson to get off of her, his actions were nonconsensual and clearly the object of the groping was Minor's breasts, which satisfies the definition of "private parts" as set forth by the statute. *See* S.C. Code Ann. § 16-3-600(A)(3) (2015) ("'Private parts' means the genital area or buttocks of a male or female or the breasts of a female."). Further, the evidence shows Robinson's intent in calling Minor to the

bathroom and forcing her into the corner was lewd and lascivious because he offered her money to have sex, revealing an overt sexual desire. Although Minor testified that Robinson did not hurt her, only that his hand around her neck was "uncomfortable," a physical, bodily injury is not required for an individual to be guilty of assault and battery in the first degree under subsection 16-3-600(C)(1)(a)(i). Because (1) our interpretation of the subsection appears to be consistent with the remainder of the statute, (2) our jurisprudence has never required an actual, physical injury to a victim's person to constitute an assault and battery, and (3) the nature of Robinson's actions falls squarely within the definition of first-degree assault and battery, we find the trial court did not err in denying Robinson's motion for a directed verdict.

CONCLUSION

Based on the foregoing, Robinson's conviction for assault and battery in the first degree is

AFFIRMED.

KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart, Respondent,

v.

Scapa Waycross, Inc., Appellant.

Appellate Case No. 2019-000649

Appeal From York County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 5931
Heard April 14, 2022 – Filed August 3, 2022

AFFIRMED

William Peele Early, of Pierce, Sloan, Wilson, Kennedy & Early, LLC, of Charleston; Joseph C. Wilson, IV, of Joseph C Wilson Law Firm LLC, of Folly Beach; S. Christopher Collier, of Lewis Brisbois Bisgaard & Smith LLP, of Atlanta, Georgia; and Robert B. Gilbreath, of Hawkins Parnell & Young LLP, of Dallas, Texas, all for Appellant.

Mona Lisa Wallace, of Wallace & Graham PA, of Salisbury, North Carolina; Kathleen Chewning Barnes, of Barnes Law Firm LLC, of Hampton; Gregory Lynn Hyland, of Gregory L. Hyland Attorney at Law LLC, of

Summerville; Thomas H. Hart, III, of Hart Law LLC, of Summerville; Frederick John Jekel, of Leventis & Ransom, of Columbia; and William M. Graham, of Wallace & Graham PA, of Salisbury, North Carolina, all for Respondent.

WILLIAMS, C.J.: In this mesothelioma case, Scapa Waycross, Inc. (Scapa) appeals the trial court's (1) denial of its motion for judgment notwithstanding the verdict (JNOV); (2) granting a new trial *nisi* additur for Stephen Redfern Stewart's estate, represented by his son Stephen R. Edwards, regarding survival damages; (3) denial to reallocate Stewart's pretrial settlement proceeds; and (4) refusal to admit certain bankruptcy claim forms Stewart filed against other manufacturers of asbestos-containing products. Principally, Scapa contends Stewart failed to provide legally sufficient evidence to prove Stewart's workplace exposure to its products was a substantial factor that caused his mesothelioma. We affirm.

FACTS/PROCEDURAL HISTORY

Stewart was employed by Bowater Southern Paper Corporation from 1963 to 2002 in Catawba, South Carolina. During his employment, Stewart worked on only paper machine #1, a machine spanning roughly 150 yards that transformed wood pulp into paper. The machine was composed of four large dryer sections, or drums, and each section had a top and bottom dryer felt. Dryer felts were large, weighing well over one thousand pounds and measuring over 150 feet long and twenty feet wide. The wood pulp sat between the two dryer felts as the felts passed the pulp continuously over each dryer section; the felts kept the pulp against the dryer sections and absorbed moisture. A number of the dryer felts used by Bowater on machine #1 were supplied by Scapa. Of the seventy-two dryer felts Scapa sold Bowater between 1963 and 1981, twenty-three contained asbestos. Asbestos constituted between 30 and 70% of a dryer felt's total composition in that time period. An expert who tested two Scapa asbestos-containing dryer felts that Bowater used on machine #1 during Stewart's employment stated that one contained roughly 1,000 pounds of asbestos and the other contained roughly 752 pounds.

While at Bowater, Stewart's job responsibilities routinely involved installing, cleaning, removing, and disposing of dryer felts and cleaning the entire machine.

Although Stewart and his coworkers were unable to identify which dryer felts contained asbestos using the naked eye, they all testified to the amount of dust the dryer felts released into the air during the installation, removal, and disposal process, and breathing in the dust. One coworker testified that after installing a dryer felt, the employees would have to use an air hose to blow themselves off due to the amount of "lint" the dryer felt left on their clothes. They also discussed the felt removal process in which they used Stanley knives to cut the felts into smaller pieces, freeing the felts from the machine and allowing them to drop into the basement. This process also caused the felts to visibly release dust into the air. Dryer felts would also malfunction and tear off of the machine during the manufacturing process causing doors on the machine to open and release paper particles and dust into the air.

Stewart and his coworkers also testified about keeping machine #1 and its building clean—a process that required freeing large amounts of dust and paper particles from the machine and cleaning up the dust. To perform this task, the men would use high-pressure, compressed air hoses to release old dust from the machine. They also used the hoses to blow the dryer felts to release old, caked paper and dust from the felts. This process produced large amounts of dust, or felt hairs, into the air. One coworker testified that during a downtime for the machine, when the men cleaned it or replaced old dryer felts, the floor could be covered with as much as six inches of dust and old paper particles. That coworker also testified that he had seen Stewart covered from head to toe with felt dust and paper after cleaning machine #1 during a down time.

Stewart retired from Bowater in 2002, and in September of 2012 he was diagnosed with malignant pleural mesothelioma, an aggressive form of lung cancer caused by asbestos exposure and inhalation. In February 2013, Stewart initiated this lawsuit against several entities whose business involved producing, using, or selling asbestos containing products. He asserted claims for strict liability, negligence, and breach of the implied warranty of merchantability. In May 2013, Stewart filed an amended complaint that added Scapa to the lawsuit.

On August 23, 2013, at the age of sixty-nine, Stewart died from mesothelioma, and Edwards, individually and as personal representative of Stewart's estate, filed a motion to substitute party and a motion to file a second amended complaint.

Edwards[1] filed the second amended complaint in November 2013, substituting Stewart's personal representative as the plaintiff and adding claims for wrongful death and survival. Prior to trial, Stewart settled with all defendants except for Scapa, which proceeded to trial. The jury returned a verdict for Stewart on the negligence claim and awarded $600,000 in damages for the survival action and $100,000 in damages for the wrongful death action.

Following the verdict, Scapa filed motions for setoff, for production of Stewart's settlements and payments with all third-party tortfeasors, and for JNOV. Stewart did not oppose the motion for setoff, but he filed a motion for new trial *nisi* additur, asking the trial court to increase the verdict to $2.3 million for the survival claim and $600,000 for the wrongful death claim. After a hearing in which the trial court indicated its intent to grant the motion for additur, Scapa filed a motion to reallocate Stewart's settlement proceeds. Stewart had received $1.036 million in prior settlements and he had uniformly allocated 80% of the proceeds towards the wrongful death claim and the remainder to the survival claim.

The trial court issued an order addressing each post trial motion. The trial court granted Stewart's motion for new trial *nisi* additur and increased the survival damages award from $600,000 to $1 million and did not adjust the wrongful death award. The court denied Scapa's motion for JNOV and its motion for production of Stewart's settlements and payments with all third-party tortfeasors. The court granted Scapa's motion for setoff and reduced the $1 million survival damages by $207,200 (20% of Stewart's prior settlement allocation) and the wrongful death award by $828,000 (80% of settlement allocation), which exceeded the jury's award for wrongful death. After applying the setoff rules, the trial court entered judgment against Scapa in the amount of $792,800, the amount remaining for Stewart's survival action. The court also refused to adjust Stewart's internal allocation of settlement proceeds. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in refusing to grant Scapa's motion for JNOV?

II. Did the trial court err in granting Stewart's motion for new trial *nisi* additur?

[1] Hereinafter referred to as Stewart.

III. Did the trial court err in refusing to reallocate Stewart's apportionment of settlement proceeds?

IV. Did the trial court err in refusing to admit claims Stewart submitted against bankrupt manufacturers of asbestos-containing products that Bowater used during Stewart's employment?

LAW/ANALYSIS

I. JNOV

Scapa asserts the trial court abused its discretion in failing to grant its motion for JNOV because Stewart failed to prove specific causation between his workplace exposure to their dryer felts and his mesothelioma. Specifically, Scapa contends Stewart failed to meet the specific causation standard set forth in *Henderson v. Allied Signal, Inc.*[2] through scientifically reliable and relevant evidence because his experts (1) used the "cumulative dose" theory in formulating their opinions and (2) did not provide a specific amount of asbestos Stewart was exposed to from its dryer felts or the threshold exposure to asbestos above which he had an increased risk of developing mesothelioma. We disagree and affirm on this issue.

"A motion for a JNOV is 'merely a renewal of [a] directed verdict motion.'" *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 623, 869 S.E.2d 819, 827 (Ct. App. 2021) (alteration in original) (quoting *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012)), *petition for cert. filed* April 11, 2022. Appellate courts must follow the same standard as trial courts when ruling on a JNOV motion: courts must view the evidence and all inferences reasonably drawn from the evidence in a light most favorable to the nonmoving party. *Id.* at 623, 869 S.E.2d at 827–28. "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." *Id.* at 623, 869 S.E.2d at 828 (quoting *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012)).

In evaluating a motion for JNOV, trial courts are concerned with the existence of evidence, not its weight, and neither appellate nor trial courts have authority to

[2] 373 S.C. 179, 644 S.E.2d 724 (2007).

resolve credibility issues or conflicts in the testimony or evidence. *Id.* Finally, a jury's verdict "must be upheld unless no evidence reasonably supports the jury's findings[,]" i.e., a trial court should only grant a motion for JNOV if no reasonable jury could have reached the verdict. *Id.* (quoting *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003)).

A. Causation

In products liability cases, a plaintiff seeking recovery under a theory of negligence must prove the proximate cause of his injury was the defendant's defective product. *Id.* at 624, 869 S.E.2d at 828. In South Carolina, plaintiffs must prove both causation in fact and legal causation, established through the foreseeability of the injury, to sufficiently prove proximate causation. *Bray v. Marathon Corp.*, 356 S.C. 111, 116–17, 588 S.E.2d 93, 95 (2003). Proximate cause is a question of fact typically reserved for the jury; a trial court's sole inquiry regarding proximate cause is to determine whether only one reasonable interpretation of the evidence exists, and therefore, only one reasonable conclusion can be reached. *Jolly*, 435 S.C. at 624, 869 S.E.2d at 828.

Further, in toxic tort cases, medical causation requires a plaintiff prove (1) general causation, (2) specific causation, and (3) if there are multiple sources of exposure to a toxin, that the plaintiff's exposure to the defendant's product was a "substantial factor" in his development of a disease. *Id.* at 624–25, 869 S.E.2d at 828–29. "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.* at 625, 869 S.E.2d at 828 (quoting *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011)). "General causation 'is generally not an issue in asbestos litigation' due to the parties' acknowledgment that exposure to asbestos causes mesothelioma." *Id.* at 625, 869 S.E.2d at 829 (quoting Recent Case, *Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even If Legal Conclusions Are Scientifically Sound. —* Haskins v. 3M Co., *Nos. 2:15-cv-02086, 3:15-cv-02123, 2017 WL 3118017 (D.S.C. July 21, 2017)*, 131 HARV. L. REV. 658, 658 n.4 (2017)). Specific causation requires the plaintiff "do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997)). He must prove similarities between himself and the individuals in the studies,

which includes proof that (1) he was exposed to the same toxin, (2) the exposure or dose level was comparable to those in the study, (3) the exposure to the toxin occurred before the onset of the injury, and (4) the latency period of the injury is consistent with the individuals in the study. *Id.*

Moreover, a plaintiff proves a specific product is a substantial factor in the development of his disease when the evidence shows the plaintiff was "expos[ed] to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 626, 869 S.E.2d at 829 (quoting *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727); *see also Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986) (explaining exposure to a toxic product is actionable when the exposure is frequent, regular, and proximate). The substantial factor test requires the plaintiff to prove "more than a casual or minimum contact with the product" and introduce evidence that would allow the jury to conclude that the plaintiff's exposure to the defendant's toxic product was a substantial factor in bringing about the injury. *Lohrmann*, 782 F.2d at 1162.

We find Stewart presented sufficient evidence to prove general causation. *See Jolly*, 435 S.C. at 625, 869 S.E.2d at 828 ("General causation is whether a substance is capable of causing a particular injury or condition in the general population."). Dr. Arnold Brody, Stewart's expert pathologist whose career focused on lung cell biology, explained that chrysotile asbestos fibers, the asbestos Scapa used to manufacture its dryer felts, are capable of reaching a human's lungs after a breath of air. He noted that chrysotile asbestos, like all other forms, is toxic and can cause mesothelioma once it reaches the pleural mesothelial cells surrounding the lungs. He also stated that individuals who are exposed to asbestos at levels above background (the amount in the air) for extended periods of time have an increased risk of developing mesothelioma.

Dr. David Harpole, Stewart's cardiothoracic surgeon who specialized in chest cancers, testified that asbestos exposure, over time, has been the number one cause of mesothelioma. He explained that exposure to asbestos fibers causes the mesothelial cells to lose their ability to quit regenerating new cells, causing the pleura to expand and produce significant amounts of fluid in the lungs. As the excess fluid builds up, it crowds the lungs making it difficult to breath and drowns the lungs with fluid. Dr. Harpole also stated, "[T]he longer and the more exposure

[an individual has to asbestos] the more likely [he is] to have asbestos related lung diseases with mesothelioma being one of them."

Finally, Dr. Arthur Frank, a physician specializing in occupational medicine, testified via deposition that all types of asbestos, including chrysotile, and all types of exposures are toxic. He further explained that in North America, while it is a rare disease, mesothelioma is almost exclusively related to asbestos exposure. Dr. Frank also stated it is generally accepted in the scientific, medical, and industrial community that there is no known safe level of asbestos exposure. In explaining an individual's "dose response" to asbestos, a medical concept that spans to practically every known disease, he explained that as an individual's dose increases through exposure, the likelihood of a biological response, whether it be asbestosis or mesothelioma, also increases.

Based on the testimony of these three experts, we find Stewart presented sufficient evidence for a jury to find asbestos exposure can cause mesothelioma. *See id.* at 624, 869 S.E.2d at 828 ("In considering a JNOV, the trial court is concerned with the existence of evidence, not its weight." (quoting *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274)); *see id* at 625, 869 S.E.2d at 828–29 (stating it is generally settled that asbestos causes mesothelioma in humans).

We also find Stewart provided sufficient evidence for the jury to determine Scapa's dryer felts were a specific cause and substantial factor in Stewart's development of mesothelioma. It was undisputed at trial that Scapa produced dryer felts that contained large quantities of asbestos, that twenty-three of those asbestos-containing dryer felts were used on paper machine #1 during Stewart's employment at Bowater, and that Scapa sold asbestos-containing felts to Bowater that were used on paper machine #1 from 1963 to 1981. Stewart and his coworkers testified regarding their job responsibilities, the extent their jobs required them to interact with dryer felts, and how they breathed in dryer felt dust. Stewart stated during his deposition that while he worked as a utility man, his main job responsibility was cleaning the machine and the building around the machine. He explained this involved cleaning a significant amount of dust and other materials off of the machine that were produced during the paper-making process. Other job responsibilities required him to handle the felts on a regular basis. This included installing, maintaining, and removing the old felts. One coworker stated that he remembered seeing Stewart covered from head to toe in dust and paper particles once after cleaning a dryer felt. Another coworker stated that employees had to

use air hoses to blow the felt dust off of each other after the installation process. While removing old felts, which involved cutting through the thick, fibrous material with a Stanley knife, Stewart and his coworkers explained that the felts would release visible dust into the air. Stewart also explained that cleaning dryer felts with high pressure air hoses caused dust from the felts to become airborne. Another coworker stated that after cleaning paper machine #1 during a down time the floor could have as much as six inches of dust on it. All but one position Stewart held while at Bowater required him to participate in cleaning the felts or manually handling the felts.

Dr. James Millette, an expert in material sciences who specialized in asbestos, testified regarding two Scapa dryer felts that were used on paper machine #1. Dr. Millette stated one felt contained over 1,000 pounds of asbestos fibers (roughly 99 quadrillion fibers) and the other contained over 700 pounds of fibers (roughly 69 quadrillion fibers). He found that after testing the two felts, they both released breathable asbestos fibers into the air after being blown with compressed air or simply touched with a wet finger. After blowing compressed air across the felts as a test, Dr. Millette concluded the felts released thirty asbestos fibers per cubic centimeter of air. He also concluded that physically handling the felts and cutting the felts with a knife released breathable asbestos fibers into the air.

Christopher DePasquale, a certified industrial hygienist, stated his job evolved around identifying, recognizing, evaluating, and controlling occupational health hazards. After visiting Bowater, DePasquale testified that based on Stewart's job responsibilities and dealing with Scapa dryer felts that contained between 20 and 70% chrysotile asbestos, Stewart was significantly exposed to asbestos fibers during the time Bowater utilized Scapa asbestos-containing dryer felts. He testified Stewart's levels of occupational exposure to asbestos from Scapa's felts placed Stewart at a greater risk of developing mesothelioma and estimated that he was exposed to 0.1 to 5.0 asbestos fibers per cubic centimeter during each felt-replacement process. He testified that the 20 to 70% asbestos composition of the Scapa dryer felts created a substantial possibility that asbestos fibers would be liberated from the felts during the paper-making process and breathed in by employees.

Dr. Frank testified that while science cannot point to one specific exposure as the sole cause of mesothelioma in an individual, he explained mesothelioma is caused by an individual's cumulative exposure to all types of asbestos from all types of

asbestos-containing products the individual has encountered. This theory does not suggest that every fiber is a cause of the disease, or that science points to an exact number of fibers necessary to cause mesothelioma; however, it does suggest that "as the amount accumulates in somebody's body . . . , [he or she is] more likely to get disease than if it was at a lower level." Dr. Frank stated, based on a review of Stewart's records, that through his work at Bowater (spanning roughly forty years), Stewart was exposed to asbestos from Scapa's dryer felts. He explained that Stewart's testimony indicated that at times during his employment the air would be cloudy with dust from the dryer felts and because the felts contained 20 to 70% asbestos fibers, the air contained a substantial amount of asbestos. Based on a degree of medical certainty, Dr. Frank testified that Stewart died from mesothelioma caused by his exposure to asbestos and that his exposure from Scapa's asbestos-containing dryer felts was a substantial contributing factor to his illness and subsequent death.

We find the evidence presented above is sufficient for a jury to find Scapa's asbestos-containing dryer felts were a substantial factor in Stewart developing and dying from mesothelioma. In sum, the evidence showed that (1) dryer felts release large quantities of dust during the paper-making process; (2) Stewart worked closely with the dryer felts on a regular basis, and all but one of his positions at Bowater required him to regularly handle the dryer felts; (3) Scapa asbestos-containing felts were used at Bowater from 1963 to 1981, roughly half of Stewart's employment; (4) there is not a known safe level of asbestos exposure; and (5) Stewart regularly breathed in dust created from the paper-manufacturing process, which included asbestos fibers from the dryer felts.

B. Cumulative Dose Testimony

Scapa argues the trial court erred in failing to grant its motion for JNOV because Stewart employed the "each and every exposure" theory of causation at trial. Scapa states that Dr. Frank explained the cumulative dose or "cumulative exposure" theory to the jury and utilized that theory in reaching his opinion as to whether Scapa's dryer felts were a substantial factor in causing Stewart's mesothelioma. Scapa conflates these two theories and claims they are inconsistent with the specific causation standard set forth in *Henderson*. We disagree.

"The 'each and every exposure' theory espouses the view that 'each and every breath' of asbestos is substantially causative of mesothelioma.'" *Jolly*, 435 S.C. at

633, 869 S.E.2d at 833 (quoting *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (2016)); *see also Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) ("Also referred to as 'any exposure' theory, or 'single fiber' theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury."). This court has recently refused to conflate the cumulative dose theory with the each and every exposure theory, concluding that an expert's opinion which states "that a certain exposure contributes to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of mesothelioma or imply that one exposure meets the legal requirement for causation." *Jolly*, 435 S.C. at 635–36, 869 S.E.2d at 834. Rather, this court viewed testimony regarding a plaintiff's cumulative dose as "background information essential for the jury's understanding of medical causation, which must be based on science." *Id.* at 636, 869 S.E.2d at 834–35.

Here, Dr. Frank deployed the cumulative dose theory during his testimony, and he used it to explain how an individual's risk of developing mesothelioma or other lung disease increases as that individual's dose of asbestos increases through exposure. Dr. Frank expressly rejected the conflation of the cumulative dose theory and the each and every exposure theory when he stated that all of an individual's exposures to asbestos contribute to his likelihood of developing disease, but "that does not mean that each exposure was the one that caused the mesothelioma." He explained, "we never know which fiber on which day from which product did it. But they all clearly increase the risk and ultimately have to be said to be contributory to that individual getting the disease." The potential exists for an individual to develop lung disease from asbestos with every fiber that individual intakes, "even though they all do not actually cause the disease." The "cumulative dose" is simply how physicians and occupational health practitioners describe the cause of mesothelioma from asbestos exposure—as the amount accumulates in the body, the likelihood of disease increases. Dr. Frank testified that this is the medical reasoning behind the cause of all but two diseases—the AIDS virus and botulism. Because Dr. Frank used Stewart's cumulative dose as a means to describe the medical reasoning as to how humans develop mesothelioma from asbestos exposure, we find the trial court did not err in failing to grant Scapa's JNOV motion or in allowing Dr. Frank's testimony on the cumulative dose theory at trial. *See id.* at 635–36, 869 S.E.2d at 834 (providing an expert "[s]tating that a certain exposure contributes to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of

mesothelioma or imply that one exposure meets the legal requirement for causation"). Therefore, we affirm on this issue.

II. New Trial *Nisi* Additur

Scapa claims the trial court erred in granting Stewart's motion for a new trial *nisi* additur and increasing his survival damages from $600,000 to $1 million. We disagree and affirm on this issue.

"The consideration of a motion for a new trial nisi additur requires the trial [court] to consider the adequacy of the verdict in light of the evidence presented." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). "When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530–31, 431 S.E.2d 557, 558 (1993)). "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial nisi." *Id.* (alteration in original) (quoting *Durham*, 314 S.C. at 531, 431 S.E.2d at 558). "'Compelling reasons'" must be given to justify the trial court invading the jury's province in this manner." *Id.* at 193, 777 S.E.2d at 829.

"The trial [court that] heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [an appellate court.]" *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723. "Motions for a new trial nisi 'are addressed to the sound discretion of the trial [court].'" *Jolly*, 435 S.C. at 654, 869 S.E.2d at 845 (quoting *Riley*, 414 S.C. at 192, 777 S.E.2d at 828). "However, the [trial] court's exercise of discretion 'is not absolute[,] and it is the duty of [appellate courts] in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law.'" *Id.* at 654–55, 869 S.E.2d at 845 (second alteration in original) (quoting *Riley*, 414 S.C. at 192–93, 777 S.E.2d at 828–29). Appellate courts will not disturb the trial court's decision to grant a new trial *nisi* additur unless the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Proctor v. Dep't of Health & Env't Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). Damages in a survival action are awarded to the benefit

of the decedent's estate and include damages for medical, surgical, and hospital bills, conscious pain and suffering, and mental distress of the deceased. *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420–21 (Ct. App. 2000).

In this case, the jury returned a verdict that awarded Stewart $600,000 for his survival claim and $100,000 for his wrongful death claim. After granting Stewart's motion for new trial *nisi* additur, the trial court issued an order that increased the survival award by $400,000 to a total of $1 million. As justification for the additur, the trial court stated that both parties stipulated to Stewart's medical bills and economic damages and Scapa did not contradict Stewart's evidence of noneconomic damages consisting of pain and suffering, loss of enjoyment of life, and mental anguish. The trial court also evaluated damages awarded for pain and suffering in comparable mesothelioma cases and determined that similar circumstances justified awards ranging from $1.5 million to more than $20 million. Based on the goal of compensatory damages in South Carolina, as stated in *Clark v. Cantrell*, "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred," the trial court decided the jury's award of survival damages was insufficient. 339 S.C. 369, 378–379, 529 S.E.2d 528, 533 (2000). The trial court then itemized the jury's $600,000 survival award as being composed of $241,000 for Stewart's stipulated medical bills and $359,000 for his noneconomic damages. In conclusion, the trial court found that the noneconomic damages were insufficient and failed to accord with the stipulated evidence and fell "inextricably short of providing fitting compensation for the magnitude of [Stewart's] losses."

We find the trial court did not abuse its discretion in granting the additur. As the trial court noted, both parties stipulated that Stewart was diagnosed with malignant pleural mesothelioma and his medical bills associated with treatment were $241,822.70. It was undisputed at trial that Stewart suffered greatly as he attempted to treat his disease. His rapid deterioration and ultimate death is well documented and uncontroverted in the record. Although he had several comorbidities—diabetes, a prior heart attack, skin cancer, bladder cancer, prostate cancer, hypertension, and chronic obstructive pulmonary disease—no evidence in the record showed suffering from those health problems interacted with or amplified the pain and suffering Stewart felt from the mesothelioma.

Stewart suffered from lung infections for several years prior to his diagnosis with mesothelioma. What caused Stewart to seek further medical evaluation

immediately before his diagnosis was severe pain under his armpits—pain from even a slight touch. After his diagnosis in October 2012, Stewart endured several rounds of chemotherapy and several rounds of thoracentesis, a procedure in which doctors drain excess fluid produced by the tumor. Dr. Harpole, Stewart's cardiothoracic surgeon, explained thoracentesis is unpleasant and that he could not imagine having to withstand the procedure twice a week for three months because doctors stick a large needle through the ribs into the lung to drain the excess fluid. Dr. Harpole also stated that draining the fluid hurt because the tube creates a vacuum that sucks on the lung. Stewart's chemotherapy was administered through two drugs, one of which Dr. Harpole described as a "sledge hammer." Due to the chemotherapy, Stewart lost weight from a lack of appetite, and he testified that his digestive track was dysfunctional and that he was constantly constipated.

Stewart explained during his deposition that his life was very different after his diagnosis. He could barely walk his dog and got winded by walking down the street a short distance. He could no longer complete yard work, garden, clean his house; he could no longer sleep well and had to rely on sleeping pills; he could no longer drive to meet his family in Columbia, a destination where he and his grandchildren would share a meal, visit the zoo, or go to a museum. He described how he was too exhausted to do anything and swelling with emotions, stated, "I never imagined my life would come to what it is."

Despite mesothelioma being a death sentence, Stewart was adamant he prolong his life. He underwent the aforementioned rounds of chemotherapy and thoracentesis, and he opted for a maximally invasive pleurectomy, which Dr. Harpole described as a dissection of the mesothelioma tumor and surrounding plaques from the lung. This procedure required Dr. Harpole to remove one of Stewart's ribs, collapse his lung, remove his pericardium (heart sack), scrape the tumor off his lung, reinflate the lung, and then reconstruct his diaphragm and heart sack.

In spite of these efforts, Stewart was unable to add any substantial amount of time to his life. He was unable to complete rehabilitation after his pleurectomy. According to Dr. Harpole, it was not from lack of effort; at that point he was "just too debilitated." In August 2013, five months after surgery, Stewart succumbed to mesothelioma at the age of sixty-nine, less than a year after diagnosis.

Because both parties stipulated to Stewart's economic damages (in the form of medical bills) and the record is replete with evidence of his pain and suffering,

which was unrefuted by Scapa, we find the trial court was well within its discretion in granting Stewart a new trial *nisi* additur and increasing his survival damages to $1 million. *See Riley*, 414 S.C. at 192, 777 S.E.2d at 828 ("When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial nisi." (quoting *Durham*, 314 S.C. at 531, 431 S.E.2d at 558)). Further, by meticulously analyzing the details of Stewart's pain and suffering, loss of enjoyment of life, and mental anguish, and in analyzing other awards for similar cases, we find the trial court provided ample justification for increasing Stewart's survival award. *See id.* at 193, 777 S.E.2d at 829 ("'Compelling reasons' must be given to justify the trial court invading the jury's province."). Accordingly, we affirm on this issue. *See Proctor*, 368 S.C. at 320, 628 S.E.2d at 518 (stating appellate courts will not disturb a trial court's decision to grant a new trial *nisi* additur unless the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law).

III. Reallocation of Settlement Proceeds

Scapa argues the trial court erred in failing to reallocate Stewart's internal apportionment of settlement proceeds between the wrongful death and survival actions, claiming the allocation did not reflect "fairness and justice." Scapa claims the trial court should have reallocated the settlement funds "in a manner reasonable under the facts." We disagree and affirm on this issue.

"A non[]settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012); *see also Riley*, 414 S.C. at 195, 777 S.E.2d at 830 ("The right to setoff has existed at common law in South Carolina for over 100 years."). "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." *Welch*, 342 S.C. at 312, 536 S.E.2d at 425. "In other words, there can be only one satisfaction for an injury or wrong." *Id.* In 1988, South Carolina codified these equitable principles as part of the South Carolina Contribution Among Tortfeasors Act.[3]

[3] In pertinent part, section 15-38-50 (2005 & Supp. 2021) reads as follows:

"The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Welch*, 342 S.C. at 313, 536 S.E.2d at 425. "Despite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any 'reduction in the judgment must be from a settlement for the same cause of action.'" *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (quoting *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). "Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non[]settling defendant may be entitled to offset." *Id.*

Here, upon an in camera review of the releases signed by Stewart and the settling defendants, the trial court verified Stewart received $1,036,000 in pretrial settlements. Stewart conceded Scapa was entitled to setoff and the trial court granted Scapa's motion for setoff. The trial court also determined that Stewart had internally allocated 20% of each settlement to the survival cause of action and 80% to the wrongful death cause of action. This corresponded with settlement totals of $207,200 for the survival action and $828,000 for the wrongful death action. The court then applied the setoff rules and reduced the survival award of $1 million to $792,800 and negated the wrongful death award.

Scapa now requests this court to find the trial court erred in denying its request to reallocate Stewart's internal apportionment to 90% for the survival cause of action and 10% for the wrongful death cause of action as this would be more "reasonable

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> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . . .

under the facts" and not just advantageous to Scapa.[4] We find this argument is without merit as Scapa points only to the fact that the trial court favored Stewart's survival action in granting the additur. *See In re Wells*, 43 S.C. 477, 485, 21 S.E. 334, 337 (1895) (finding the party seeking departure from the application of standard setoff rules bears the burden of proof and must be "prepared to justify such [reallocation] as fair, bona fide, and just"). Scapa maintains the trial court finding that the evidence presented at trial warranted an increase of the survival claim to make it 90% of the total damages justified a reallocation of Stewart's settlement proceeds to match the respective award percentages—90% for survival and 10% for wrongful death.

Scapa's argument stands in contrast to the principle that plaintiffs who settle with defendants gain control and leverage in relation to nonsettling defendants—control that is often reflected in the plaintiff's ability to apportion settlement proceeds in a manner most advantageous to it. *See Riley*, 414 S.C. at 197, 777 S.E.2d at 831. As the *Riley* court noted,

> Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of [settling] parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Id. (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1018 (Ill. App. Ct. 2009)).

Scapa's "percentages-based allocation" argument is an attempt to refashion a disadvantageous allocation of the settlement proceeds. Merely because Stewart's internal allocation of the proceeds is not in Scapa's best interests is "insufficient to justify [an] appellate reapportionment for the sole purpose of benefitting [a nonsettling party]." *Id.* Because we do not perceive the effect of setoff based on

[4] Indeed, such a reallocation of the settlement proceeds would be greatly advantageous to Scapa and would result in a substantial discount, costing Scapa only $67,600 in total damages to Stewart. A savings of roughly $725,200.

Stewart's internal allocation as improper, unreasonable under the facts of this case, or unfair simply because it favored Stewart and did not reflect percentages that corresponded with the percentage of each award, we find the trial court did not err in denying Scapa's motion to reallocate Stewart's settlement proceeds for the purpose of setoff. *See id.* ("If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do." (quoting *Lard*, 901 N.E.2d at 1019)). Therefore, we affirm on this issue.

IV. Bankruptcy Claims

Scapa argues the trial court erred in refusing to admit claims Stewart filed with bankruptcy trusts established by companies that manufactured asbestos-containing products used at Bowater. Scapa asserts the claims were admissible as an admission of a party opponent and under *Smith v. Tiffany*.[5] In holding the claims inadmissible, Scapa contends the trial court "made it impossible for Scapa to try its empty-chair defense." We disagree and affirm on this issue.

The admission or exclusion of evidence is within the sound discretion of the trial court, and the court's decision will not be disturbed absent an abuse of such discretion. *Fields v. Reg. Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). An abuse of discretion occurs when the trial court's decision is based on an error of law or factual conclusion that lacks any evidentiary support within the record. *Id.* at 26, 609 S.E.2d at 509.

Here, during a pretrial motion, Scapa sought approval from the trial court to admit claims Stewart submitted to bankrupt companies' trusts. Scapa contended it only sought to admit the claims as a party admission of asbestos exposure to other companies' products, not to prove Stewart requested or may have received money from those companies. The trial court decided the issue under *Smith* and denied Scapa's request. In making its ruling under *Smith*, the court found that evidence showing the existence of settling defendants, "other pots of money," and claims against other parties was inadmissible during trial and was properly considered during the setoff portion of trial. In differentiating between Scapa's request to admit the bankruptcy claims with an attempt to establish an empty-chair defense,

[5] 419 S.C. 548, 799 S.E.2d 479 (2017).

the court noted the empty chair defense is an attempt to introduce direct evidence of the liability of a bankrupt company for the injuries Stewart suffered—evidence the court would admit. The trial court determined Scapa attempted "to put before the jury the fact that a bankruptcy claim was made on the altar of saying that it's an admission of a party opponent."

Our appellate courts hold fast to the longstanding principle that evidence of conduct or statements made in compromise negotiations is inadmissible because the law favors compromise. *See QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004). Under Rule 408, SCRE,

> Evidence of . . . accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

We find Stewart's trust claims are analogous to an offer or promise to accept compensation for his contact with the bankrupt organizations' asbestos-containing products. In other words, Stewart's claims are an offer to compromise. These settlement trusts are unique in that Stewart's submission of a claim, if he is deemed qualified by the trustee, constitutes his acceptance of whatever amount the trust offers as settlement. *See Oddo v. Asbestos Corp. Ltd.*, 173 So. 3d 1192, 1217 (La. Ct. App. 2015) (holding the trial court did not err in excluding bankruptcy trust claims filed by a mesothelioma patient). Although these claims could amount to a party admission, this type of admission—made for the purpose of settling a claim—is precisely what Rule 408, SCRE, was designed to exclude at trial. The purpose of Rule 408 is to encourage free and unfettered negotiation while

providing parties peace of mind that their negotiations—concessions, denials, admissions, and claim amounts—cannot be used against them *to prove liability for the disputed* claims *or its amount* at trial. *See* Rule 408, SCRE ("Evidence of . . . accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount."); *McCutcheon*, 360 S.C. at 209, 600 S.E.2d at 111 ("Because the law favors compromises, our appellate courts have long held that testimony as to negotiations and offers to compromise are inadmissible for proving liability."); *Hunter v. Hyder*, 236 S.C. 378, 387, 114 S.E.2d 493, 497 (1960) ("This Court has held that compromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute cannot be given in evidence against the party by whom such offer or attempt was made."); *Fesmire v. Digh*, 385 S.C. 296, 307–08, 683 S.E.2d 803, 809 (Ct. App. 2009) ("[Rule 408, SCRE] contemplates that the parties need to feel free to make certain assumptions for the purpose of settlement negotiations and that those statements are assumed by the author to be true only for the purpose of compromise negotiations.").

Further, we find that Scapa's empty-chair defense argument fails to grasp the nature and purpose of these unique trusts and the empty-chair defense. "The empty-chair defense is the defendant's 'right to assert another potential tortfeasor, *whether a party or not*, contributed to the alleged injury or damages' and was codified in the Uniform Contribution Among Tortfeasors Act (the Act) at section 15-38-15 of the South Carolina Code (Supp. 2020)." *Dawkins v. Sell*, 434 S.C. 572, 590, 865 S.E.2d 1, 10 (Ct. App. 2021) (quoting *Smith*, 419 S.C. at 557, 799 S.E.2d at 484). In seeking to establish an empty-chair defense, a defendant must assign fault for the plaintiff's injury to another party by providing evidence to the fact-finder that is sufficient for it to determine whether the party's "actions were the cause of the plaintiff's injuries." *Machin v. Carus Corp.*, 419 S.C. 527, 542–43, 799 S.E.2d 468, 476 (2017). Here, the settlement claims Stewart filed would not provide evidence to the jury that is sufficient for it to determine if the bankrupt companies' products were the cause of Stewart's mesothelioma. The claims would only show that Stewart could have been exposed to their products and that he was seeking compensation from the trusts for his mesothelioma. The claims do not in themselves provide a link between Stewart's mesothelioma and the bankrupt companies' products.

Moreover, contrary to Scapa's argument on appeal, the trial court's ruling in no way "made it impossible for Scapa to try its empty-chair defense." The record is replete with instances of Scapa interrogating witnesses regarding other companies that produced asbestos-containing dryer felts, insulation, and valves used at Bowater. Scapa named thirteen manufacturers of asbestos-containing products used at Bowater during Stewart's employment at trial. Therefore, we find the trial court did not err in refusing to admit the bankruptcy trust claims and did not prevent Scapa from trying its empty-chair defense.

CONCLUSION

Accordingly, the trial court's rulings are

AFFIRMED.

KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Basilides F. Cruz, Joseph A. Floyd, Sr., Arthur C. Gillam III, Alma C. Hill, Barry N. Martin, Charles F. Morris, Sr., and Joseph A. Smith, Appellants,

v.

City of Columbia, Respondent.

And

Larry Strickland, Denious L. Dimery, and Bailey G. McClinton, Appellants,

v.

City of Columbia, Respondent.

Appellate Case No. 2019-000374

Appeal From Richland County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5932
Heard February 10, 2022 – Filed August 3, 2022

AFFIRMED

Lucy Clark Sanders and Nancy Bloodgood, both of Bloodgood & Sanders, LLC, of Mt. Pleasant; Susan K. Dunn, Legal Director for American Civil Liberties Union

Foundation of South Carolina, of Charleston; and
Christopher James Bryant, of Yarborough Applegate,
LLC, of Columbia, all for Appellants.

W. Allen Nickles, III, of Nickles Law Firm, of Columbia,
for Respondent.

KONDUROS, J.: This case comes back to our court following remand to the circuit court for a determination of whether the plaintiffs could prove their claims for equitable estoppel and promissory estoppel.[1] The circuit court found in favor of the City of Columbia (the City), concluding the plaintiffs could not establish the necessary damages to prevail on their claim. We disagree with the circuit court's reasoning as to damages, but affirm its finding in favor of the City on additional sustaining grounds.

FACTS/PROCEDURAL BACKGROUND

In 2009, Kirby Bishop and several firefighters and policeman, all retired and under the age of 65, sued the City regarding the City's promise to provide them no-cost health insurance for their lifetimes. That year, the City began charging a $33.18 or $63.17 monthly premium, depending on the level of coverage, for retirees under 65 to participate in the City's health insurance program. The Bishop plaintiffs alleged causes of action for breach of contract, unfair trade practices, promissory estoppel, equitable estoppel, and declaratory judgment. The circuit court granted summary judgment on all causes of action except promissory estoppel, holding the plaintiffs' reliance on a promise of no-cost health insurance was not reasonable based on their knowledge that the City's health plan was subject to change. Additionally, the circuit court held their reliance was unreasonable because the municipality could not be bound by the acts of individuals who told the plaintiffs about no-cost health insurance because that would illegally usurp the function of city council. The plaintiffs appealed, and this court affirmed the grant of summary judgment as to all claims with the exception of the equitable estoppel and promissory estoppel

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[1] When this matter was remanded to the circuit court, causes of action for both equitable estoppel and promissory estoppel were at issue. However, the circuit court only ruled on the matter of promissory estoppel and that is the only cause of action still being pursued by Appellants.

claims. The *Bishop* opinion[2] remanded the case to the circuit court to determine if the promises made by City representatives—supervisors and human resource officers—could be sufficient to give rise to an estoppel claim even though the City's representative's statements were not legally sufficient to create a contract between the City and the plaintiffs.

In 2013, the City stopped paying the full cost for health insurance for retirees 65 and older. As a result, Larry Strickland and a group of other retirees, 65 or older, filed suit alleging similar claims to those in the *Bishop* case. The Strickland plaintiffs sought class certification. That request was denied in August 2016. The court found the criteria for class certification were not met because each member would have to demonstrate individually how he was prejudiced or his position was made worse in reliance on a promise by the City. The remanded *Bishop* case and the Strickland case were consolidated.

After a two-day bench trial, the circuit court found for the City. The circuit court concluded the plaintiffs failed to establish proof of damages for the promissory estoppel claim because they "failed to prove they would have been better off." This appeal followed.

STANDARD OF REVIEW

"Promissory estoppel is equitable in nature. In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence." *Craft v. S.C. Comm'n for Blind*, 385 S.C. 560, 564, 685 S.E.2d 625, 627 (Ct. App. 2009) (citation omitted). "However, this court is not required to disregard the findings of the trial court who saw and heard the witnesses and was in a better position to judge their credibility." *Id*.

[2] *Bishop v. City of Columbia*, 401 S.C. 651, 667-68, 738 S.E.2d 255, 263 (Ct. App. 2013).

LAW/ANALYSIS

I. Damages[3]

The doctrine of promissory estoppel was first recognized in South Carolina in *Higgins Construction Co. v. Southern Bell Telephone & Telegraph Co.*, 276 S.C. 663, 281 S.E.2d 469 (1981). It states, "[the] doctrine holds 'an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice.'" *Id*. at 665, 281 S.E.2d at 470 (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 48 (1966)). In order to establish a promissory estoppel claim, a claimant must demonstrate: "(1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise." *Satcher v. Satcher,* 351 S.C. 477, 483-84, 570 S.E.2d 535, 538 (Ct. App. 2002) (quoting *Woods v. State,* 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993)). "The applicability of the doctrine depends on whether the refusal to apply it 'would be virtually to sanction the perpetration of a fraud or would result in other injustice.'" *Id*. at 484, 570 S.E. 2d at 538 (quoting *Citizens Bank v. Gregory's Warehouse, Inc.,* 297 S.C. 151, 154, 375 S.E.2d 316, 318 (Ct. App.1988)). "Notably, neither meeting of the minds nor consideration is a necessary element." *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013). "Thus, in the interest of equity, the doctrine 'looks at a promise, its subsequent effect on the promisee,' and where appropriate '*bars the promisor* from making an inconsistent disposition of the property.'" *Id.* (quoting *Satcher*, 351 S.C. at 484, 570 S.E.2d at 538) (emphasis in original).

Appellants assert the circuit court used an incorrect standard in evaluating damages because it stated Appellants failed to establish they "would have been better off" had the City not made the promise regarding the life-long provision of free health insurance. The circuit court referenced the order denying class certification when using the "better off" language. That order denying class certification for the

[3] We are combining Appellants' issues on appeal as they all inextricably relate to the proof of damages in the case.

Strickland plaintiffs relied on *Craft v. South Carolina Commission for Blind* for the proposition that Craft's promissory estoppel claim failed because he could not show he would have been better off but for the Commission's promise. Craft worked as the canteen vendor at Greenville's County Square, but was promised a canteen position at the Perry Correctional Institute closer to his home. *Id*. at 563, 685 S.E.2d at 626. Craft quit his job in Greenville, and the Commission withdrew its promise for the Perry position. *Id*. The Greenville canteen closed, without explanation, and Craft was without a job. *Id*. at 563-64, 685 S.E.2d at 626-27. The court denied Craft's promissory estoppel claim reasoning the broken promise did not cause Craft's injury because he would have been unemployed with the unexplained closing of the Greenville canteen anyway. *Id*. at 568, 685 S.E.2d at 629. The lack of nexus between Craft's injury and the promise was the fatal flaw. Therefore, extrapolating *Craft* into a requirement that Appellants prove they would have been better off is not quite fitting.

Determining whether the application of the "better off" standard was erroneous can be better considered by comparing the elements of equitable estoppel and promissory estoppel. "To prove [equitable] estoppel against the government, the relying party must prove: (1) the lack of knowledge and of the means of knowledge of the truth of the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position." *S.C. Dep't of Transp. v. Horry County.,* 391 S.C. 76, 83, 705 S.E.2d 21, 25 (2011). *See also Town of Kingstree v. Chapman*, 405 S.C. 282, 313, 747 S.E.2d 494, 510 (Ct. App. 2013) ("The elements of equitable estoppel for 'the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position.'" (quoting *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001))). A successful equitable estoppel claim clearly requires a plaintiff to show a prejudicial change in position. By contrast, promissory estoppel requires an injury in reliance on an unambiguous promise. Admittedly, determining exactly what that means in a particular case can be difficult, and every promise cannot be enforced based solely on the promisee's hope the promisor will follow through. However, the proof of an injury in reliance in promissory estoppel appears to be something at least slightly different than a prejudicial change in position. The circuit court's order conflates the two concepts indicating Appellants needed to prove with specificity that but for the promise of free health coverage they would have found other, better employment. In this case, the promise arguably induced long-term conduct. For someone relying on an ongoing promise,

the ability to establish their reliance in terms of what they specifically forewent may be very difficult.

Many of the cases involving promissory estoppel do not end in a finding for the party asserting it either because the promise at issue was ambiguous or the reliance on it was unreasonable. *See A&P Enters., LLC v. SP Grocery of Lynchburg, LLC*, 422 S.C. 579, 589-90, 812 S.E.2d 759, 764 (Ct. App. 2018) (finding plaintiff did not demonstrate an unambiguous promise for defendant to sell back to plaintiff three parcels of land on which defendant had operated a liquor store, grill, and gas station in the absence of any specific terms about the buyback); *Rushing v. McKinney*, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006) (holding promise too ambiguous to support claim when plaintiff could not "clearly articulate" the terms of an alleged oral contract, including whether money involved would be treated as a loan or capital contribution or how the parties would "settle up"); *Barnes,* 402 S.C. at 471-73, 742 S.E.2d at 12-13 (denying promissory estoppel claim because although plaintiff established a general understanding that he could purchase a home and renovate and split the profits with a partner, "clear and convincing evidence of several key terms was never clearly articulated"); *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634-35, 620 S.E.2d 65, 67-68 (2005) (holding teachers' reliance on pay raises if they attained additional certification was not reasonable when district superintendent indicated raise was subject to school board approval).

A few cases have produced successful promissory estoppel claims. The original promissory estoppel case, *Furman University v. Waller*, 124 S.C. 68, 72, 117 S.E. 356, 357 (1923), involved charitable subscriptions.[4] Waller pledged $10,000 to Furman University during a campaign drive. *Id*. In reliance on the pledges received through the campaign, Furman made numerous improvements and additions to its campus. *Id*. at 73, 117 S.E.2d at 358. The court concluded Waller's demurrer could not be granted, and Waller's estate was obligated to fulfill the pledge. *Id*. at 86, 88, 117 S.E.2d at 362. The court, following the trend of other jurisdictions, determined that under the right circumstances, what may appear to be

[4] Although *Furman University* does not use the term promissory estoppel, it is recognized as one of the first South Carolina cases to employ the doctrine. *See Higgins*, 276 S.C. at 665, 281 S.E.2d at 470 ("While this [c]ourt has never used the term 'promissory estoppel,' it has applied the doctrine.").

a naked promise, could become an enforceable obligation. *Id*. at 85, 117 S.E.2d at 362-63.

In *Higgins Construction Company,* the complaint alleged Southern Bell failed to move telephone lines by the date Southern Bell promised, knowing Higgins would rely upon their removal by that date. *Higgins*, 276 S.C. at 665, 281 S.E.2d at 469-70. It also alleged Southern Bell's failure to remove the lines by the promised date resulted in delay of the entire project, adding to Higgins' costs and interfering with its normal construction program. *Id*. at 666, 281 S.E.2d at 470. The court granted the promissory estoppel claim, but remanded for a calculation of damages because "[t]he verdict did not take into account certain admitted benefits derived by [Higgins] from wages paid to employees and expenses for equipment during the period in question." *Id*. at 666-67, 281 S.E.2d at 470.

In *Powers Construction Co. v. Salem Carpets, Inc.*, 283 S.C. 302, 305-06, 322 S.E.2d 30, 32-33 (Ct. App. 1984), the court considered the issue of a contractor's bid in reliance on a subcontractor's bid. "A number of jurisdictions will permit a general contractor to enforce a subcontractor's bid under the doctrine of promissory estoppel where a general contractor's reasonable reliance upon a subcontractor's bid results in a forseeable prejudicial change in position."[5] *Id*. at 305-06, 322 S.E.2d at 33. A jury found for Powers for one-half the difference between what Powers had to pay another subcontractor and the erroneous bid by Salem Carpets. *Id*. at 310, 322 S.E.2d at 35.

Finally, in *Satcher*, the court considered a promise by a grandfather to his grandson.

> In reasonable reliance on that promise, [grandson] moved to the house and provided Grandfather with companionship and other services for more than twenty years. In further reliance, [grandson] gave up his opportunity to purchase a house, investing time and effort

[5] This is the only South Carolina promissory estoppel case that specifically mentions a prejudicial change in position. However, in a contractor-subcontractor bid situation, a prejudicial change in position would necessarily take place as the subcontractor's bid would be an essential element on which the contractor's bid was calculated.

> in Slide Hill and Grandfather's care. All of this was foreseeable and intended by Grandfather who did not wish to live alone on the property. . . . Moreover, we believe it would be an injustice not to apply the doctrine of promissory estoppel here because of the extreme amount of time and energy [grandson] has expended in reliance on Grandfather's promise. Therefore, we find [grandson] has proved his claim to Slide Hill and remand this matter for further proceedings consistent with our decision.

Satcher, 351 S.C. at 486, 570 S.E.2d at 539-40.

Of all the foregoing cases, *Satcher* is most instructive because it is similar in the amount of time invested by the promisee in reliance on the promise. Appellants worked numerous years for the City believing they were earning no-cost health insurance for life. There were other reasons Appellants stayed in their jobs including a high-quality pension and general quality of life. However, the promise of free health insurance was one of several benefits that enticed Appellants to stay. It is not essential that the specific promise of no-cost insurance be the sole inducement for their continuing employment just as Waller's promised donation in *Furman University* did not have to be the sole reason Furman made the improvements it made. *See Furman University*, 124 S.C. at 85, 117 S.E. at 362 ("[I]t is not essential . . . that the promise of the subscriber be the sole inducement to the activities and expenditures of the beneficiary.").

It is noteworthy that the four cases cited above result in two different types of damages. *Furman* and *Satcher* produced expectation damages—something the City says cannot result from a promissory estoppel claim. *Higgins* and *Salem* resulted in reliance damages. Our jurisprudence has recognized that either type of damages may be appropriate depending on the case. *See Thomerson v. DeVito*, 430 S.C. 246, 260, 844 S.E.2d 378, 386 (2020) (stating "[a] trial court retains broad discretion under promissory estoppel to fashion whatever remedies or damages justice requires" (quoting 28 Am. Jur. 2d Estoppel and *Waiver* § 51 (2011))). In this case, like *Satcher* and *Furman*, the specific performance of the promise would likely be the most logical and equitable method of discerning damages. We recognize this is a complicated issue, but conclude requiring Appellants to prove they would have been "better off" was too high a burden to

place on them under the circumstances of this case. Therefore, we reverse the circuit court's ruling as to damages.

II. Additional Sustaining Grounds – Unambiguous Promise and Reasonable Reliance

The circuit court did not address any other elements of the promissory estoppel claim except damages. The City asserts several additional sustaining grounds for affirming the circuit court's grant of summary judgment. One such ground is that the promise in this case was not unambiguous. We agree.

> [T]he presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist. Thus, promissory estoppel has broad applicability to prevent injustice, but where a promise is unclear or the alleged harms are unconnected to the inconsistent disposition, the doctrine does not risk imposing its own inequity against the party sought to be estopped.

Barnes, 402 S.C. at 470, 742 S.E.2d at 12 (citations omitted).

> Because one may properly invoke promissory estoppel absent elements typically required for a contract, such as a meeting of the minds or exchanged consideration, the doctrine still requires, by clear and convincing evidence, a "promise unambiguous in its terms." *See Satcher,* 351 S.C. at 483-87, 570 S.E.2d at 538-40 (holding an unclear agreement that lacked details was not shown by clear and convincing evidence to be unambiguous); *Rushing,* 370 S.C. at 295, 633 S.E.2d at 925 (holding that an agreement was ambiguous and not enforceable under promissory estoppel because the party seeking enforcement of the promise "could not clearly articulate [its] terms"). This necessity for unambiguous terms, in the absence of a contract, reflects balancing the availability of an equitable remedy with ensuring the remedy's appropriate

> application. *See Satcher,* 351 S.C. at 483-84, 570 S.E.2d at 538-39 (stating promissory estoppel requires "a promise unambiguous in its terms" and "[u]nlike a contract, which requires a meeting of the minds and consideration, promissory estoppel looks at a promise [and] its subsequent effect on the promisee").
>
> Consistent with this balancing of interests and the lack of a contract specifically defining the agreement, an inability "*to clearly articulate the terms* of [an] alleged oral contract," including how an existing "capital contribution" would be treated and specifically how the parties "would settle up," renders an agreement ambiguous. *Rushing,* 370 S.C. at 295, 633 S.E.2d at 925; *see Satcher,* 351 S.C. at 487, 570 S.E.2d at 540 (finding, despite testimony that some agreement existed, an unclear, unspecific promise to be ambiguous); *see also* 28 Am. Jur. 2d *Estoppel and Waiver* § 52 (2011) ("The promise must be clear and unambiguous and sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms.").

Id. at 471-72, 742 S.E.2d at 12.

In the present case, the promise of "no-cost health insurance for life" does not establish clearly articulated and definite terms. The ambiguity inherent in such a general promise is demonstrated by Appellants' expectations regarding exactly what they believe they are entitled to receive. One appellant testified he believed the City promised a high-quality health plan with prescription coverage better than that provided by Medicare. When pressed further on the point, he stated, "The city told me I would have a high quality health insurance plan, I don't care how they do it, that's what I expect." Another appellant testified he was entitled to the benefits that were in place on the date of his retirement, regardless of whether changes were made to the City's plan. Another appellant also testified his benefits were fixed as of the date of retirement regardless of changes in the City's plan that might lessen his coverage.

Additionally, Appellants' reliance on the promise under all the circumstances presented falls short of the reasonable reliance necessary to establish a claim for promissory estoppel. None of the written materials presented as exhibits indicate that the no-cost benefit was guaranteed for life. Appellants acknowledged their retirement letters stated the *current* policy was to allow them, individually, to participate in the City's health program and the City would cover the cost. They all acknowledged the term current would indicate at the present time. The letter does not indicate that offer was guaranteed for life nor could the Appellants have relied on the letter during the period of their employment as they did not receive it until the conclusion of their service to the City. The newsletters presented only informed plan participants when new insurance booklets were being issued and make no mention of the cost to participate much less indicating promises regarding *future* costs or participation. Furthermore, several Appellants testified they understood City Council was responsible for the budget and that City Council held the authority to make changes as needed. Moreover, Appellants testified they understood any individual who proclaimed no-cost health insurance was guaranteed for life was not personally able to fulfill such an obligation. Furthermore, the ambiguity of the promise renders its reliability questionable. *See A&P Enterprises, LLC*, 422 S.C. at 589, 812 S.E.2d at 764 ("[R]eliance on any alleged promise by [the promisor] was unreasonable in light [of] the ambiguities of the alleged promise.").

As our case law recognizes, there must be a balancing in the consideration of promissory estoppel claims. The proponent of the estoppel must demonstrate all requirements by clear and convincing evidence so as to not "risk imposing its own inequity against the party sought to be estopped." *Barnes*, 402 S.C. at 470, 742 S.E.2d at 12. Additionally, promissory estoppel is only invoked when the failure to find it would essentially result in a fraud. This case does not reveal an intent on the part of the City to defraud Appellants. It has not changed the premiums charged to retirees on a whim. Instead, it is a response to the ever-increasing costs of healthcare. Additionally, the City continues to pay approximately 90-95% of the retiree's coverage depending on the coverage selected. Based on all of the foregoing, we conclude the decision of the circuit court in favor of the City is

AFFIRMED.

WILLIAMS, C.J., and VINSON, J., concur.