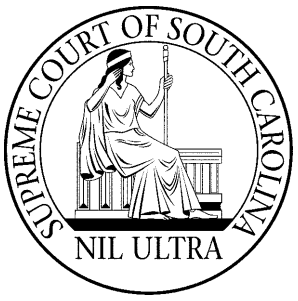

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 19, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Christi Anne Misocky, Respondent

Appellate Case No. 2021-001258

Opinion No. 28079
Submitted December 30, 2021 – Filed January 19, 2022

DISBARRED

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Julie K. Martino, both of Columbia, for the Office of Disciplinary Counsel.

Jonathan M. Harvey, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to disbarment, and agrees to pay restitution and costs. We accept the Agreement and disbar Respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

Client A hired Respondent in late 2016 to handle a child support modification action after Client A's ex-wife filed a Rule to Show Cause. The York County Family Court issued a temporary order in December 2016. Respondent failed to

adequately communicate with Client A about the status of the action until a hearing was scheduled for August 7, 2017. Prior to the hearing, on August 3, 2017, Respondent filed a Rule to Show Cause due to ex-wife's alleged failure to comply with the temporary order. The hearing was continued and mediation was scheduled for September 22, 2017. Respondent did not communicate with Client A about the reason for the continuance or the mediation and failed to diligently work on the case. Respondent and Client A signed a consent order to withdraw as counsel for Client A on September 18, 2017. The family court signed and filed the consent order a week later. The case was eventually dismissed pursuant to the 365-day rule.

ODC mailed Respondent a notice of investigation on September 29, 2017, requesting a response within fifteen days. Having received no response, ODC served Respondent with a letter pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), on October 30, 2017, again requesting a response. The certified letter, which was sent to Respondent's AIS address, was returned unclaimed. On November 14, 2017, ODC served Respondent at her AIS address with a subpoena requiring Respondent to provide a copy of Client A's file.

Respondent submitted a response to the notice of investigation and subpoena on December 18, 2017. Respondent did not address Client A's allegations, instead claiming Client A's wife filed the complaint due to a personal grudge Client A's wife had with Respondent. In response to the subpoena for the client file, Respondent provided only an invoice of fees charged, a copy of the motion to withdraw as counsel for Client A, and a copy of a proposed order of continuance dated August 3, 2017. Respondent provided an additional response on March 7, 2018, in which she denied Client A's allegations but provided no additional documentation from the file or other evidence to support her denial.

Respondent admits her conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (requiring diligence); Rule 1.4 (requiring adequate communication); Rule 8.1(b) (prohibiting a knowing failure to respond to an ODC inquiry); and Rule 8.4(e) (prohibiting conduct prejudicial to the administration of justice).

Matter B

Client B hired Respondent on December 12, 2016, to bring a foreclosure action against a borrower. Client B made three payments totaling $5,297.50 for the representation. Respondent filed the foreclosure action in York County on March 27, 2017. Respondent was late to the first hearing in the case, and when she did arrive, she was not prepared. The master-in-equity continued the hearing and rescheduled it, but Respondent failed to appear for the second hearing. Thereafter, communications between Client B and Respondent broke down. Client B attempted to call Respondent several times with no success. Client B also emailed Respondent in an attempt to reach her, but Respondent did not respond. The master-in-equity issued a notice of foreclosure sale on September 21, 2017. Respondent submitted a revised affidavit of attorney's fees on September 27, 2017, in which she requested $5,597.50 in fees—$300 more than Client B had already paid Respondent.

The master-in-equity accepted the highest bid offered at the public sale on November 6, 2017. He issued an order of sale and disbursement on November 20, 2017, along with a check in the amount of $44,611.50, payable to Respondent and Client B. The check represented the net proceeds of the sale, including attorney's fees and costs. On December 13, 2017, the master-in-equity issued an order for disbursement of funds, in which he observed that Respondent and Client B had a dispute over the amount of attorney's fees and costs and noted that the check had not yet been negotiated. The master-in-equity ordered Respondent to deposit the check into her trust account and to pay Client B the proceeds of the sale, plus reimbursement to Client B of any amounts already paid to Respondent. Respondent endorsed the check and attempted to deposit it without Client B's endorsement. The bank refused the check, and Respondent subsequently lost the check.

On December 28, 2017, the master-in-equity emailed Respondent, reminding her that she should have properly endorsed the check and deposited the funds in her trust account. The master issued a replacement check, required Respondent to pay $30.00 to stop payment on the first check, and informed Respondent that she was required to disburse the funds in accordance with his December 13, 2017 order.

Respondent held back the entire $5,597.50 as attorney's fees, even though Client B had already paid her $5,297.50, and she was entitled to keep only an additional $300. Client B filed a claim with the Lawyers' Fund for Client Protection and was awarded $5,297.50.

ODC mailed Respondent a notice of investigation to her AIS address on November 14, 2017, requesting a response within fifteen days. Also on November 14, 2017, ODC served Respondent at her AIS address with a subpoena requiring her to provide a copy of Client B's file.

Respondent provided a response on December 18, 2017, that did not address the allegations of misconduct. Instead, Respondent blamed her paralegal for encouraging Client B to file a complaint. In response to the subpoena for the client file, Respondent provided only one email from her paralegal to Client B, one page of the master's order for disbursement of funds, and receipts of fee payments Client B made to Respondent.

Respondent admits her conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (requiring diligence); Rule 1.4 (requiring adequate communication); Rule 1.15 (requiring the safekeeping and prompt delivery of client funds); Rule 8.1(b) (prohibiting a knowing failure to respond to an ODC inquiry); and Rule 8.4(e) (prohibiting conduct prejudicial to the administration of justice).

Matter C

On January 19, 2017, Respondent conducted a real estate closing on property owned by Client C. After the closing, Client C realized the following errors in the closing disclosure: the closing date was incorrect; the amount of closing costs, set forth in two separate places, was listed inconsistently; an addendum stated that a second mortgage loan was to be paid off as part of the closing, but no second mortgage existed; and the alleged amount of the second mortgage, $906.50, was the same amount as the "Deed Stamps for Transfer" item on the closing disclosure.

Client C and her real estate agent (Agent) attempted to contact Respondent several times over the next two weeks to get clarification about the closing disclosure. Respondent did not respond to calls, text messages, or emails. On February 10,

2017, Client C and Agent went to Respondent's office. Respondent met with them but could not locate the file associated with the closing. On February 27, 2017, Respondent emailed Client C a revised closing disclosure, explaining that last minute changes in the terms and a software glitch caused the errors. The revised closing disclosure corrected only some of the prior errors and contained several additional errors. Client C sent two registered letters to Respondent requesting an explanation of the closing disclosure, but Respondent never responded. Respondent overcharged Client C $500 in closing costs.

On January 2, 2018, Client C filed a complaint against Respondent. ODC mailed Respondent a notice of investigation to her AIS address on January 23, 2018, requesting a response within fifteen days. Having received no response, ODC served Respondent with a *Treacy* letter on February 12, 2018, again requesting a response. On February 15, 2018, ODC served Respondent at her AIS address with a subpoena requiring her to provide a copy of Client C's closing documents and Respondent's trust account records required under Rule 417, SCACR. The certified letter and subpoena were both returned to ODC as unclaimed.

Respondent provided a response to the notice of investigation on March 7, 2018, in which she blamed last minute changes and a software glitch for the errors and did not explain why she failed to correct all of the errors in the closing disclosure. Respondent provided closing documents and some bank statements in response to ODC's subpoena, but she failed to provide complete records as required under Rule 417, SCACR.

Respondent admits her conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (requiring thoroughness and preparation); Rule 8.1(b) (prohibiting a knowing failure to respond to an ODC inquiry); and Rule 8.4(e) (prohibiting conduct prejudicial to the administration of justice).

Matter D

On February 13, 2018, ODC received a complaint involving Respondent. ODC investigated the allegations but was unable to obtain clear and convincing evidence that Respondent had committed misconduct. However, Respondent failed to respond to ODC's March 3, 2018 notice of investigation or ODC's April 25, 2018

Treacy Letter, both of which were sent to Respondent's AIS address.[1] Respondent admits her failure to respond to the notice of investigation in this matter violated Rule 8.1(b), RPC, Rule 407, SCACR (prohibiting a knowing failure to respond to an ODC inquiry).

Matter E

On February 15, 2019, Respondent was arrested on two counts of forgery under state law. On March 1, 2019, this Court issued an order placing Respondent on interim suspension. *In re Misocky*, 425 S.C. 614, 825 S.E.2d 48 (2019). Respondent was subsequently indicted on numerous federal criminal charges involving conspiracy, forgery, counterfeiting, and identity theft, and the state charges were eventually dismissed in favor of federal prosecution.

The basis for the federal charges was that Respondent conveyed personal client information to two other individuals who used that information to make and pass counterfeit and forged securities in the names of the clients. These two other individuals deposited the money from the forged securities into a designated account from which Respondent paid them a percentage of the fraudulently obtained proceeds. Additionally, Respondent endorsed stolen checks; attempted to use another person's identity to facilitate a vehicle trade; possessed a fake driver's license and social security card and attempted to use them to purchase a car; purchased a different vehicle using a false identity; and possessed and passed two counterfeit checks with the intent to defraud a car dealership.

On July 6, 2021, Respondent entered into a plea agreement in which she agreed to plead guilty to a single count of conspiracy in exchange for the dismissal of the remaining five federal charges. Her guilty plea was entered on August 2, 2021. Respondent has not yet been sentenced.

ODC sent Respondent a notice of investigation on November 25, 2020, requesting a response within fifteen days. This notice was sent to Respondent's AIS email address and her AIS mailing address, along with two other email addresses and one other mailing address Respondent had previously provided. Respondent never responded to the notice of investigation.

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[1] The April 25, 2018 *Treacy* Letter, which was sent certified mail, was ultimately returned to ODC as unclaimed.

Respondent admits her conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 8.1(b) (prohibiting a knowing failure to respond to an ODC inquiry); Rule 8.4(b) (prohibiting criminal acts that reflect adversely upon a lawyer's honesty, trustworthiness, or fitness as a lawyer); Rule 8.4(c) (prohibiting criminal acts involving moral turpitude); and Rule 8.4(d) (prohibiting conduct that involves dishonesty, fraud, deceit, or misrepresentation).

Matter F

Respondent is also licensed to practice law in North Carolina. In 2017, the North Carolina Bar began an investigation based on several insufficient funds notices on Respondent's law firm IOLTA accounts with Wells Fargo. The preliminary investigation indicated Respondent mishandled funds. Initially, Respondent expressed a desire to cooperate with the North Carolina Bar and entered into a Consent Order of Preliminary Injunction on August 4, 2017, in which Respondent was enjoined from accepting or receiving any funds against any account in which client funds had been deposited. Respondent agreed to produce comprehensive records of all such funds to the North Carolina Bar. Although she initially provided some of the records requested by the North Carolina Bar, Respondent did not provide all of the required information and stopped communicating or cooperating with the investigation after August 2017.

On October 12, 2017, Respondent visited a branch of Bank of America in Ballantyne, North Carolina, and opened two new checking accounts and one savings account in her law firm's name. Thereafter, Respondent relocated her practice to South Carolina, and she accepted and disbursed client money through the new Bank of America accounts until February 2018. Respondent also commingled personal funds with client funds in these accounts.

On June 7, 2021, the North Carolina State Bar Disciplinary Hearing Commission entered an order suspending Respondent from the practice of law based on her failure to comply with the investigation of seventeen grievances pending against her.[2] Specifically, the order found Respondent failed to provide requested records

[2] Twelve of these grievances were filed in 2017. Four more grievances were filed in 2018, and the remaining one was filed in 2020.

and information, failed to fully cooperate with a subpoena for an audit, failed to respond to several letters of notice, and failed to cooperate with the North Carolina State Bar's effort to serve letters on her.

Respondent admits her conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(a) (prohibiting the commingling of funds and requiring compliance with financial recordkeeping rules); Rule 1.15(b) (prohibiting the deposit of a lawyer's own funds in a client trust account beyond an amount necessary to pay account service charges); Rule 8.4(d) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation).[3] Respondent also admits her conduct violates the following North Carolina Rules of Professional Conduct found in Chapter 2 of Title 27 of the North Carolina Administrative Code: Rule 1.15-2 (requiring a lawyer to safekeep entrusted property); Rule 1.15-3 (establishing requirements for financial recordkeeping); Rule 8.1(b) (prohibiting a knowing failure to respond to a lawful disciplinary inquiry); Rule 8.4(b) (prohibiting criminal acts that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); and Rule 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation).

II.

Respondent admits her misconduct in the above matters constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (committing violations of the Rules of Professional Conduct); Rule 7(a)(2) (engaging in conduct that violates rules of professional conduct from another jurisdiction); Rule 7(a)(3) (prohibiting a willful failure to comply with disciplinary subpoenas or a knowing failure to respond to an ODC inquiry); Rule 7(a)(4) (being convicted of a serious crime or crime of moral turpitude); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or conduct demonstrating an unfitness to practice law); Rule 7(a)(6) (violating the lawyer's oath found in Rule 402(h)(3), SCACR); and Rule 7(a)(7) (willfully violating a court order issued by a court in this state or another jurisdiction).

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[3] "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." Rule 8.5(a), RPC, Rule 407, SCACR.

In the Agreement, Respondent consents to disbarment and requests that the sanction be imposed retroactively to the date of her interim suspension. ODC does not oppose Respondent's request for retroactivity. Respondent also agrees to pay, within thirty days, the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct, to reimburse Client C in the amount of $500, and to reimburse the Lawyers' Fund for Client Protection for any claims paid on her behalf.

III.

We accept the Agreement and disbar Respondent from the practice of law in this state, retroactive to March 1, 2019, which is the date of her interim suspension.

Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR, and she shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of this Court.

Within thirty (30) days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan with the Commission on Lawyer Conduct to: (1) pay the costs incurred in the investigation and prosecution of this matter by Disciplinary Counsel and the Commission; (2) reimburse Client C in the amount of $500; and (3) reimburse the Lawyers' Fund for Client Protection for any claims paid on Respondent's behalf.

DISBARRED.

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

The Supreme Court of South Carolina

In the Matter of David B. Sample, Petitioner.

Appellate Case No. 2021-000154

ORDER

On February 16, 2016, Petitioner was suspended from the practice of law for a period of nine months. *In re Sample*, 415 S.C. 337, 782 S.E.2d 583 (2016). Petitioner has now filed a petition for reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. After referral to the Committee on Character and Fitness (Committee), the Committee has filed a report recommending that Petitioner be reinstated.

We find Petitioner has met the requirements of Rule 33(f), RLDE. We therefore grant the petition and reinstate Petitioner as a regular member of the South Carolina Bar.

s\ Donald W. Beatty C.J.

s\ John W. Kittredge J.

s\ Kaye G. Hearn J.

s\ John Cannon Few J.

s\ George C. James J.

Columbia, South Carolina
January 12, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elizabeth Murray as Personal Representative of the Estate of Minnie H. Murray and Elizabeth Stylesetters, Appellants,

v.

The Estate of William E. Murray, Respondent.

Appellate Case No. 2018-001680

Appeal from Charleston County
Jennifer B. McCoy, Circuit Court Judge
Tamara C. Curry, Probate Court Judge

Opinion No. 5890
Heard April 15, 2021 – Filed January 19, 2022

AFFIRMED

George J. Kefalos, of George J. Kefalos, PA; Oana Dobrescu Johnson, of Oana D. Johnson, Attorney at Law; and Barry I. Baker, of Baker & Varner, LLC, all of Charleston; and Stephen Michael Slotchiver, of Slotchiver & Slotchiver, LLP, of Mount Pleasant, all for Appellants.

Robert H. Hood and Mary Agnes Hood Craig, of Hood Law Firm, LLC, both of Charleston; Jean Marie Jennings, of Charleston; and Deborah Harrison Sheffield, of Columbia, all for Respondent.

LOCKEMY, A.J.: Appellants Elizabeth Murray, as personal representative of the Estate of Minnie H. Murray (Mother's Estate), and Elizabeth Stylesetters (Stylesetters) (collectively, Appellants) appeal the circuit court's ruling affirming the probate court's order granting summary judgment in favor of the Estate of William E. Murray (Murray's Estate). Appellants argue the circuit court erred in finding that (1) Mother's Estate lacked standing to bring its claim against Murray's Estate, (2) the statute of limitations and laches barred Mother's Estate's claim, and (3) judicial estoppel barred Stylesetters' claim. We affirm.

FACTS AND PROCEDURAL HISTORY

William E. Murray (Murray) and Minnie Murray (Mother) were married in the State of New York. The couple had three daughters: Pamela Murray[1] was born in 1951; Elizabeth Murray (Elizabeth) was born in 1953; and Catherine Murray was born in 1954 (collectively, Daughters). Mother passed away in 1967 shortly after the couple divorced. Murray passed away on August 4, 2007. James Ma and Hilton Smith, husband of Catherine Murray, were appointed as co-personal representatives of Murray's Estate. Elizabeth filed two creditor's claims against Murray's Estate on June 3, 2008: the first claim was for $6,260,845.70 on behalf of Mother's Estate, and the second claim was for $538,034.00 on behalf of Elizabeth's business, Stylesetters.

During their marriage, Mother pledged personal securities as collateral for a loan of $142,685 to Murray. Murray acknowledged this debt as valid and owing when the parties divorced in March of 1967, and that debt was subsequently transferred to Mother's Estate upon her death in June of 1967. In 1975, Elizabeth was appointed as the administrator of Mother's Estate.[2]

In 1980, Daughters, as the beneficiaries of Mother's Estate, entered an agreement with Murray (the 1980 Agreement) concerning the outstanding debt he owed to Mother's Estate. Murray agreed the outstanding balance of the loan was $240,000. The 1980 Agreement provided, "Daughters, [Mother's] Estate, and [Murray] wish

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[1] Pamela passed away during the pendency of this case.

[2] Elizabeth was appointed after the original administrator was removed for malfeasance.

to conclude the administration of the Estate of the late Minnie Holmes Murray, mother of Daughters and former wife of [Murray]; and thereby to establish the trust under the Will of [Mother] . . . ." Murray acknowledged he was indebted to Mother's Estate and agreed to pay $240,000 plus interest to Mother's Estate in yearly installments. For the years 1980, 1981 and 1982, Murray was to pay interest only, which was $19,200 per year; thereafter, he was to pay principal and accrued interest, amortized over a period of ten years. The 1980 Agreement provided the indebtedness bore interest of 8% per annum but the failure to make any payments when due would trigger an automatic increased interest rate of 12% per annum for the period of the unpaid installment. In addition, Murray agreed to maintain and pay premiums upon a $385,000 life insurance policy that was previously transferred to Mother's Estate. Murray made six payments on the debt until 1986 and made no further payments. He also stopped paying premiums on the life insurance policy.

In December 1992, Daughters reached an agreement among themselves regarding the outstanding debt. The agreement provided,

> This letter constitutes an agreement by and between Pamela Murray Stack, Elizabeth E. Murray[,] and Catherine Peronneau Murray Smith, the three beneficiaries of the Estate of Minnie Holmes Murray, Deceased, *that the total obligation owing from William E. Murray to the Estate* as outlined in a prior agreement dated April 22, 1980 between William E. Murray and the above-mentioned three beneficiaries, as well as accrued interest, penalty interest, interest owed on his loans from the New England Life Insurance policy, as well as the accrued interest thereon and other monies which may become due, *shall become community property* between Pamela Murray Stack, Elizabeth E. Murray[,] and Catherine Peronneau Murray Smith on a joint, not several basis. Any monies remitted thereon to any one or more beneficiaries shall impose and constitute liability and obligation on that beneficiary(ies) to remit a pro-rata share to the other parties to this agreement.

Smith testified in a deposition that he assisted Daughters with Mother's Estate in the weeks prior to the 1992 Agreement. The record contains letters from Smith suggesting Daughters intended to liquidate the estate when they entered the 1992 Agreement. Smith agreed that in 1995, Murray presented a financial summary to his bank and the Small Business Administration acknowledging that he owed $1.4 million to Mother's Estate. Elizabeth testified during her March 2015 deposition that although Mother's Estate made distributions in 1992, the estate only partially liquidated its assets, and she never filed a release and discharge with the probate court.

Elizabeth wrote several letters to Murray from 1998 to 2006, in which she reminded him of the outstanding debt. The following are excerpts from Elizabeth's February 2006 letter to Murray, which Elizabeth did not discover until February 2009:

> I need you to formally certify below that you are in agreement with your original stated obligation to Mommy's Estate, . . . which is now over $5 million per the computation attached for your examination.
>
> I must have you, as soon as possible, memorialize this agreement that those monies are due, as outlined in the 1980 agreement (see attached), by you to her Estate, whether on a currently due basis or as part of debt that will be due upon your death as a valid claim to the three of us.
>
> . . . .
>
> . . . . I must ask you affirm this decades old debt owed to your first three children, which you have always stated is your intention, both legally and as our father.
>
> . . . .
>
> Thank you for making this issue one of the past and not one of the future. I love you and want the best for you for many years to come but this is both a[] legal

> Agreement as well as an "honor debt." I have delayed enforcing its collection in trust of your advi[c]e and counsel, and as your daughter. But this is a legal responsibility for me and I need you to respect my position as someone trusting in you to do the right thing, especially since I have followed your legal counsel with respect to my position as Executrix.

Attached to the letter was a copy of the 1980 Agreement and the payment schedule. A signature purporting to be Murray's appears at the end of the letter. Murray was diagnosed with Parkinson's disease in 2001 when he was in his seventies, and the parties dispute whether Murray in fact signed the letter as well as whether he possessed the requisite mental capacity to do so.[3]

From 1999 until 2002, Elizabeth worked for Murray at his property, the Inn at Quogue, in New York. In her deposition, Elizabeth stated she expended "hundreds of thousands of dollars and interest thereon" to pay expenses at the Inn, including renovation, delivery bills, and payroll. She contended Murray agreed to pay her, as owner of Stylesetters, $2,000 per month towards those services, and that he made monthly payments on the debt until July 2007. Smith acknowledged Murray gave Elizabeth a monthly allowance of $3,000. He stated that to his knowledge, these payments were unrelated to the alleged debt due Elizabeth from the Inn at Quogue. Elizabeth testified Murray began paying her a $3,000 monthly allowance in 2003 and continued until 2006. She stated the payments Murray made from 2006 onward included $2,000 per month toward the Inn at Quogue debt.

Elizabeth asserted that a letter dated July 21, 2007, [4] evidenced Murray's agreement to repay her for her expenditures at the Inn of Quogue. In the July 21, 2007 letter, which Murray purportedly wrote and signed, Murray stated,

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[3] These disputed facts are not at issue on appeal.

[4] The heading of the letter reflects the date June 21, 2007; however, the letter reflects the witnesses—Larry Bump and Jeffrey Young—witnessed Murray's signature on July 21, 2007. Bump and Young both testified they witnessed Murray sign the letter on July 21, 2007.

> Elizabeth is to receive the principal sum of $117[,000] plus accrued credit card and cash line of credit interest from proceeds upon the sale of the Inn at Quogue . . . .
>
> Such payments shall be for items purchased by her for or . . . used by the Inn, cash advances used to support payroll and emergency expenses related to her work there, [and] her past due payroll for design work . . . .
>
> I have made various payments from my personal account at a rate of $2,000 per month, which payments began in January[] 2006.

Murray's Estate filed notices of disallowance of claim as to the claims of both Mother's Estate and Stylesetters, and Appellants subsequently filed a petition for allowance of claim for both claims. After a lengthy discovery, Murray's Estate moved for summary judgment on October 31, 2016. The probate court heard the motion in July 2017 and took the matter under advisement. Thereafter, the probate court granted summary judgment in favor of Murray's Estate.

First, the probate court found Mother's Estate lacked standing because any obligation due under the 1980 Agreement was due to Daughters jointly and not to Mother's Estate. The probate court reasoned Daughters agreed to transfer the debt to themselves jointly in the 1992 Agreement, and Elizabeth stated in her 2013 affidavit that all obligations due under the 1980 Agreement were community property between Daughters. Second, the court found the claims of Mother's Estate were barred by the statute of limitations pursuant to section 15-3-530 of the South Carolina Code (2005)[5] and 62-3-802 of the South Carolina Code (Supp. 2020)[6] because Murray last paid on the debt on February 24, 1986. Moreover, the probate court concluded the February 9, 2006 letter did not revive the debt because it was not a clear and explicit promise to pay the debt or an unqualified and unequivocal admission that the debt was still due. Third, the court found Mother's Estate's claims were barred by the doctrine of laches. Finally, as to Stylesetters'

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[5] (providing the statute of limitations for "an action upon a contract, obligation, or liability, express or implied" is three years).

[6] (providing "no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid").

claim, the probate court found it was judicially estopped from making this claim based up on a position Elizabeth took in a 2006 action involving a trust. Appellants appealed to the circuit court, which affirmed the probate court's grant of summary judgment for the same reasons the probate court provided. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by finding Mother's Estate did not have standing to prosecute its claim against Murray's Estate based upon an agreement among Daughters as to how they would divide the proceeds due to Mother's Estate?

2. Did the circuit court err by concluding Mother's Estate's claim was barred by the statute of limitations or the doctrine of laches?

3. Did the circuit court err by granting summary judgment as to Stylesetters' claim based on a theory of judicial estoppel?

STANDARD OF REVIEW

> When reviewing a grant of summary judgment, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law.

S.C. Pub. Interest Found. v. S.C. Dep't of Transp., 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017). "This Court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.*

LAW AND ANALYSIS

A. Mother's Estate

1. Standing

Mother's Estate argues the circuit court erred by concluding the 1992 Agreement constituted a transfer of the debt from Mother's Estate to Daughters. Mother's Estate contends Daughters agreed among themselves as to how they would hold the proceeds of the claim once it was liquidated and did nothing to transfer ownership of the claim from Mother's Estate to themselves or change the real party in interest. We agree.

"A plaintiff must have standing to institute an action." *Sloan v. Greenville County*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (Ct. App. 2003). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013) (quoting *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008)).

> To have standing . . . one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.

Sloan, 356 S.C. at 547, 590 S.E.2d at 347 (omission in original) (quoting *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999)). Rule 17(a), SCRCP provides:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State. No action shall be dismissed on

> the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

"[T]he burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff." *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). "Under ordinary circumstances, the Probate Code grants the personal representative the exclusive authority to bring civil actions . . . on behalf of an estate." *Id.* at 238, 811 S.E.2d at 741. "The requirement of standing is not an inflexible one." *Draper*, 405 S.C. at 220, 746 S.E.2d at 481 (quoting *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000)).

As an initial matter, in its August 15, 2014 order, the probate court recognized Elizabeth as the appointed foreign personal representative of Mother's Estate pursuant to sections 62-4-204 and 62-4-205 of the South Carolina Code (Supp. 2020). Murray's Estate has not challenged this, and therefore Elizabeth was authorized to maintain actions on behalf of Mother's Estate in South Carolina. *See* S.C. Code Ann. § 62-3-703(c) (Supp. 2020) ("[A] personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death."); § 62-4-204 ("[A] domiciliary foreign personal representative may file with a court in this State in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of the will, if any."); § 62-4-205 ("A domiciliary foreign personal representative who has complied with Section 62-4-204 may exercise as to assets (including real and personal property) in this State all powers of a local personal representative and may maintain actions and proceedings in this State . . . .").

Although the record contains a document that Daughters signed purporting to relieve Elizabeth as personal representative, the record does not indicate this document was ever filed with the probate court of New York. Elizabeth testified Mother's Estate remained active, that the 1992 distribution only partially liquidated the estate, and that she was never released as personal representative. The

evidence therefore indicates Mother's Estate was never closed. The 1992 Agreement was among Daughters, and Mother's Estate was not a party to that agreement. We do not believe the 1992 Agreement transferred the debt from Mother's Estate to Daughters. Rather, Murray's obligation to pay the debt was an obligation to Mother's Estate, and Mother's Estate retained the right to enforce the debt and was therefore the real party in interest. Accordingly, we conclude Mother's Estate, and Elizabeth, as personal representative of Mother's Estate, had standing to bring the claim.

2. Statute of Limitations

Mother's Estate argues the question of whether Murray reaffirmed the debt was a question of fact and the circuit and probate courts erred by deciding such question as a matter of law. Specifically, Mother's Estate contends the question of whether Murray intended for his signature on the February 9, 2006 letter to show his intent to repay the debt was a question of fact. It asserts the letter "explicitly asked Mr. Murray to acknowledge the debt was still owed and that it would be paid." We disagree.

In the February 9, 2006 letter, Elizabeth asked Murray to certify that he was in "agreement with [his] original stated obligation to M[other]'s Estate." She also wrote,

> I must have you, as soon as possible, memorialize this agreement that those monies are due, as outlined in the 1980 agreement (see attached), by you to her Estate, *whether on a currently due basis or as part of debt that will be due upon your death* as a valid claim to the three of us.

In affirming the probate court's order, the circuit court assumed for purposes of summary judgment that Murray signed the February 9, 2006 letter. The circuit court found that as a matter of law the letter did not constitute a new promise to pay the debt. Although the parties dispute the authenticity of his signature—and whether he was competent to sign such a document at the time—these questions are not at issue on appeal.

"Actions to recover debts in South Carolina must generally be brought within three years of the default on the debt. This bar only effects the remedy available to a collecting party rather than the underlying right: it does not erase the debt." *In re Vaughn*, 536 B.R. 670, 677 (Bankr. D.S.C. 2015) (citation omitted); *see also* § 15-3-530. "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this statute unless it be contained in some writing signed by the party to be charged thereby." S.C. Code Ann. § 15-3-120 (2005). However, "payment of any part of principal or interest is equivalent to a promise in writing." *Id.*

"Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations is a question for the court, but whether the debt sued for is the one acknowledged is a question for the jury." *Hill v. Hill*, 51 S.C. 134, 140, 28 S.E. 309, 312 (1897) (quoting 1 *Thomp. Trials* § 1268).

"After the statute [of limitations] has run out, there must be 'an express promise to pay, or an admission of a subsisting debt which the party is willing and liable to pay.'" *Horlbeck v. Hunt*, 26 S.C.L. (1 McMul.) 197, 200-01 (1841). "[I]f there be an unequivocal admission, that [the debt] is due and unpaid, unaccompanied by any expression, declaration, or qualification, indicative of an intention not to pay, the state of facts on which the law implies a promise, is then present, and the party is bound by it." *Id.* at 201 (quoting *Young v. Monpoey*, 18 S.C.L. (2 Bail. 280) 278 (1830)); *see also Suber v. Richards*, 61 S.C. 393, 403, 39 S.E. 540, 543 (1901) (stating the writing must "recognize an existing debt . . . [and] should contain nothing inconsistent with an intention on the part of the debtor to pay it" (quoting *Manchester v. Braender*, 14 N.E. 405, 406 (N.Y. 1887)). "Such new promise . . . must amount to an unqualified admission of a subsisting legal liability and must be established by evidence unambiguous and full." *Black v. White*, 13 S.C. 37, 40 (1880).

In *Horlbeck v. Hunt*, the court found no implied promise to pay the debt when the defendant debtor acknowledged he owed the debt but stated he could not pay it and that it would have to "come in with his other debts." 26 S.C.L. at 197-98. The court reasoned that although the debtor admitted the debt was due and unpaid, such admission was "accompanied by a plain expression that the [debtor] did not intend to pay, when he said 'he could not pay,' and when he declined [an] . . . offer to settle by note or bond on his own time.'" *Id.* at 201. The court concluded the

debtor's other observation that the debt "must come in to be paid with [his] other debts" was "no undertaking to pay it" but simply meant the debt must "take its chance for payment with [his] other debts." *Id.* at 201. Viewing the debtor's statements as a whole, the court found that although "the defendant admitted that the debt once was due, and might once have been paid, . . . he declined to admit either his liability or willingness to pay." *Id.* at 201.

In *Hill*, the appellate court concluded statements a debtor made in letters he wrote to his creditors were sufficient to imply a new promise to pay. 51 S.C. at 141, 28 S.E. at 312. The debtor wrote four separate letters to his creditors, and expressed in each letter his intention to repay the debt, offering notes and real estate securities to satisfy the debt. *Id.* at 140-41, 28 S.E. at 311. In the final letter he stated, "[D]o not understand me to say that I do not mean to pay, for I expect to pay every dollar of it." *Id.* The court concluded the letters constituted an "unqualified and unequivocal admission that a debt [wa]s still due, unaccompanied by any expression indicative of an intention not to pay, as would imply a promise to pay." *Id.* at 140-41, 28 S.E. at 312.

In *Black v. White*, our supreme court held an administrator's mere inclusion of a debt upon the inventory of his intestate's estate did not constitute "an unqualified admission of a subsisting legal liability." 13 S.C. at 40-41. Similarly, applying South Carolina state law, the bankruptcy court in *In re Vaughn*, concluded that the mere listing of a debt as a claim on her bankruptcy schedules was insufficient to imply a new promise to pay such that the statute of limitations did not bar the debt. 536 B.R. at 677-79.

Here, although the 2006 letter identified the specific debt and acknowledged the debt was "due," it then stated Murray owed the debt to Mother's Estate "whether on a currently due basis or as part of debt that will be due upon [Murray's] death as a valid claim to [Daughters]." A statement that the debt was either currently due or alternatively would be due upon Murray's death was not an unequivocal admission the debt was due. Although Murray did not expressly refuse to pay the debt, he essentially just established options, which was inconsistent with an intention to repay it. *See Suber*, 61 S.C. at 403, 39 S.E. at 543 (stating the writing must "recognize an existing debt . . . [and] should contain nothing inconsistent with an intention on the part of the debtor to pay it" (quoting *Manchester*, 14 N.E. at 406)). Such language merely suggests this debt must simply take its chances with other debts. *See Horlbeck*, 26 S.C.L. at 201 (finding the debtor's observation that the

debt "must come in to be paid with [his] other debts" was "no undertaking to pay it" but simply meant the debt must "take its chance for payment with [his] other debts."); *Black*, 13 S.C. at 40-41 (holding an administrator's mere inclusion of debt upon the inventory of his intestate's estate did not constitute "an unqualified admission of a subsisting legal liability"); *In re Vaughn*, 536 B.R. at 678 (applying South Carolina state law on debt revival and stating "a mere acknowledgement of a debt as a debt that will be paid in accordance with other debts does not revive the debt"). Moreover, the letter indicated the debt was due "both legally and as our father" and referred to the debt as an "honor debt." These statements were equivocal because by signing the letter, Murray seems to have acknowledged only a moral obligation and not a legal one to repay this debt that is now over two decades old. Because the letter contained equivocal language and an expression that was inconsistent with Murray's intent to repay the debt, we find this letter was insufficient to demonstrate an unequivocal admission that the debt was due and unpaid. Accordingly, we affirm the circuit court's grant of summary judgment in favor of Murray's Estate as to this issue.

3. Laches

Mother's Estate contends laches is an equitable defense that does not apply to a legal claim to collect on a debt. On the merits, it argues any delay in asserting the claim was understandable given Daughters' relationship with Murray and the fact Smith periodically undertook to advise Daughters how to preserve the ongoing validity of the debt. Further, Mother's Estate asserts the accrual of substantial interest was of Murray's making because he could have paid the debt at any time either before or after his death. We find the doctrine of laches was inapplicable because this case involved a legal claim to collect on a debt. *See Edens v. Edens*, 312 S.C. 488, 491, 435 S.E.2d 851, 852 (1993) ("The statute of limitations rather than laches applies to all legal claims against an estate."). Rather, as we concluded, the statute of limitations barred the claims of Mother's Estate.

B. Stylesetters

Judicial Estoppel

Stylesetters argues Murray reaffirmed the debt and his intention to repay it in a letter dated July 21, 2007. Stylesetters asserts the circuit court erred in concluding the viability of the claim turned on Murray's competence. Stylesetters contends

that even without the 2007 letter, the debt remained valid because Murray made payments on the debt from 2006 until May of 2007. Sytlesetters argues the circuit court erred by finding judicial estoppel barred its claim because Elizabeth never took a position as to Murray's competency in the 2006 trust litigation and no judicial determination was made as to his competence in that action. We disagree.

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251 489 S.E.2d 472, 477 (1997). "Judicial estoppel comes into play when the court is forced to take a position based on a factual assertion." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003); *see also Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 554 n.6, 556 S.E.2d 718, 723 n.6 (Ct. App. 2001) ("The doctrine generally applies only to inconsistent statements of fact.").

> When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. . . . [T]he truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence.

Hayne Fed. Credit Union, 327 S.C. at 252, 489 S.E.2d at 477 (footnote omitted).

"The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). It "is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case. The application of judicial estoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court." *Id.* at 216, 592 S.E.2d at 632.

> [T]he following elements [are] necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity

> with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Id. at 215-16, 592 S.E.2d at 632. "[T]he term 'privity,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Carrigg v. Cannon*, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001) (alteration in original) (quoting *Ex parte Allstate Ins. Co.*, 339 S.C. 202, 207, 528 S.E.2d 679, 681 (Ct. App. 2000)).

In 2006, Elizabeth was involved in litigation in New York pertaining to Murray's position as trustee of the Samuel Freeman Charitable Trust (the Trust Litigation). Elizabeth and her sister Pamela filed a verified answer and cross-petition, alleging the following: "Over the past several years [Murray]'s physical and mental competency have become severely impaired. As of this date he is unable to fully focus upon, understand, and deal with basic and fundamental business and financial matters. Accordingly, he is regrettably no longer able to fulfill the duties of Chairman of the Trust." Elizabeth additionally alleged Murray "lacked and lacks the requisite mental capacity to intelligently and knowingly execute a document that purported to remove [her] . . . as a Trustee." She claimed "[he] suffered a significant stroke" and was involved in a "major automobile accident" in 1992 and that these incidents were followed by a series of "mini-strokes" that left his "mental capacities increasingly impaired." Elizabeth further alleged he suffered another stroke in 1999, further impairing his ability to reason, use simple vocabulary, and recall the names of people and places. She stated that subsequently in 2003, due to the effects of Parkinson's syndrome, he became increasingly unable to verbalize his thoughts and intentions and that his condition had deteriorated even further. Specifically, Elizabeth asserted that in August 2003 he was a in a state of confusion about dates, times, events, and places. The probate court concluded Stylesetters' claim, which was based on the July 2007 letter, was judicially estopped based on Elizabeth's statements regarding Murray's capacity in her verified answer and cross-petition. The probate court also noted Elizabeth alleged Murray lacked capacity in a July 2007 guardianship proceeding, however, the petitioner named on that document was Pamela, not Elizabeth.

We find the circuit court did not err in affirming the probate court's application of judicial estoppel. As to the first element, Elizabeth and Stylesetters were in privity with one another. Elizabeth brought the creditor's claim against Murray's Estate on behalf of her business, Stylesetters. Elizabeth testified Stylesetters was a sole proprietorship "doing business as" itself. Elizabeth Stylesetters and Elizabeth Murray, therefore, are not distinct entities. *See Moore v. Moore*, 360 S.C. 241, 259, 599 S.E.2d 467, 476 (Ct. App. 2004) ("Because Appellant's business was a sole proprietorship, he and his business were not distinct entities."); *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 600, 748 S.E.2d 781, 789 (2013) (noting a "sole proprietorship form of business provides complete identity of the business entity with the proprietor himself" (quoting *Bushey v. N. Assurance Co. of Am.*, 766 A.2d 598, 603 (Md. 2001))). Elizabeth took two inconsistent positions: in the Trust Litigation, she claimed Murray lacked competence to remove her as trustee and that his competency steadily declined over a period of years leading up to that litigation; in this case, she claims that only eight months later he was competent to acknowledge a debt of more than $100,000. Therefore, the first element of judicial estoppel is met.

As to the second element, the Trust Litigation involved Elizabeth, and as we stated, Elizabeth and Stylesetters were in privity. Although this case and the Trust Litigation involved different types of claims, both cases presented a question of fact concerning Murray's competence and how his competence or lack thereof affected the conduct at issue. There, it was Murray's decision to remove Elizabeth as trustee. Here, it was his recognition of an agreement to repay a substantial debt to Elizabeth's business. In either case, Murray's competence would have been a significant issue in a trial on the merits. Therefore, we find the second element of judicial estoppel is met.

As to whether Elizabeth was successful in maintaining an inconsistent position in the related litigation and received a benefit, we find this element was met. Although the Trust Litigation settled and there was no judicial determination as to Murray's mental capacity, Elizabeth was reinstated as trustee and therefore received a benefit. Therefore, we find the third element of judicial estoppel is met.

Next, the record shows the inconsistency was part of an intentional effort to mislead. Stylesetters argues it never took a position on Murray's competency in the Trust Litigation. Because of the relationship between Elizabeth and Stylesetters, this claim is disingenuous and suggests an intentional effort to mislead

the court. In her answer and cross-petition in the Trust Litigation, Elizabeth stated Murray's "mental competency" had "become severely impaired" over the last several years. She stated he was "unable to fully focus upon, understand, and deal with basic and fundamental business and financial matters" as of the date of that filing, which was November 17, 2006. She made several additional representations concerning his mental faculties in that pleading. For example, she asserted, "any purported removal of Elizabeth as a trustee was ineffective as a matter of law on the ground, among others, that [Murray] lacked and lacks the requisite mental capacity to intelligently and knowingly execute a document that purported to remove [her] as trustee." In this case, she asserts Murray had capacity to agree to repay her hundreds of thousands of dollars in July 2007 notwithstanding her allegations that his mental competency had steadily declined in the years leading up to November 2006. This demonstrated an intent to mislead the court because Elizabeth and her business advanced whichever factual position was most advantageous to their claims in each case. Accordingly, we find the fourth element of judicial estoppel is met.

Finally, the positions were totally inconsistent. The periods in question were closely related in time. In the November 17, 2006 pleading, Elizabeth claimed Murray had suffered from the effects of Parkinson's syndrome since 2003 and had become "increasingly unable to verbalize thoughts and intentions." She alleged his condition continued to deteriorate thereafter and he was particularly susceptible to the undue influence of Smith. Elizabeth sought an order declaring the documents Murray signed purporting to remove her as trustee were "ineffective and void on the ground that [he] lacked mental capacity to exercise such a function as Chairman of the Trust and were the product of improper and undue influence exercised by [Smith] over [Murray]." In this case, Stylesetters claims that about eight months later, and a few weeks prior to his death, Murray was competent to acknowledge a debt of hundreds of thousands of dollars. Because of the overlapping periods and issues of competency, the positions Elizabeth and Stylesetters took in these two cases were totally inconsistent.

Finally, although Stylesetters asserts that even excluding the July 21, 2007 letter, Murray affirmed the debt when he continued to make monthly payments on such debt until July 2007, neither the circuit court nor the probate court addressed this issue in their orders granting summary judgment. We believe Stylesetters failed to preserve any argument that Murray affirmed the debt by making the $3,000 monthly payments because it failed to file a Rule 59(e), SCRCP, motion seeking a

ruling on that issue. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions are . . . used to preserve those [issues] that have been raised to the trial court but not yet ruled upon by it.").

Based on the foregoing, we conclude the circuit court did not err by granting summary judgment in Murray's Estate's favor as to Stylesetters' claim based on the doctrine of judicial estoppel.

CONCLUSION

For the foregoing reasons, the circuit court's order affirming the probate court's grant of summary judgment in favor of Murray's Estate as to the claims of Mother's Estate and Stylesetters is

AFFIRMED.

HEWITT, J., and HUFF, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dale Brooks, Employee, Appellant,

v.

Benore Logistics System, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Respondents.

Appellate Case No. 2018-002087

Appeal From The Workers' Compensation Commission

Opinion No. 5891
Submitted November 1, 2021 – Filed January 19, 2022

REVERSED AND REMANDED

Robert T. Usry, of Holland & Usry, PA, of Spartanburg, for Appellant.

Daniel Barry Eller and William Franklin Childers, Jr., both of Eller Tonnsen Bach, of Greenville, for Respondents.

HILL, J.: Dale Brooks brought this workers' compensation claim seeking benefits for a repetitive trauma injury to his lower back and right leg. A single commissioner awarded him benefits, but the Full Commission reversed, finding Brooks failed to prove his job was repetitive. We reverse and remand.

I. Facts

Brooks began working as a "switcher" truck driver for Benore Logistics Systems, Inc. in June 2016. His job consisted of driving a "switcher truck" to move trailers to various points in a yard at the BMW manufacturing plant. He would drive the switcher truck across the yard and back it up to a trailer, hook it to his truck, and drive the trailer to another location where he would unhook it. The process required Brooks to climb up three steps to access the cab of the truck (which he testified he had to stoop to enter), bend his body to position it in the seat, bend and twist his body while seated to back up the truck to the trailer, exit the cab by a rear door to access a platform where he would then have to bend to hook or unhook the trailer, climb off the platform and close the rear trailer doors, reenter the cab, and return to his seat to drive the truck. Brooks had to switch forty-five to sixty trailers each twelve-hour shift, sometimes getting in and out of the truck 225 times. Brooks testified he often had to switch sea containers, which were far more demanding physically because they were more difficult to open, higher off the ground, and had a ceramic seal that had to be opened with bolt cutters. Sometimes he also had to stoop underneath the sea container and pull pins to slide the axle.

In January 2017, Brooks began experiencing pain in his back and leg. He went to the emergency room and was discharged with the recommendation to follow up with an orthopedist. He was then seen by Benore's doctor at WorkWell, reporting that his symptoms had begun several weeks before when he felt sharp low back pain while stepping into his truck at work. At Brooks' follow up appointment, the WorkWell doctor ordered an MRI. This MRI was never completed because two minutes after Brooks left the appointment, Benore's adjuster called WorkWell and advised that Brooks' claim had been denied.

On May 1, 2017, Brooks went to Dr. Eric Loudermilk, whose notes state:

> He presents today complaining of pain in his back and leg which has been present since around January 3, 2017. He runs a switcher truck. He apparently works as a driver and he climbs up and down some stairs approximately 150 times per day switching trucks. He apparently does at a minimum of 30 trucks per shift. This involves switching trucks in and out multiple times during the day, opening

> and closing doors, bending and stooping, and climbing ladders. Around January 3, 2017, he developed burning pain in his legs. Several days later, he developed severe pain in his lower back which radiated down his right leg all the way to the calf and right foot.

After obtaining an MRI, Dr. Loudermilk diagnosed Brooks with right lower extremity radiculopathy secondary to a L4–L5 lumbar disk protrusion and recommended a non-surgical course of treatment. Brooks' lawyer sent Dr. Loudermilk a questionnaire that included the following two questions:

> A. Did the repetitive activities of Dale's job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping, and climbing ladders, most probably cause low back pain with right leg radiculopathy?
>
> B. Did the work injuries from repeated work activities above cause an L4–5 disc protrusion shown on Dale's MRI of 6.27.17?

Dr. Loudermilk answered "yes" to both questions.

This questionnaire and other evidence were presented at the hearing before the single commissioner, where Brooks was the sole witness. Benore presented an ergonomics report it had procured that opined Brooks' job duties entailed no enhanced risk of injury to his back. The single commissioner found Brooks proved he had suffered a repetitive trauma injury and awarded him benefits.

The Full Commission disagreed. Relying on the ergonomics report, it concluded Brooks had not proven his job duties were repetitive and denied him benefits. Brooks now appeals to us.

II. Standard of Review

We must affirm the factual findings of the Commission if they are supported by substantial evidence. S.C. Code Ann. § 1-23-380(5) (2005 & Supp. 2020); *Lark v. Bi-Lo, Inc*., 276 S.C. 130, 132–33, 276 S.E.2d 304, 305 (1981). Like any other finder

of fact, the Commission may not rest its findings on speculation or guesswork. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) ("Workers' compensation awards must not be based on surmise, conjecture or speculation."). Instead, the Commission must anchor its ruling on evidence substantial enough to provide a reasonable basis for its findings. *Hutson v. S.C. State Ports Auth*., 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). As relevant here, we may reverse the Commission's decision if its findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"; the result of an error of law; or arbitrary, capricious, or an abuse of discretion resulting in prejudice to Brooks' substantial rights. S.C. Code Ann. § 1-23-380(5).

III. Analysis

A. *The standard for recovery for a repetitive trauma injury*

Section 42-1-172 of the South Carolina Code (2007) is the exclusive method for determining the compensability of repetitive trauma injuries. *Michau v. Georgetown County ex rel. S.C. Cntys. Workers Comp. Tr.,*, 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012). The relevant part of § 42-1-172 provides:

> (A) "Repetitive trauma injury" means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events. Compensability of a repetitive trauma injury must be determined only under the provisions of this statute.
>
> (B) An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury.
>
> (C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.

> (D) A "repetitive trauma injury" is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.

The leading case construing § 42-1-172 tells us compensability of a repetitive trauma injury requires a specific finding of fact, made by the greater weight of the evidence, of a direct causal relationship, established by medical evidence, between the injury and a repetitive act occurring in the course of the regular duties of employment. *Murphy v. Owens Corning*, 393 S.C. 77, 85, 710 S.E.2d 454, 458 (Ct. App. 2011).

B. *The single commissioner's ruling*

In ruling Brooks was entitled to compensation for a repetitive trauma injury, the single commissioner's order tracked § 42-1-172 and *Murphy* precisely, stating:

> 14. . . . Based on the preponderance of the evidence before me in this case, I must conclude that [Brooks] has suffered a compensable repetitive trauma injury to his low back affecting his right leg.
>
> > A. I find a direct causal relationship between the repetitive acts and the employment.[1]
> > B. This finding is based on the entire record.

C. *The Full Commission's ruling*

The Full Commission reversed, finding § 42-1-172 requires "a two-part analysis a claimant must meet in order to meet his burden of proving a compensable repetitive trauma injury." The Commission went on to describe the two-part test:

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[1] In making this statement, the single commissioner was following *Murphy* to a fault. *Murphy* states, "Compensability under section 42-1-172 requires a specific finding of fact, by the preponderance of the evidence, of a direct causal relationship, established by medical evidence, between the repetitive act *and the employment*." 393 S.C. at 85, 710 S.E.2d at 458 (emphasis added). We are certain the emphasized phrase was a scrivener's error and should read "and the injury."

> First, there must be medical evidence establishing a causal connection between the "condition under which the work is performed and the injury." § 42-1-172(D). Additionally, there is an independent requirement that the Commissioner find by a preponderance of evidence that the claimant's specific job activities are repetitive. § 42-1-172(B).

The two-part test announced by the Full Commission is unfaithful to *Murphy* and misreads § 42–1–172. The plain language of § 42–1–172 does not support a two-part construct. The intent of the statute is to require a commissioner to make a specific factual finding that medical evidence establishes a causal connection between the repetitive duties of claimant's employment and the injury. The single commissioner did just that. In insisting the statute also requires the commissioner to make a separate factual finding that the employee's job duties were repetitive, the Full Commission sees something in the statute that is not there. Setting such an extra hurdle violates fundamental rules of statutory construction. *Paschal v. State Election Comm'n*, 317 S.C. 434, 437, 454 S.E.2d 890, 892 (1995) (court may not resort to subtle or forced construction to expand or limit a statute's scope).

The effect of the Full Commission's two-part formula would be to force claimants to offer expert testimony that their job duties were repetitive. But that would not be enough, for there is no question § 42-1-172 requires that the causal connection between the work and the injury must be established by "medical evidence," which "means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." § 42-1-172(C).

Michau illustrates why the ergonomics report here is not competent medical evidence under § 42-1-172. *Michau* held § 42-1-172 mandates that to be admissible as "medical evidence" in repetitive trauma cases, the doctor's opinion must reflect that it is stated to a reasonable degree of medical certainty, something an ergonomics report cannot do. *Michau*, 396 S.C. at 595–96, 723 S.E.2d at 808 (quoting § 42-1-172).

We are certain that in drafting § 42-1-172, the General Assembly understood, as we do, that medical doctors are capable of diagnosing the cause of an injury. Doctors do not require, any more than the statute does, an ergonomics report to diagnose the

cause of a repetitive trauma injury. The Full Commission therefore committed an error of law in adding an improper, redundant condition to § 42-1-172.

The Full Commission also committed a clear error in finding the ergonomics report concluded Brooks' job duties were not repetitive. The report makes no such statement and does not even use the word "repetitive." A fair reading of the report reveals it merely opined Brooks' duties did not, in general, expose him to an enhanced risk of injury to his back or legs. Recovery under § 42-1-172 is not limited to work injuries that an ergonomics report deems statistically likely.

It is obvious to us the Full Commission substituted the opinion of the ergonomics report for the considered medical opinion, made to a reasonable degree of medical certainty, of Dr. Loudermilk. This was reversible error. *See Herndon v. Morgan Mills, Inc*., 246 S.C. 201, 216, 143 S.E.2d 376, 384 (1965) ("[W]here the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no knowledge, the unanimous opinion of medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses.").

The Full Commission tried to discredit Dr. Loudermilk by claiming his "opinions assume the job is sufficiently repetitive," because he was "never asked whether [Brooks'] job activities are sufficiently repetitive" and "there is no evidence Dr. Loudermilk ever reviewed a job description for a 'switcher'". These statements from the Full Commission's order are based on fuzzy logic (they use the classic fallacy known as appeal to ignorance) and are refuted by the record. Dr. Loudermilk did not assume the duties were repetitive; he gave his expert opinion that, to a reasonable degree of medical certainty, Brooks' repetitive job duties caused his injury. In reaching that opinion, he well knew Brooks' job duties, as he recorded them in his notes and reaffirmed them in answering the questionnaire. Nothing in § 42-1-172 prevents a medical doctor from using his expert evaluation of patient history in forming his professional opinion, and we expect the medical community would be surprised to learn the Full Commission believes this time-honored practice always entails an unwarranted assumption. More to the point, Dr. Loudermilk avowed the ergonomics report—which cataloged Brooks' job duties—did not alter his opinion.

While the Commission may refuse to accept even uncontradicted medical evidence, it must base its refusal on a valid reason supported by competent evidence in the record. Otherwise, the refusal is arbitrary and capricious and warrants reversal.

Baker v. Graniteville Co., 197 S.C. 21, 28–29, 14 S.E.2d 367, 371 (1941); *see also Tiller*, 334 S.C. at 340, 513 S.E.2d at 846 ("[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record."); 12 Lex K. Larson, *Larson's Workers' Compensation Law* § 128.03(4) at 128-13 (Matthew Bender, Rev. Ed. 2014) ("If a Commission wishes to enter an award contradicting the medical testimony, it must take care to show in the record the valid competing evidence or considerations that impelled it to disregard the medical evidence. Failure to do so may lead to reversal both of denials and awards of compensation."); *Cf. Burnette v. City of Greenville*, 401 S.C. 417, 427–28, 737 S.E.2d 200, 206 (Ct. App. 2012). The ergonomic report was not competent evidence of causation in this § 42-1-172 case. Therefore, because all of the competent evidence supports Brooks' claim, Brooks is entitled to compensation as a matter of law. *See Clemmons v. Lowe's Home Centers, Inc.-Harbison*, 420 S.C. 282, 289, 803 S.E.2d 268, 271 (2017); *Herndon*, 246 S.C. at 209–10, 143 S.E.2d at 381.

To repeat, because the only rational inference that can be drawn from the record is that Brooks met his burden of proving he suffered a repetitive trauma injury arising out of his employment as defined by § 42-1-172, we reverse the ruling of the Full Commission and remand for calculation of benefits.

REVERSED AND REMANDED.[2]

KONDUROS and HEWITT, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thomas Stephen Acker, Appellant.

Appellate Case No. 2016-002368

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5892
Heard October 10, 2019 – Filed January 19, 2022

AFFIRMED

Appellate Defenders Adam Sinclair Ruffin and Kathrine Haggard Hudgins, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., Assistant Attorney General Susan Ranee Saunders, and Assistant Attorney General Jonathan Scott Matthews, all of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg; all for Respondent.

MCDONALD, J.: Thomas Stephen Acker appeals his convictions for first-degree criminal sexual conduct (CSC) with a minor and disseminating obscene material to a minor, arguing the circuit court abused its discretion in (1) admitting expert

testimony addressing the behavioral characteristics of child sexual abuse victims and (2) admitting his statement regarding a pornography addiction. Acker further contends the circuit court erroneously denied his motion for a directed verdict on the dissemination charge. We affirm.

Facts and Procedural History

During the summer of 2014, Child's parents sent her to a counselor in response to her depression and because she was intentionally cutting herself. During her counseling sessions, Child disclosed that Acker, her grandmother's (Grandmother) ex-husband, sexually abused her at Acker and Grandmother's home, which she visited often after school when she was five years old.[1] Her parents filed a police report, and Child was referred to the Children's Advocacy Center, where she underwent a forensic interview. During the interview, Child recounted that the sexual abuse at Grandmother's house began when she was in kindergarten and lasted until she was eight or nine years old.

Child testified at trial that while she was at Grandmother's house, Acker touched her inappropriately, made her touch his genitals, exposed himself, and masturbated in front of her.[2] Acker told Child he would kill Grandmother if she told anyone about the abuse and that no one would believe her. Additionally, Child testified Acker showed her pornography on his computer while holding her in a chokehold and telling her, "You need to grow up and be like that and people will love you if you're like that." Such conduct happened on more than one occasion and occurred until she was seven years old.

Grandmother and Acker were married for five years; they divorced in July 2008. The two remained in contact after their divorce, and Acker contacted Grandmother through emails and letters and by showing up at her job. Grandmother noted Acker mentioned pornography in one of his letters and admitted he had been addicted to pornography for fifty-two years.

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[1] Grandmother and Acker were married at the time of the alleged abuse but divorced several years before Child's disclosure.

[2] Child was seventeen years old at the time of trial.

After the State presented its case, Acker moved for a directed verdict, which the circuit court denied. Thereafter, Acker testified he and Grandmother lived at his house during their five-year marriage. Acker worked from home in an office at the front of the house while Grandmother worked in an office in the back. Acker denied abusing Child and testified he never showed her anything on his computer nor put her in a chokehold. He admitted he told Grandmother he "had had some problems, but it [was] not entirely pornography" and claimed he never showed anyone else pornography in his home.

On cross-examination, when asked if he had an addiction to pornography, Acker responded that he "had some contact with pornography from early ages" and acknowledged he told Grandmother he had been addicted to pornography for fifty-two years, including the years of the alleged abuse. However, Acker testified there was no truth to Child's allegations of abuse, claiming, "[t]hey are all fantasy tales that she dreamed up."

The jury convicted Acker of first-degree CSC with a minor and disseminating obscene material to a minor twelve years of age or younger. The circuit court sentenced him to twenty years' imprisonment on the CSC conviction and a concurrent five years on the dissemination charge, with credit given for time served.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Therefore, appellate courts are "bound by the trial court's factual findings unless they are clearly erroneous." *Id.* 345 S.C. at 6, 545 S.E.2d at 829. "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015).

Law and Analysis

I. Expert Testimony

Acker argues the circuit court erred in admitting Shauna Galloway-Williams's testimony on risk factors, grooming, and the behaviors displayed by child sexual abuse victims because her testimony did not provide information outside the ordinary knowledge of the jury and did not assist the jury in understanding the evidence or determining a fact in question. Acker asserts that although Galloway-Williams testified there was a unique set of characteristics associated with victims of child sexual abuse, she failed to identify these specific characteristics. We disagree.

During an in camera hearing, Galloway-Williams testified she is the executive director of the Julie Valentine Center, where she provides clinical supervision and interviewed child victims.[3] She is a licensed professional counselor who has provided counseling for children and adults for fifteen years, and has over 150 hours of skills-based training, specifically in the area of interviewing and assessing children regarding allegations of child maltreatment. Although she is a clinician and had not published articles at the time of her testimony, she was familiar with publications in the field as she attended trainings based on peer-reviewed articles and continues to read peer-reviewed material in her continuing education. At the time of this trial, Galloway-Williams had testified as an expert thirty-six times.

Galloway-Williams explained the field of child sex abuse dynamics includes issues common to child sexual abuse cases, such as delayed disclosure, grooming, false allegations, false denials, risk factors, and the behaviors children can demonstrate when they have been sexually abused. There are unique characteristics associated with how children disclose abuse, how they react to abuse, and how offenders abuse children, and these can be counterintuitive to what people believe normal reactions should be. Galloway-Williams testified that children delay disclosing abuse for several reasons, including: they are usually abused by someone they know, trust, and love; they fear what could happen to them and others if they report their abuse; they feel responsible, guilty, or ashamed about the abuse; they may be

[3] The Julie Valentine Center is a child abuse and sexual assault recovery center, which provides education, intervention, and treatment.

unable to articulate the abuse depending on their age; and they may have been threatened by their abuser. A majority of the cases Galloway-Williams had been associated with involved delayed disclosure, and there are common factors attributable to this phenomenon.

Regarding the reliability of her testimony, Galloway-Williams stated she would testify based on her experience, education, and training. Research in the field has been based on case studies involving known abuse in an ongoing effort to consider behavioral similarities among abused children. As to the question of scientific reliability, Galloway-Williams noted clinicians in her field cannot seek to replicate results because one cannot expose children to abuse conditions for testing purposes. Her field is a "soft science" based on "longitudinal studies, case studies, actual cases and reviewing those and looking at the similarities or differences in those and based on that type of research." A study in this area might "look at a certain number of cases of children where there's known sexual abuse …, and they may look at all of those cases and determine if there is a specific condition that's similar among those cases, for instance." When asked if she was aware of any research or cases that had found a delayed disclosure unreliable, she acknowledged there had been times when a child made a delayed disclosure and then, following an interview or investigation, it was determined abuse did not occur. Upon further cross-examination, Galloway-Williams admitted that the Julie Valentine Center does not track those instances involving delayed disclosures later determined to be false.

At the end of her in camera testimony, the State declared it intended to offer Galloway-Williams as an expert in child maltreatment and child abuse dynamics, including grooming, risk factors, false disclosures and allegations, denials and delayed disclosures, and behaviors children can exhibit after abuse. Acker objected, arguing Galloway-Williams's testimony that children delay disclosure because they were abused by someone they loved or trusted or because they feared their abuser, as well as her testimony addressing the impact abuse can have on a child's life, were all topics within the ordinary knowledge of the jury. Acker further argued the testimony was unreliable as it was based on the witness's own personal experiences, rather than the literature or science. Additionally, Acker asserted the State's sole purpose in presenting the testimony was to bolster the victim's credibility, and the prejudicial effect of this testimony substantially outweighed its probative value.

The circuit court disagreed, finding Galloway-Williams's testimony was outside the ordinary knowledge of the jury. Regarding reliability, the circuit court found the testimony was based on both the witness's personal experiences and the literature, noting the impossibility of testing for behavioral characteristics. Citing *Brown*[4] and *Jones*,[5] the circuit court concluded Galloway-Williams's testimony was reliable based "upon the requisite education, training and experience" and did not constitute improper bolstering because she was testifying as a blind expert only as to matters within her area of expertise, which might or might not be applicable to the characteristics of this child's case. The circuit court explained:

> [T]he witness doesn't know anything about this case because she's not talked to anybody about it; she's not interviewed any witness; she's not interviewed the child; she's not interviewed the parents; she's not interviewed the police officers; she's not interviewed the counselors; she's not interviewed the Children's Advocacy interviewer. So she knows nothing about the case, and she didn't even hear the witness' testimony.
>
> So there's nothing that she could that would—nothing she could reasonably do to bolster the witness' testimony because she doesn't even know what it is.
>
> The fact that she testifies to things that might be similar to those things experienced by the witness is not considered bolstering.

Finally, the circuit court found the prejudicial effect of Galloway-Williams's testimony did not substantially outweigh its probative value for Rule 403 purposes. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

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[4] *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018).

[5] *State v. Jones*, 417 S.C. 319, 790 S.E.2d 17 (Ct. App. 2016), *aff'd as modified*, 423 S.C. at 631, 817 S.E.2d at 268.

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

In the presence of the jury, Galloway-Williams testified generally about delayed disclosure, risk factors, grooming, and the behavioral characteristics of victims of abuse. She explained there are several risk factors that make children more vulnerable to abuse, including substance abuse in the home; a child's age—with younger children being more vulnerable to abuse because they depend on adults for caregiving; and a child's special needs or disabilities because such children need more assistance from adults. Finally, children with behavioral problems may be more vulnerable to abuse because "if they are troublemakers or seen as bad children and then they do make a disclosure, an outcry, sometimes they're not believed because they have a previous history of getting in trouble or making things up."

Galloway-Williams explained "grooming" referred to an adult developing a trusting relationship and might include giving a child special attention or gifts or spending more time with the child in an effort to normalize sexual behavior. She opined that grooming could affect a child's disclosure because a child may have developed a trusting and close relationship with his or her abuser, have received special attention, or been abused by someone they loved, therefore, impacting their ability to disclose the abuse. A child might display an array of behaviors after being sexually abused, including depressive tendencies, nervousness, anxiety, self-harm, or no behavioral effect at all. Galloway-Williams discussed different disclosures, including partial disclosures, accidental disclosures, purposeful disclosures, and false disclosures—including false denials. When referencing false disclosures and false denials, Galloway-Williams explained a false denial occurs when there is known abuse yet the child denies being abused, while a false allegation occurs when a child makes a disclosure that is later determined to be unfounded. When asked if false denials or false disclosures were more common, Galloway-Williams responded, "What's more common would be the false denial where we—where a child denies that something has happened when, in fact, something did occur."

A. Subject Matter of the Testimony and Ordinary Knowledge of the Jury

In *Jones*, 423 S.C. at 636, 817 S.E.2d at 271, our supreme court stated, "the law in South Carolina is settled: behavioral characteristics of sex abuse victims is an area

of specialized knowledge where expert testimony may be utilized." *See also State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015); *Brown*, 411 S.C. at 342, 768 S.E.2d at 251 (concluding "the unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror" and, thus, the general behavioral characteristics of child sex abuse victims "are more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims' testimony"), *abrogated on other grounds by Jones*, 423 S.C. at 637-38, 817 S.E.2d at 271 (abrogating *Brown* to the extent the court indicated it was appropriate to consider *voir dire* responses when evaluating the need for expert testimony); *see generally State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) ("Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible.").

We find Galloway-Williams's testimony on grooming, the behaviors children may display after abuse, false denials, and risk factors falls within this recognized area of expertise. *See Jones*, 423 S.C. at 636-37, 817 S.E.2d at 271 (determining an expert's testimony about delayed disclosure fell within the commonly recognized category of behavioral characteristics of sex abuse victims); *see generally Brown*, 411 S.C. at 337, 768 S.E.2d at 249 (noting the expert testified children delay disclosure for many reasons, including grooming by the perpetrator). Galloway-Williams's testimony provided context for the jury and assisted jurors in understanding how a change in a person's behavior might indicate abuse, why a child might delay disclosure, and how special attention and grooming affect a child's ability to disclose abuse. *See Weaverling*, 337 S.C. at 474-75, 523 S.E.2d at 794 (alteration by court) ("[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect. . . . It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor." (citations omitted)). Thus, the circuit court properly concluded the subject matter of Galloway-Williams's testimony was beyond the ordinary knowledge of the jury. *See Jones*, 423 S.C. at 638, 817 S.E.2d at 271 ("Whether the subject matter of a proposed expert's testimony is outside the realm of lay knowledge is a determination left solely to the trial judge and his or her sense of what knowledge is commonly held by the average juror.").

B. Reliability

Acker next asserts the circuit court erred in finding Galloway-Williams's testimony reliable by erroneously relying on her education, training, and experience, which related to her qualifications, not the reliability of her testimony. He contends the State failed to establish the testimony itself was reliable and analogizes this case to those in which the circuit court failed to make any reliability determination at all. Additionally, he argues Galloway-Williams did not provide the necessary specific research, publications, training information, or case studies on which she relied to support her testimony and failed to identify the unique characteristics she testified were associated with child sexual abuse.

"All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Rule 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. "There is no formulaic approach for determining the foundational requirements of qualifications and reliability in non-scientific evidence." *Chavis*, 412 S.C. at 108, 771 S.E.2d at 339.

In *Chavis*, the defendant appealed his convictions for multiple crimes involving unlawful sexual conduct with a minor, arguing the circuit court erred in allowing an expert witness to testify about a forensic interviewer's report because the State failed to demonstrate the expert's reliability. 412 S.C. at 104, 107, 771 S.E.2d at 337, 339. Our supreme court found that although the expert had "extensive experience and training," the State failed to show the expert's individual reliability because there was no evidence establishing the expert's conclusions were accurate. *Id.* at 107-08, 771 S.E.2d at 339. The court explained that "evidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies." *Id.* at 108, 771 S.E.2d at 339. Thus, the court concluded the circuit court erred in allowing the expert's testimony because the threshold reliability requirement of Rule 702 was not met. *Id.*

The *Jones* defendant appealed his convictions for first-degree CSC with a minor, second-degree CSC with a minor, and two counts of lewd act upon a child, arguing the circuit court erred in permitting the same child abuse dynamics expert involved in this case, Galloway-Williams, to testify because there was no evidence supporting the reliability of her opinions, including whether the opinions were subjected to peer review. 417 S.C. at 326, 331, 790 S.E.2d at 21, 23, *aff'd as modified by Jones*, 423 S.C. at 631, 817 S.E.2d at 268. However, this court distinguished *Chavis* because the *Jones* expert was not qualified as a forensic interviewer and did not discuss any conclusions garnered from the RATAC[6] method of interviewing victims; rather, the expert testified in general terms about child sex abuse dynamics, including delayed disclosure and the responses of non-offending caregivers. *Id.* at 332, 790 S.E.2d at 24. This court concluded the record supported the circuit court's reliability finding because the expert "testified that her methods were published in articles in professional journals and trade publications, subjected to peer review, uniformly accepted and recognized within the area of child sex abuse experts and professionals, and relied upon for sexual abuse counseling and treatment." *Id.* at 333, 790 S.E.2d at 24. The court further found the expert testified she had given multiple presentations on the role of non-offending caregivers and delayed disclosure, her employer applied the principles she described in her testimony, and other counselors used said principles. *Id.* at 333, 790 S.E.2d at 24-25. Accordingly, the court concluded the circuit court did not abuse its discretion in performing its gatekeeping function as to reliability. *Id.* at 333, 790 S.E.2d at 25.

Our supreme court affirmed as modified in *Jones*, finding *Chavis* distinguishable because the *Jones* expert did not testify about the RATAC protocol or forensic interviewing methods. 423 S.C. at 639, 817 S.E.2d at 272. Rather, "her testimony focused on explaining the concept of delayed disclosure and the role of nonoffending caregivers in the dynamics of sexual abuse." *Id.* Regarding the reliability of the expert's testimony, the court noted the expert testified: (1) she could provide citations to the court identifying articles serving as the basis for her opinions; (2) "her opinions were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by

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[6] RATAC stands for Rapport, Anatomy, Touch, Abuse Scenario, and Closure. Our supreme court acknowledged in *Kromah*, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5, "that RATAC is not without its critics." *See Chavis*, 412 S.C. at 107 n.6, 771 S.E.2d at 339 n.6.

child sexual abuse experts and professionals"; (3) "she participates in the peer review process and has given numerous presentations on the subject"; and (4) "she was unaware of any organizations that found her methods unreliable and that, out of all cases involving delayed disclosure of child abuse, statistically two to four percent are considered false allegations." *Id.* Thereafter, the court concluded the expert "met the threshold reliability requirement when she testified her methods were published in professional articles and trade publications, subject to peer review, and uniformly accepted and relied upon by other professionals in the field." *Id.* at 640, 817 S.E.2d at 272.

Similarly, we find the circuit court did not abuse its discretion in determining Galloway-Williams's testimony here satisfied the reliability threshold. As in *Jones*, *Chavis* is distinguishable because Galloway-Williams was not qualified as a forensic interviewer and did not testify as to the specifics of this child's disclosure. Instead, she testified as a blind expert on child sexual abuse dynamics, addressing general concepts and characteristics of victims in such cases. Her testimony was based on her experience and the research conducted in her field, and this research was based on case studies for which the researchers analyzed cases of known abuse to determine whether there were similarities among cases. Thus, the circuit court did not err in admitting Galloway-Williams's testimony after properly considering its reliability.

C. Bolstering

Acker contends Galloway-Williams indirectly bolstered Child's credibility when she testified that false denials are more common than false allegations because it "suggested that the jury should believe the minor witness because children are more likely to deny that abuse occurred than make a false allegation of abuse." Acker further challenges the admission of Galloway-Williams's testimony that children with behavioral problems are more vulnerable to abuse because they are less likely to be believed.

Galloway-Williams's testimony did not constitute improper bolstering. She was a blind expert; she never met Child or her parents, and she had no information about the circumstances of Child's case. *See e.g., Anderson*, 413 S.C. at 218-19, 776 S.E.2d at 79 ("The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To

allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility.").

First, Galloway-Williams's testimony regarding disclosures by children with behavioral problems did not improperly bolster Child's credibility because the testimony was included in her general testimony addressing multiple risk factors that make certain children more vulnerable to abuse. *See State v. Barrett*, 416 S.C. 124, 131-33, 785 S.E.2d 387, 390-91 (Ct. App. 2016) (finding an expert's testimony regarding general behavioral characteristics did not improperly vouch for the victim's credibility because she never directly or indirectly commented on the victim's veracity and truthfulness or the credibility of the victim's claims and she did not limit her testimony to only those behavioral characteristics displayed by the victim). She did not comment on Child's credibility, and she did not seek to link her general characteristics testimony to any type of behavioral reaction Child may—or may not—have exhibited. *See id.*; *Brown*, 411 S.C. at 345, 768 S.E.2d at 253 (finding the expert did not improperly bolster the victim's credibility because she testified in broad terms about the reasons victims delay disclosing abuse and she never applied her testimony to the victims in the case).

Additionally, there was no evidence that Child had behavioral problems such that others would be less likely to credit her disclosures. Rather, the testimony indicated Child did not exhibit behavioral or emotional problems until she began cutting her arms. Thus, as in *Brown*, we do not believe Galloway-Williams's general testimony in this case about children with behavioral problems potentially not being believed bolstered Child's credibility. *See State v. Cartwright*, 425 S.C. 81, 96, 819 S.E.2d 756, 764 (2018) (concluding the independent expert did not improperly bolster the victims' credibility because she never testified she believed the victims; rather, her testimony generally explained the potential reasons why children recant and the behaviors common to sexually abused children).

Nor did Galloway-Williams's testimony about false denials being more common than false allegations improperly bolster Child's credibility. As stated previously, Galloway-Williams did not testify regarding Child; rather, she testified as to the general behavioral reactions of children who have been abused, risk factors, and the concepts of grooming and delayed disclosure. Although we acknowledge Galloway-Williams's testimony could be interpreted as having insinuated Child's testimony was credible because false allegations are not as common as false denials, Galloway-Williams's statement here is distinguishable from those in cases

in which our courts have found there was no way to interpret the challenged statements *other than as* bolstering a victim's credibility. *Compare State v. Makins*, 433 S.C. 494, 505, 860 S.E.2d 666, 672 (2021) (holding dual expert's testimony served foundational purpose other than to vouch for minor's credibility but cautioning that the use of "one witness as both a characteristics expert and the treatment witness is a risky undertaking" and the better practice is to use a blind witness as *Anderson* urged), *with State v. McKerley*, 397 S.C. 461, 465-67, 725 S.E.2d 139, 142-43 (Ct. App. 2012) (finding although the expert never directly stated she believed the victim, the jury could not interpret the expert's testimony in any way other than that she believed the victim was telling the truth); *see also Chavis*, 412 S.C. at 109, 771 S.E.2d at 340 (finding the circuit court erred when allowing an expert witness to testify about her recommendation that the victim "not be around the [defendant] for any reason" because this testimony could only be interpreted as indicating the expert believed the victim's allegations).

Here, Galloway-Williams never treated Child and never testified she believed Child, nor did she provide any indication that she had considered Child's specific disclosures. *See State v. Jennings*, 394 S.C. 473, 479-80, 716 S.E.2d 91, 94 (2011) (first alteration by court) (concluding the circuit court erred in admitting a forensic interviewer's report stating the victims "provide[d] a compelling disclosure of abuse" by the defendant because "[t]here is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful")). Galloway-Williams never linked her general statements to this case or Child's credibility. *See Brown*, 411 S.C. at 345, 768 S.E.2d at 253 (finding an expert did not improperly bolster the victim's credibility when she testified that seventy to eighty percent of children delay disclosing abuse because she never applied this statistic to the victims in that case); *see generally Weaverling*, 337 S.C. at 474-75, 523 S.E.2d at 794-95 (concluding an expert's testimony that it was very common for a victim of abuse to commit subsequent abuse on another person "simply explained the effect" of the prior abuse on the individual's subsequent conduct); *State v. Smith*, 411 S.C. 161, 172, 767 S.E.2d 212, 218 (Ct. App. 2014) (stating that although the State's question about whether the length of the delay in the disclosure eroded the credibility of the disclosure invited vouching, there was no reversible error because the expert explained credibility and delayed reporting were unrelated and the expert did not provide an opinion about the victim's truthfulness). Because Galloway-Williams's testimony did not improperly bolster Child's credibility, the circuit court did not abuse its discretion in admitting it.

D. Rule 403, SCRE

Acker next argues the circuit court erred in declining to find the probative value of Galloway-Williams's testimony was substantially outweighed by its prejudicial effect. Acker contends the testimony about risk factors, grooming, and behaviors exhibited by victims of abuse was not relevant and lacked probative value because it did not assist the jury in determining any fact at issue or in understanding the evidence. According to Acker, this expert testimony did not prove or disprove anything but instead, "tended to suggest a decision based on unreliable testimony that improperly suggested to the jury that the expert believed the minor witness."

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)).

Galloway-Williams's testimony was relevant and assisted the jury in understanding child sexual abuse victims' behavior and how children react differently to abuse: some demonstrate self-harm, depression, or anxiety, while others exhibit no outward change in behavior at all. *See Jones*, 417 S.C. at 336-37, 790 S.E.2d at 26-27 (finding the probative value of the expert's testimony outweighed its prejudicial effect because it helped the jury understand the victim's behavior and demeanor and was "crucial" in explaining why child victims "are often unable to effectively relay incidents of criminal sexual abuse"); *Brown*, 411 S.C. at 347-48, 768 S.E.2d at 254 (concluding the expert's testimony was highly probative and helped the jury understand sex abuse victims' behavior and did not unfairly prejudice the defendant); *Weaverling*, 337 S.C. at 475, 523 S.E.2d at 794 (stating behavioral evidence "assists the jury in understanding some of the aspects of the

behavior of victims and provides insight into the sexually abused child's often strange demeanor"). This testimony further assisted the jury in understanding why victims delay disclosure, how close relationships can affect disclosure, and how certain factors may increase the risk of abuse. Therefore, we agree with the circuit court that this testimony was relevant and probative.

Significantly, Galloway-Williams did not testify that *Child* displayed behaviors associated with abuse or that she harmed herself and suffered depression. In fact, she did not—and as observed by the circuit court, could not—speak to Child's behavior at all. Rather, she generally explained behaviors commonly exhibited by sex abuse victims, risk factors, and grooming. Thus, we find no abuse of discretion in the circuit court's admission of this testimony. *See* Rule 403, SCRE (stating relevant evidence is inadmissible if the unfair prejudice substantially outweighs its probative value); *Brown*, 411 S.C. at 347-48, 768 S.E.2d at 254; *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429 ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989))).

II. Directed Verdict

Acker argues the circuit court erred in denying his motion for a directed verdict on the charge of dissemination of obscene material to a minor because the State failed to prove the videos he allegedly forced Child to watch were obscene and Child's testimony alone was insufficient to prove obscenity. We disagree.

Section 16-15-355 of the South Carolina Code (2015) provides a person "eighteen years of age or older who knowingly disseminates to a minor twelve years of age or younger material which he knows or reasonably should know to be obscene within the meaning of Section 16-15-305 is guilty of a felony . . . ." Material is obscene pursuant to section 16-15-305(B) if:

> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;
> (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material

> taken as a whole appeals to the prurient interest in sex;
> (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
> (4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.

S.C. Code Ann. § 16-15-305(B) (2015). Patently offensive is defined as "obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community." S.C. Code Ann. § 16-15-305(C)(2) (2015). Prurient interest is defined as "a shameful or morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd or lascivious desires and thoughts." S.C. Code Ann. § 16-15-305(C)(3) (2015). "Obscenity must be judged with reference to ordinary adults except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant sexual groups if it appears from the character of the material or the circumstances of its dissemination to be especially for or directed to children or such audiences or grounds." S.C. Code Ann. § 16-15-305(D) (2015).

"On appeal from the denial of a directed verdict, [the appellate court] views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016). The case should be submitted to the jury if the State provides "direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced." *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014).

Child testified Acker showed her pornography on his computer in his home office, specifically "videos of people having sex." Viewing this evidence in the light most favorable to the State, we find the circuit court properly denied Acker's motion for a directed verdict. *See generally Weaverling*, 337 S.C. at 465-67, 523 S.E.2d at 789-90 (noting the victim stated the defendant showed him "dirty" magazines, a pornographic movie, and nude photographs and the defendant was convicted of disseminating harmful material to a minor).

III. Rule 404, SCRE

Acker next contends the circuit court erred in allowing Grandmother to testify about a letter he wrote to her in which he admitted to having a fifty-two-year pornography addiction. On appeal, he asserts the substance of the letter constituted evidence of a prior bad act not subject to an exception to the inadmissibility mandated by Rule 404, SCRE.

Grandmother testified she and Acker remained in contact after they divorced in July 2008 and began to testify as to their correspondence. Acker objected to her testimony as irrelevant, and the circuit court indicated it would sustain the objection unless the State could "show some relevance." Grandmother then testified Acker contacted her by email and through letters or by coming to her workplace. When asked whether Acker mentioned viewing pornography in his letters, Grandmother answered, "Yes," and Acker again objected to the testimony as lacking relevance. The circuit court held a bench conference before allowing the State to proceed. The State then asked Grandmother if Acker ever mentioned viewing pornography in his letters, and Acker again objected. The circuit court overruled the objection. Grandmother responded that Acker "admitted to [her] in that letter that he had been addicted to pornography for [fifty-two] years."

At the end of Grandmother's testimony and outside the presence of the jury, the circuit court allowed Acker to state his objections more fully on the record. Acker first objected based on Rule 401, arguing any pornography addiction was irrelevant because the time period of his addiction included the majority of his life and the letter did not describe the medium of the pornography, i.e., whether it involved magazines, television, computer images, or videotapes. Acker asserted the testimony left "too much room" for speculation by the jury about the nature and extent of his addiction and the form it could take. Acker also argued that even if the testimony were relevant, it was inadmissible under Rule 403 because the testimony was "too prejudicial" since it covered a large period of time and there was no testimony as to the form of the addiction. Acker contended the testimony did not "necessarily go toward the fact that he had a propensity for showing this as a person in his mid [sixties] to a young child that is five years old." Finally, Acker argued the testimony was inadmissible under Rule 404 because the testimony

constituted improper character evidence and did not satisfy any exception set forth in Rule 404. Acker requested a mistrial if the circuit court maintained its admissibility ruling.

In response, the State argued Acker's admission in the letter included the 2004-2005 timeframe during which Child claimed Acker showed her pornography and it was necessary for the State to establish the presence of obscene material to prove the dissemination charge. The State elaborated, "I think the jury can decide whether or not he showed it to that child. Him just having the pornography is not illegal. It's him showing it to the child." Thus, the State continued, his admission as to the length of his addiction was relevant to show Acker's possession of pornography during the timeframe he allegedly showed obscene material to Child.

The circuit court found the testimony admissible because it was "clearly relevant" to the dissemination charge and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. The circuit court admitted the testimony under Rule 401 and Rule 403. The circuit court did not separately address Rule 404.

The State argues Acker's Rule 404 argument is not preserved for review because the circuit court did not rule on this ground of his argument. Although the circuit court did not expressly rule on Acker's Rule 404 argument, the circuit court addressed it by implication in overruling Acker's objection and admitting the evidence. The grounds for the objection, however, are more problematic. At trial, Acker objected to the admission of the statement in the letter to Grandmother as improper character evidence under Rule 404(a). *See* Rule 404(a), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . " other than as set forth in certain exceptions.). Before this court, however, Acker asserts the testimony was improperly admitted under Rule 404(b) as inadmissible evidence of other crimes, wrongs, or acts. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). As the Rule 404(b) argument was not made to the circuit court, we find it unpreserved for our review. *See State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review. Moreover, a

defendant may not argue one ground below and another on appeal." (citation omitted)).[7]

For these reasons, we affirm Acker's convictions.

AFFIRMED.

WILLIAMS, A.C.J., and HUFF, A.J., concur.

[7] Because our ruling on preservation resolves this issue, we decline to address the State's additional argument that Acker's own testimony on this point rendered Grandmother's testimony merely cumulative and therefore harmless.