The Supreme Court of South Carolina

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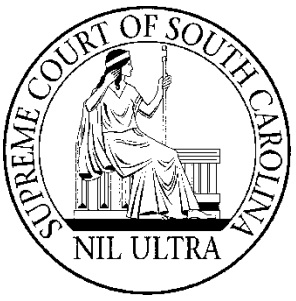

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36
September 13, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Robert Lee Miller, III, Petitioner.

Appellate Case No. 2021-000985

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Allendale County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 28178
Heard May 16, 2023 – Filed September 13, 2023

AFFIRMED

Appellate Defender Lara M. Caudy, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Isaac McDuffie Stone III, of Bluffton, all for Respondent.

Hannah Lyon Freedman, of Justice 360, of Columbia, and John H. Blume, III, of Ithaca, New York, of Cornell Juvenile Justice Project, Amici Curiae.

ACTING CHIEF JUSTICE KITTREDGE: Petitioner Robert Miller III was convicted of the brutal murder of eighty-six-year-old Willie Johnson (the victim). Following the murder, Petitioner—who was fifteen years old at the time—confessed four times: twice to his close friends and twice to law enforcement. All four confessions were admitted at trial, three without objection. This appeal centers around the voluntariness of Petitioner's fourth and final confession to two agents of the South Carolina Law Enforcement Division (SLED). After examining the totality of the circumstances surrounding the fourth confession, we hold that Petitioner's free will was not overborne, and his confession was voluntary. We therefore affirm.

I.

The elderly victim lived alone in Allendale, South Carolina. On the night of the murder, three juveniles—Petitioner, his older brother (Kashawn Bynum), and his brother's friend (Gabriel Joyner)—knocked on the victim's door before overpowering the victim and forcing their way into the house. While inside, the juveniles bound the victim's hands before nearly beating the victim to death, resulting in the victim's dentures being shattered and scattered around the room. Petitioner then tied a plastic trash bag over the victim's head and left him while he was still breathing. The victim asphyxiated and was found two days later by members of his church who were concerned that they had not heard from the elderly victim. During the subsequent investigation, law enforcement found a single bloody handprint on the wall at the crime scene, which they later determined was made out of the victim's blood and definitively matched Petitioner's handprint.

One week after the murder, in an unrelated crime, a fourteen-year-old boy was shot in Fairfax, South Carolina (approximately five miles from Allendale). Petitioner and his best friend, Jonathan Capers, immediately became suspects and were brought in for questioning at around 3:00 or 4:00 p.m. by the Fairfax Police Department. Petitioner and Capers were accompanied by Capers's mother, Tiffany Sabb, who—in Petitioner's words—was "like a mother" to him.

Slightly before 5:00 p.m., Chief Marvin Williams interviewed Petitioner alone in his office. After Chief Williams mirandized[1] Petitioner, he began questioning Petitioner in regards to the shooting in Fairfax. According to Chief Williams, Petitioner—unprompted—instead confessed his involvement with the victim's murder in Allendale:

> [Petitioner] said that he didn't do the shooting in Fairfax. He thought we wanted him for the incident that took place in Allendale. And I stated, what are you talking about. And he went into the situation of . . . the beating of the old man in Allendale. . . . [Petitioner] stated that they pushed [the victim] down . . . , robbed him[,] beat him . . . and put a bag over his head. And I asked him, why [did] you put a bag over his head. He said [the victim] kept looking at him. That is why he put the bag over his head.

Knowing he had no jurisdiction over the Allendale murder, Chief Williams left the room and contacted two SLED agents in the area—Agents Richard Johnson and Natasha Merrell—who were already investigating the matter. Over the next thirty minutes, Petitioner remained alone in the interview room while law enforcement talked to Capers; Capers gave a statement indicating Petitioner had confessed (to Capers) his role in the victim's murder.

According to Capers, Petitioner told him that Bynum and Joyner had planned to "hit a lick" and pulled Petitioner into their scheme. Petitioner told Capers they knocked on the door of Joyner's across-the-street neighbor and asked the victim for some sugar, but the victim said he did not trust them because he had been "getting robbed lately and before." The three juveniles then rushed the victim "and hit him and then he fought." Bynum and Joyner ransacked the house while Petitioner tied up and beat "the old man." After stomping on the victim's face, Petitioner then put a plastic bag on the victim's head, and the three juveniles left.

After obtaining Capers's statement, SLED Agents Johnson and Merrell interviewed Petitioner for approximately one hour.[2] At the outset of the interview, Petitioner

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

[2] The interview was recorded (audio only) on Agent Merrell's SLED iPhone. Despite the interview lasting for an hour, the recording of the interview submitted at trial was only around thirty minutes long. Apparently, the interview was heavily redacted for all mentions of the Fairfax shooting and any mention of Petitioner's extensive

was in the room with Sabb, Agent Johnson, Agent Merrell, and Chief Williams. The three law enforcement officers did not re-mirandize Petitioner because Chief Williams advised the SLED agents that he had already done so during the initial interview thirty minutes earlier. Agent Johnson asked the questions at first, confirming Petitioner was "okay with talking to us" and "okay with [his mom not being present]." At Agent Johnson's inquiry, Petitioner confirmed he was in summer school after failing eighth grade but that he could read and write.

Chief Williams left the room, and Agent Johnson asked Sabb if she would mind if they talked to Petitioner without her present as well. Sabb agreed, but before she could leave the room, Petitioner interjected that he would like to speak to Agent Merrell alone. Agent Johnson stated, "Okay, that's fine, you don't like males? I intimidate you?," to which Petitioner replied, "I just got more respect for females."

After Sabb left the room, but before Agent Johnson left, he asked Petitioner if he needed to use the restroom and if he was "good with just what we have done" so far in the interview (i.e., sending Sabb out). Likewise, Agent Johnson reiterated to Petitioner, "[I]t's up to you if you wanna talk to us now. You said you okay. Isn't that right?" Petitioner responded, "Yes, sir," and Agent Johnson left the room.

Agent Merrell then questioned Petitioner about his involvement in the murder, but Petitioner maintained he had an alibi. Specifically, Petitioner denied being in Allendale the Tuesday of the murder, claiming he had been in Fairfax for summer school until that Friday (three days later). Petitioner told Agent Merrell she could confirm his alibi with "Gail," a school bus driver who lived in a trailer "down the road." Agent Merrell pressed him, asking whether he was sure he had not been in Allendale on Tuesday night. Petitioner admitted that on Tuesday morning, he attended a hearing at an alternative school in Allendale. Agent Merrell asked how

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use of marijuana. Additionally, the portion of the interview introduced at trial stops and starts at certain parts, some of which are due to the redactions, others of which are due to Agent Merrell's iPhone receiving an incoming call, which (unbeknownst to the SLED agents) automatically stopped the recording. In this appeal, we were provided with, and thus only analyze, the portion of the interview introduced at trial. We offer no comment on whether the redacted portions of the interview made it more or less coercive than what is evident from the version submitted to the jury. Likewise, while not raised by either party, we note there are discrepancies between the transcript of the interview and the actual audio recording of the interview. We have relied on the audio recording rather than the transcript.

he got back to Fairfax after the hearing, but Petitioner "c[ould]n't really say," other than he was sure he attended summer school Wednesday morning in Fairfax.

Petitioner then informed Agent Merrell that he had recently spoken to two Allendale police detectives—one of whom Petitioner knew from his past interactions with law enforcement—that were looking for Joyner. However, Petitioner insisted he did not "know . . . anything about [Joyner]" and had never associated with him.

At that point, Agent Merrell asked Agent Johnson to re-enter the interview room and take back over. Petitioner did not object or express any discomfort.

Agent Johnson informed Petitioner he was going to jail that day no matter what was said in the interview. Explaining he "want[ed] to try and help [Petitioner] on the far end," Agent Johnson asserted that all of the perpetrators would get the same amount of jail time except for the one who cooperated.

Next, Agent Johnson attempted to tell Petitioner that law enforcement had already discovered his fingerprints and DNA at the crime scene, but before he could do more than ask Petitioner the setup question of "Do you watch CSI?," Petitioner interrupted, changing the subject and asking how many years his sentence would be for the victim's murder.[3] Agent Johnson then said,

> You ain't getting out of this, but what you can do is minimize the kind of time. Look at it this way, alright, I don't know what kind of time you'll get. I can't tell you that. I'm not the judge or the lawyer. But here's what I'm getting at, I'm just throwing some hypothetical numbers out. Let's say if you were looking at 30 years and because you talked, let's say you tell the truth and come clean . . . and you lay it out on the table, and you cooperate? What we do is, is let the prosecutor know. . . . That's the one who is going to try and send you to prison.

Petitioner immediately confessed, stating he was at home when Joyner arrived with a plan to rob the victim (Joyner's neighbor), and that while he (Petitioner) did not want to participate, he went along with Joyner and Bynum. Petitioner related that,

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[3] In particular, Agent Johnson stated, "There's this thing that you don't know. That while you were here, we already got what we need. You ever watch CSI?" Petitioner's response was, "How many years I got?"

after knocking on the victim's door, he opened it and hit the victim, then Joyner bound the victim.

Agent Johnson asked what happened next, but rather than continue the narrative, Petitioner stated he "was tired of doing this" because it was "all fucked up." Agent Johnson feigned understanding and told Petitioner his goal should be to minimize the "length of time that [he was] looking at doing." Petitioner disagreed, stating that it "still don't mean nothing [because he would] still be doing the time." Petitioner therefore told Agent Johnson to just take him straight to jail.

Agent Johnson stated, "Listen, it's like I told you from the beginning, it's up to you to talk to us. You don't have to talk to us. If you wanna stop at any time we can stop. It's up to you. What do you wanna do?" Petitioner stated he wanted to go home, but Agent Johnson told him that was impossible at that stage and asked Petitioner again whether he wanted to continue the interview. Petitioner stated he had already told the agents about his involvement, but Agent Johnson disagreed, stating Petitioner had blamed Joyner for everything and did not give sufficient detail about his own involvement.

Petitioner responded, "I was just told you. I knock on the door, I went in, and I hit him. And I hold him down." He continued, stating law enforcement would find Joyner's fingerprints all over the victim's house because Joyner was the one rifling through the victim's belongings, and he (Petitioner) did not know what was inside the house; rather, Petitioner "was just posted up out in the living room the whole . . . time." Agent Johnson asked, "Who put the bag over his head?" to which Petitioner responded simply, "I did." Agent Johnson followed up, inquiring who took the victim's wallet out of his pocket, to which Petitioner responded, "I did." Agent Johnson said, "And you know your prints and stuff will be on that wallet [when it is tested in the coming months]. Thank you. That's why I asked you if you have ever seen CSI." Petitioner then indicated he was done answering questions, and the interview immediately ended.

Petitioner, Joyner, and Bynum were all arrested that night and charged with the victim's murder. Due to the severity and violent nature of the crime, Petitioner was waived from family court to the Court of General Sessions for trial.

Before Petitioner's trial, Sabb gave a statement to law enforcement in which she explained that, on the night of the murder, Petitioner had confessed his involvement in the slaying to her. Specifically, Sabb asserted she was the one who drove him back from Allendale to Fairfax on the night of the murder. Sabb claimed she had

heard from a friend that night that Petitioner was involved in the victim's death, so she questioned him about it. As Sabb recounted,

> It was not [Petitioner's] idea, he was pulled into it. . . . According to what [Petitioner] said, that it was the other two when they knocked on the door, they asked the old man for some sugar. The . . . older man told them that he . . . was not going to . . . give them any sugar, because . . . [s]omebody . . . already was trying to rob him. . . . So, apparently, the other two young gentlemen[] must have kicked in the door. And [Petitioner] said it was too late. The old man had done seen all three of them. S[o] all three of them went in the house together. . . . I guess they tortured the old man. . . . They beat him. . . . The only part that [Petitioner] mentioned to me about the [plastic] bag [over the victim's head] was, when I asked him, how did you know that the old man was still alive. He said that he was still breathing because the bag was moving [as Petitioner, Bynum, and Joyner were leaving].

During the pretrial *Jackson v. Denno*[4] hearing, Petitioner sought to suppress his confessions to both Chief Williams and the SLED agents; however, Petitioner did not seek to suppress his confessions to Capers and Sabb. Chief Williams, Agent Johnson, and Agent Merrell testified at the hearing. In addition to recounting the facts surrounding the interviews, all of which are summarized above, the three related that Petitioner was relaxed enough during certain redacted portions of the interview with Agents Johnson and Merrell to laugh with them about his marijuana usage.

In response, Petitioner called his attorney from the waiver proceedings, Kimberly Jordan (a juvenile public defender). Jordan testified about her observance of a pre-waiver evaluation of Petitioner conducted by a psychologist with the Department of Juvenile Justice (DJJ). According to Jordan, the evaluation revealed that, while it was not definitive, there was a possibility Petitioner did not understand the *Miranda* warning read during the evaluation.[5]

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[4] 378 U.S. 368 (1964).

[5] Of note, Jordan did not testify about any of the other evidence elicited or argued at the waiver hearing, including Petitioner's IQ (76) or his reading comprehension level (fourth grade). As a result, that information was not before the trial court.

The trial court waited until the next day to issue its ruling, ultimately finding both statements to law enforcement were voluntary and admissible based on the totality of the circumstances. In support of its ruling, the court analyzed Petitioner's personal characteristics, the structure of the interviews, and law enforcement's actions during the interviews.

Regarding Petitioner's personal characteristics, the trial court acknowledged that Petitioner's age and maturity level were concerning and that Petitioner was "somewhat limited on an educational basis," as evidenced by his "vernacular" used during the interviews. However, the court also noted Petitioner had several prior encounters with law enforcement that gave him experience with being interviewed as a suspect.[6] Moreover, the trial court found Petitioner to be "pretty street smart" because Petitioner immediately and repeatedly claimed that he had an alibi for the night of the murder. Likewise, the court explained Petitioner appeared to be in "good physical condition" throughout the interview and his responses to the officers' questions were appropriate and indicated his understanding was adequate.

Turning next to the structure of the interviews, the trial court placed emphasis on the fact that Petitioner was advised of his *Miranda* rights before the interviews began. Further, the trial court found the length and location of the interviews were "fine" and "entirely reasonable in the circumstance."

Finally, examining law enforcement's actions during the interviews, the trial court held the law enforcement officers did not unduly coerce Petitioner into confessing, even when viewing the interaction from Petitioner's standpoint. The court specifically explained law enforcement did not make any misrepresentations, promises of leniency, or threats of violence in securing Petitioner's confessions. Likewise, the trial court emphasized Agent Johnson expressly clarified he could not promise Petitioner a reduced sentence, but instead could only inform the State of Petitioner's cooperation. Finally, the court noted that Sabb, as a stand-in for Petitioner's biological mother, was present at the beginning of the interview, and Agent Johnson confirmed Petitioner was still willing to talk to law enforcement both

[6] The trial court specifically referred to the fact that Petitioner knew some of the Allendale police detectives by name before his interview with the SLED agents. Likewise, the trial court considered Petitioner's juvenile record, which included several adjudications of delinquency in family court for second-degree burglary, third-degree assault and battery, petit larceny, and disturbing schools. Petitioner was on probation for the burglary offense when he murdered the victim.

before and after Sabb left the interview room. The court concluded that while certain statements in isolation could be given "what meaning that you want to prescribe them," the totality of the circumstances indicated Petitioner was not unduly coerced.

At trial, Capers and Sabb both testified without objection, relating the details of Petitioner's confessions to them. While Petitioner renewed his motion to suppress the confession to the SLED agents, he did not similarly renew the motion as it related to his confession to Chief Williams. As a result, Chief Williams also testified without objection regarding the details of Petitioner's confession to him.[7] Over Petitioner's objections, Agents Johnson and Merrell testified regarding the fourth and final confession. The jury took slightly more than hour to find Petitioner guilty of the victim's murder. Following an *Aiken*[8] hearing, the trial court sentenced Petitioner to fifty-five years' imprisonment.

Petitioner appealed, and the court of appeals affirmed. *State v. Miller*, 433 S.C. 613, 861 S.E.2d 373 (Ct. App. 2021). In relevant part, the court of appeals examined the facts surrounding the fourth confession and found that "the trial court did not err in finding [Petitioner] voluntarily waived his *Miranda* rights based on the totality of the circumstances." *Id.* at 629–32, 861 S.E.2d at 381–83. We granted a writ of certiorari to review the decision of the court of appeals.

II.

As an initial matter, we take this opportunity to revisit and clarify the appropriate standard of review for determining the voluntariness of a criminal defendant's statement. Historically, in analyzing the voluntariness of a statement, South Carolina courts have employed a bifurcated process under which both the trial court and the jury separately evaluate the voluntariness of a statement. *See, e.g.*, *State v. Washington*, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988); *State v. Smith*, 268 S.C.

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[7] More specifically, Petitioner objected during Chief Williams's recount of his confession, but it was only a preemptive objection to ensure Chief Williams did not mention the Fairfax shooting in discussing why he was questioning Petitioner in the first place.

[8] *Aiken v. Byars*, 410 S.C. 534, 539–44, 765 S.E.2d 572, 575–77 (2014) (requiring, for juvenile defendants eligible to receive a sentence of life without the possibility of parole, a hearing in which the parties and court explore how the juveniles' youth and life experiences affected their actions).

349, 354, 234 S.E.2d 19, 21 (1977). Then, on appeal, the appellate court reviews only the trial court's determination: without reevaluating the facts based on its own view of the preponderance of the evidence, an appellate court determines whether the trial court's ruling is supported by any evidence. *State v. Brewer*, 438 S.C. 37, 44, 882 S.E.2d 156, 160 (2022), *cert. denied*, 143 S. Ct. 2649 (2023); *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Contrary to our historic bifurcation of this issue, the United States Supreme Court has explained multiple times that "the ultimate issue of 'voluntariness' is a legal question." *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (citation omitted) (collecting cases).[9] To that end, as we recently noted, "some jurisdictions view the question of whether a statement was voluntarily given as a mixed question of law and fact." *Brewer*, 438 S.C. at 44 n.1, 882 S.E.2d at 160 n.1 (citing several cases for the proposition that the appellate court would accept the trial court's factual findings unless clearly erroneous and review the ultimate legal conclusion—the voluntariness of the statement—de novo); *see also Crane v. Kentucky*, 476 U.S. 683, 688–89 (1986) ("[T]he circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." (internal citation omitted)).

We agree with those jurisdictions that have found the question of voluntariness presents a mixed question of law and fact. Accordingly, we take this opportunity to refine our standard of review. Going forward, we will review the trial court's factual findings regarding voluntariness for any evidentiary support. However, the ultimate

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[9] *See also Lego v. Twomey*, 404 U.S. 477, 489–90 (1972) (rejecting the petitioner's contention that, even though the trial court ruled on the voluntariness of his statement, he was entitled to have a jury decide the question anew; "the normal rule [is] that the admissibility of evidence is a question for the court rather than the jury"); *Jackson*, 378 U.S. at 382–83 (asserting a jury may "find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession . . . and an issue which may be reargued in the jury room," and questioning whether a jury tasked with determining whether the State has met its burden of proof can simultaneously decide in a reliable manner whether a defendant's statement was voluntary).

legal conclusion—whether, based on those facts, a statement was voluntarily made—is a question of law subject to de novo review.[10]

III.

There are two constitutional bases requiring any confessions admitted into evidence to be voluntary: the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment right against self-incrimination. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). Petitioner claims a violation of both of those rights with respect to his statement to Agents Johnson and Merrell. We therefore discuss each right in turn.

A.

"[C]ertain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). As a result, "[i]t is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Jackson*, 378 U.S. at 376; *see also Dickerson*, 530 U.S. at 433 ("[C]oerced confessions are inherently untrustworthy.").

In analyzing whether a defendant's will was overborne and the resulting confession was offensive to due process, courts must consider the totality of the circumstances, including the details of the interrogation and the characteristics of the defendant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Ultimately, the determination will depend "upon a weighing of the circumstances of pressure against the power of

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[10] Based on our recognition of voluntariness as a legal question, it is unnecessary going forward for trial courts to submit the question of voluntariness to the jury. Of course, however, the parties may continue to argue to the jury why a statement is more or less trustworthy based on its voluntary nature. *See Crane*, 476 U.S. at 688, 691 ("[B]ecause questions of credibility, whether of a witness or of a confession, are for the jury, the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial. . . . As both *Lego* and *Jackson* make clear, evidence about the manner in which a confession was obtained is often highly relevant as to its reliability and credibility." (cleaned up)).

resistance of the person confessing." *Dickerson*, 530 U.S. at 434 (citation omitted). Courts may consider the impact of a number of factors, such as:

1. the youth and maturity of the accused;

2. the accused's lack of education or low intelligence;

3. the failure to advise the accused of his constitutional rights, particularly the rights to remain silent and have counsel present;

4. the presence of a written waiver signed by the accused regarding his constitutional rights;

5. the physical condition of the accused, including whether the accused was intoxicated at the time of the interrogation;

6. the mental health of the accused;

7. the length of the interrogation;

8. the location of the interrogation;

9. the continuity of the interrogation;

10. the repeated or prolonged nature of the interrogation;

11. the use of physical punishment, including both physical brutality as well as the deprivation of food or sleep;

12. whether law enforcement offered specific promises of leniency, rather than general remarks that a cooperative attitude would be to the accused's benefit; and

13. whether law enforcement made deliberate misrepresentations of the evidence against the accused.[11]

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[11] *See Withrow v. Williams*, 507 U.S. 680, 693–94 (1993) (collecting cases); *Colorado v. Connelly*, 479 U.S. 157, 164 (1986); *Fare v. Michael C.*, 442 U.S. 707, 727 (1979); *Schneckloth*, 412 U.S. at 226 (internal citations omitted); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962); *Brewer*, 438 S.C. at 45–46, 882 S.E.2d at 160–61; *State v. Register*, 323 S.C. 471,

Likewise, when the accused is a juvenile, courts may also consider other "special concerns," including:

1. the presence and competence of parents;

2. the minor's prior experience with law enforcement;

3. the minor's background;

4. whether the minor has the capacity to understand the nature of his *Miranda* warnings and the consequences of waiving those rights; and

5. the minor's development of an alibi to conceal his involvement in the crime.[12]

None of these factors are dispositive in and of themselves; rather, they must be considered in their totality to determine whether the defendant's will was overborne. *State v. Moses*, 390 S.C. 502, 514, 702 S.E.2d 395, 401 (Ct. App. 2010) (first citing *Schneckloth*, 412 U.S. at 226–27; and then citing *Pittman*, 373 S.C. at 566, 647 S.E.2d at 164); *cf., e.g.*, *Smith*, 268 S.C. at 354–55, 234 S.E.2d at 21 (noting the Court had declined to adopt a rule that any inculpatory statement obtained from a minor in the absence of his parents was inadmissible per se, and instead applying a totality of the circumstances analysis). Moreover, "Although courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile's confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion." *Pittman*, 373 S.C. at 568, 647 S.E.2d

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478–79, 476 S.E.2d 153, 158 (1996); *State v. Davis*, 309 S.C. 326, 341–42, 422 S.E.2d 133, 143 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *State v. Peake*, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987); *Smith*, 268 S.C. at 354, 234 S.E.2d at 21; *State v. Callahan*, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974).

[12] *See Fare*, 442 U.S. at 725; *In re Gault*, 387 U.S. 1, 55 (1967), *abrogated on other grounds by Allen v. Illinois*, 478 U.S. 364 (1986); *State v. Pittman*, 373 S.C. 527, 566–67, 647 S.E.2d 144, 164–65 (2007); *Smith*, 268 S.C. at 354, 234 S.E.2d at 21; *State v. Parker*, 381 S.C. 68, 86–87, 671 S.E.2d 619, 628–29 (Ct. App. 2008) (quoting *State v. Miller*, 375 S.C. 370, 385–86, 652 S.E.2d 444, 452 (Ct. App. 2007)); *In re Christopher W.*, 285 S.C. 329, 331, 329 S.E.2d 769, 770 (Ct. App. 1985).

at 165; *id.* at 568 n.8, 647 S.E.2d at 165 n.8 (collecting cases); *see, e.g.*, *Gallegos*, 370 U.S. at 53–55 (holding involuntary the confession of a fourteen-year-old juvenile defendant who was held in police custody with no visitation for five days); *Haley v. Ohio*, 332 U.S. 596, 597–600 (1948) (finding inadmissible the confession of a fifteen-year-old defendant who was questioned continuously by "relays of police" with no parent present for about five hours beginning around midnight and was not informed of his right to counsel); *Thomas v. North Carolina*, 447 F.2d 1320, 1321–22 (4th Cir. 1971) (granting a writ of habeas corpus to a fifteen-year-old defendant (with a fourth-grade education and an IQ of 72) due to an improperly admitted confession secured after the defendant was taken into custody at midnight, questioned until 4:30 a.m., given a three-hour reprieve, and then questioned again from 7:30 a.m. to 5 p.m. by a team of officers who rotated interrogations and drove the defendant to various crime scenes while inquiring about his involvement in the offenses).

Here, Petitioner contends there were a number of factors that tended to show his fourth confession to Agents Johnson and Merrell was coerced, including his youth, "limited cognitive functioning," promises of leniency by Agent Johnson, the alleged failure to adequately mirandize him, the use of sophisticated interrogation techniques, and the absence of a parent during the interview.[13] While acknowledging that certain facts in isolation could be viewed as coercive, we disagree that the totality of the circumstances indicates Petitioner's fourth confession was involuntary.

Specifically, looking first at the details of the interrogation, Petitioner was advised of his constitutional rights—including his right to remain silent and his right to counsel—and asked if he understood them before signing a *Miranda* waiver. By all accounts, Petitioner appeared to understand his rights and the questions he was subsequently asked. While Petitioner was not re-mirandized before his interview with Agents Johnson and Merrell, the break between the interview with Chief Williams (in which Petitioner was mirandized) and the interview with Chief Williams and Agents Johnson and Merrell was only thirty minutes, and Petitioner did not leave the custodial interrogation setting in the interim. Such a minimal break in the continuity of the interview did not require Petitioner to be re-mirandized,

[13] Petitioner also informed Agent Merrell during the interview that he had been told by his classmates that SLED agents would hold him at gunpoint due to his involvement in the victim's murder, but Agent Merrell expressly refuted that notion.

especially because there is no allegation that something occurred after Petitioner's *Miranda* waiver that would have affected his understanding of his rights.[14]

During the interview, Petitioner was not handcuffed and, at that time, had not been charged with any crimes. Likewise, throughout the overwhelming majority of the questioning, Petitioner was in the room with only one law enforcement officer at a time. Moreover, Petitioner was only interviewed for approximately two hours in the late afternoon to early evening, with a break of approximately thirty minutes during which law enforcement secured a statement from Capers.[15] The questioning by Agents Johnson and Merrell was not unduly repetitious or prolonged.

The SLED agents did not make Petitioner any explicit promises of leniency, instead telling Petitioner they would relay his cooperation to the solicitor. Additionally, Agent Johnson never made any misrepresentations to Petitioner about the evidence against him. There is no contention law enforcement threatened or physically

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[14] *See, e.g.*, *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995) ("[R]ewarning [a defendant of his *Miranda* rights] is not required simply because some time has elapsed. . . . [T]here is no requirement that an accused be continually reminded of his rights once he has intelligently waived them." (cleaned up)); *id.* at 1312–13 (collecting cases holding that breaks of between thirty minutes and five hours did not require the readministration of *Miranda* warnings; and explaining that even significant breaks, including a period of up to one week, may not nullify the initial giving of the *Miranda* warnings under certain circumstances); *Ex parte Landrum*, 57 So. 3d 77, 81 (Ala. 2010); *State v. Nguyen*, 133 P.3d 1259, 1274–75 (Kan. 2006) ("[A] waiver does not expire through the mere passage of 5 to 8 hours when a suspect has been in continuous custody."); *In re Tracy B.*, 391 S.C. 51, 68, 704 S.E.2d 71, 79 (Ct. App. 2010) (finding an interval of two hours between the initial *Miranda* warning and the defendant's statement did not require re-mirandizing the defendant).

[15] More specifically, Petitioner arrived at the police station around 3:00 or 4:00 p.m., was mirandized by Chief Williams at 4:56 p.m., and was interviewed by Agents Johnson and Merrell for about one hour, between 6:00 and 7:00 p.m. While Petitioner was not booked into the DJJ until 3:00 a.m., the interview with Agents Johnson and Merrell was concluded by 7:00 p.m., and there is no indication in the record that Petitioner talked to law enforcement about the victim's murder after 7:00 p.m.

punished Petitioner. They did not deprive him of food or sleep, and they asked him if he needed a restroom break.

Moreover, while a parent's presence is not required by law when questioning a minor, Sabb—who was "like a mother" to Petitioner—was present with Petitioner at the outset of the interview with Agents Johnson and Merrell. Although law enforcement asked Petitioner and Sabb if they minded if the SLED agents talked to Petitioner alone, there is no indication in the record that Sabb could not have stayed in the room if either she or Petitioner had insisted upon it. Agent Johnson even confirmed, both before and after Sabb left the room, that Petitioner was comfortable with what had just happened and was still willing to make a statement.

Similarly, Agent Johnson repeatedly reminded Petitioner he could stop talking to them at any time. Petitioner never unequivocally stated he wanted to stop the interview until the end, when it did stop. Rather, at best, Petitioner said he "was tired of doing this" and to "please just lock [him] up," but when Agent Johnson asked him explicitly if that meant he wanted to stop the interview, Petitioner continued to talk and answer questions.

As to the characteristics of the defendant, and looking only at what the trial court knew at the time of the *Jackson* hearing, Petitioner was only fifteen-and-a-half when interviewed and "much smaller" than the SLED agents. However, statements by minors significantly younger than fifteen have been found to be voluntary and admissible,[16] and youth alone does not require exclusion of the confession. Moreover, Petitioner communicated in an understandable way, was in "good physical condition," and did not appear to be under the influence of drugs or alcohol at the time of the interview.

Nonetheless, Petitioner's education level was limited, in part because of his young age and in part because he struggled in school. However, the trial court made a factual finding that Petitioner was "pretty street smart." In support, the trial court explained Petitioner attempted multiple times to convince the SLED agents that he had an alibi.[17] Likewise, Petitioner had a prior juvenile record and was on probation

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[16] *See, e.g.*, *Pittman*, 373 S.C. 527, 647 S.E.2d 144 (twelve years old); *Smith*, 268 S.C. 349, 234 S.E.2d 19 (thirteen years old); *Tracy B.*, 391 S.C. 51, 704 S.E.2d 71 (fourteen years old); *Christopher W.*, 285 S.C. 329, 329 S.E.2d 769 (eleven years old).

[17] *See, e.g.*, *Pittman*, 373 S.C. at 569–70, 647 S.E.2d at 166 (explaining the twelve-

for a violent offense at the time he murdered the victim. Also, Petitioner had enough experience with law enforcement that he knew the names of several Allendale police detectives involved in the case. The trial court concluded that, despite Petitioner's limited formal education, his past experiences with law enforcement and "street smarts" helped to render his confession voluntary. The factual findings regarding Petitioner being "street smart" are supported by "any evidence" and, therefore, must be upheld under our standard of review. With Petitioner's "street smarts" in mind, we find his education and experiences weigh in favor of a finding of voluntariness.[18] In other words, Petitioner was "street smart" enough to understand what was going on and the nature of the rights he was waiving when he decided to talk to the SLED agents.[19]

Perhaps in conjunction with Petitioner's prior law enforcement experiences, Petitioner was relaxed enough during the interview to laugh with Agents Johnson and Merrell about his marijuana usage. Similarly, Petitioner not infrequently interrupted the SLED agents during the conversation to clarify a point or change the topic, not merely following where the SLED agents' questions led the interview. Moreover, when Agent Johnson asked Petitioner if he intimidated him, Petitioner deflected, joking he just had "more respect for females," causing everyone to laugh. It would be somewhat unusual to find a suspect was coerced into confessing while simultaneously laughing and joking with the law enforcement agents who were overbearing his free will.[20]

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year-old defendant's actions in developing an elaborate alibi tended to show an elevated level of intelligence that offset the otherwise-coercive factors of his youth and immature behavioral issues).

[18] *See Fare*, 442 U.S. at 726; *Christopher W.*, 285 S.C. at 331, 329 S.E.2d at 770.

[19] We say this understanding there is evidence to the contrary that was presented to the trial court, specifically, Jordan's testimony that, during the pre-waiver evaluation with the DJJ psychologist, Petitioner appeared *not* to understand his *Miranda* rights until after they were more fully explained to him. However, based on the standard of review and the deference this Court is required to give the trial court's factual findings and credibility determinations, we find that counterevidence does not overcome the evidence the trial court found credible.

[20] It is also worth noting Petitioner never confessed to his involvement in the Fairfax shooting during the allegedly coercive interviews with Chief Williams and Agents

Thus, as a whole, the facts in this case stand in "stark contrast to the cases in federal or other state courts where courts have set aside convictions because they were based on confessions admitted under circumstances that offended the requirements of due process." *Pittman*, 373 S.C. at 568, 647 S.E.2d at 165 (cleaned up). Accordingly, with respect to Petitioner's due process challenge, we hold Petitioner's confession to Agents Johnson and Merrell was voluntary under the totality of the circumstances.

B.

The second constitutional basis which requires confessions to be voluntarily given is the Fifth Amendment's prohibition of compelled self-incrimination. *Dickerson*, 530 U.S. at 433. In *Miranda v. Arizona*, the Supreme Court recognized that custodial police interrogation, by its very nature, isolates and pressures an individual, thereby blurring the line between voluntary and involuntary statements to law enforcement. 384 U.S. at 439, 455. Driven by a concern that the traditional due-process, totality-of-the-circumstances test risked overlooking involuntary custodial confessions, the Supreme Court set forth the four now-ubiquitous *Miranda* warnings. *Id.* at 457, 467, 479. "The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions." *Berghuis v. Thompkins*, 560 U.S. 370, 387 (2010).

Petitioner now argues his *Miranda* waiver was involuntary because he did not understand those rights before waiving them. We disagree.

Whether a criminal defendant understood the *Miranda* warnings given to him is a quintessential factual question and, therefore, must be reviewed under the deferential "any evidence" standard of review. Here, the trial court's finding that Petitioner was advised of and understood his *Miranda* warnings prior to being questioned is certainly supported by the evidence.

First and foremost, Chief Williams properly advised Petitioner of his *Miranda* rights before Petitioner was questioned, and Petitioner signed a waiver to that effect. *See Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."); *Smith*, 268 S.C. at 354, 234 S.E.2d at 21 ("The decisions are

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Johnson and Merrell.

voluminous that the signing of a written waiver is usually sufficient" to show an accused "intelligently waived his privilege against self-incrimination.").

Second, despite his youth, Petitioner had already had multiple run-ins with law enforcement in which he was mirandized and had those rights explained to him. In fact, aside from being adjudicated delinquent several times, Petitioner was on probation when he murdered the victim. All of these prior experiences exposed him to the *Miranda* warnings and the concomitant rights associated with being interviewed by law enforcement. *See Fare*, 442 U.S. at 726 (noting that a sixteen-and-a-half-year-old juvenile offender who had been arrested several times in the past and was on probation at the time of a subsequent offense had sufficient intelligence to understand his *Miranda* rights, waive those rights, and understand the consequence of waiving those rights); *Christopher W.*, 285 S.C. at 331, 329 S.E.2d at 770 (finding voluntary the confession of an eleven-year-old boy in part because the boy had several past encounters with law enforcement in which he had been mirandized and had his rights explained to him, and because he was on probation when he committed the new offense).

As a result, under our deferential standard of review, we conclude there is evidence in support of the trial court's findings that Petitioner was properly mirandized, understood his rights, and had an opportunity to invoke his rights before being interviewed by law enforcement. We therefore find his statements voluntary under the Fifth Amendment.

IV.

Even were we to find Petitioner's statement to Agents Johnson and Merrell involuntary, it is indisputable that any possible error resulting from admitting Petitioner's involuntary statement was harmless beyond a reasonable doubt. *See State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." (cleaned up)).

Here, as at trial, Petitioner does not challenge the voluntariness or admissibility of his three other confessions to Capers, Sabb, and Chief Williams. The allegedly involuntary confession to Agents Johnson and Merrell was cumulative in every material respect to the prior three admissible confessions. *See Milton v. Wainwright*,

407 U.S. 371, 372–73 (1972) (explaining the admission of an involuntary confession was harmless beyond a reasonable doubt due to the proper admission of three additional, cumulative confessions). Moreover, Petitioner's confession to Agents Johnson and Merrell was corroborated by direct and circumstantial evidence, the most significant of which (although there was certainly more) was Petitioner's bloody handprint—made with the victim's blood—found on the wall of the living room. *See Fulminante*, 499 U.S. at 301–02 (explaining that, as it related to involuntary confessions, the harmless error analysis may be affected by whether the confession was fully corroborated by direct and circumstantial evidence); *cf. Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) (explaining, in the context of post-conviction relief review, that for "evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, *such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the* Strickland[21] *standard of 'a reasonable probability the factfinder would have had a reasonable doubt' cannot possibly be met*" (emphasis added) (cleaned up)).

As a result, even were we to find the fourth confession to Agents Johnson and Merrell was erroneously admitted, the error was harmless beyond a reasonable doubt.

V.

As the Supreme Court has previously explained, "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Fulminante*, 499 U.S. at 296 (cleaned up). Here, Petitioner confessed four times to murdering the elderly victim. Petitioner challenges only the last of his damning confessions. Under a totality of the circumstances, we hold that the final confession was voluntarily given and, thus, admissible. We therefore affirm the decision of the court of appeals.

AFFIRMED.

FEW, JAMES, HILL, JJ., and Acting Justice Kaye G. Hearn, concur.

[21] *Strickland v. Washington*, 466 U.S. 668 (1984).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jonathan Mart, on behalf of himself and others similarly situated, Respondent,

v.

Great Southern Homes, Inc., Appellant.

Appellate Case No. 2018-001598

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 6026
Heard April 5, 2021 – Filed September 13, 2023

REVERSED AND REMANDED

Ronald L. Richter, Jr. and Scott Michael Mongillo, both of Bland Richter, LLP, of Charleston; and Eric Steven Bland, of Bland Richter, LLP, of Columbia, all for Appellant.

Charles Harry McDonald, of Belser & Belser, PA, of Columbia; Beth B. Richardson, of Robinson Gray Stepp & Laffitte, LLC, of Columbia; Terry E. Richardson, Jr., of Richardson, Thomas, Haltiwanger, Moore & Lewis, of Barnwell; Brady Ryan Thomas, of Richardson, Thomas, Haltiwanger, Moore & Lewis, of Columbia; and Matthew Anderson Nickles, of Rogers, Patrick, Westbrook & Brickman, LLC, of Columbia, all for Respondent.

MCDONALD, J.: Great Southern Homes, Inc. (GSH) appeals the circuit court's order denying its motion to dismiss and compel arbitration in this action brought by Jonathan Mart, individually and on behalf of other similarly situated homeowners. Mart entered into a contract with GSH to purchase a custom-built home and later brought this action for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Mart also seeks declaratory relief to address two questions: 1) the validity of GSH's contract provision requiring a home buyer to waive the implied warranty of habitability without separate consideration, and 2) the validity of GSH's effort to transfer its warranty obligations to a third party upon the closing of the transaction.[1] Pursuant to our supreme court's holding in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 604–05, 879 S.E.2d 746, 751 (2022), *cert. denied*, 143 S. Ct. 2581 (2023), we reverse and remand for arbitration.

Facts and Procedural History

In July 2015, Mart contracted with GSH, a large builder and seller of new homes, to purchase a newly constructed home in the Longview North subdivision of Kershaw County. GSH required Mart to execute its proprietary "Contract for Sale" (Sales Contract) containing a disclaimer of warranty rights, including the implied warranty of habitability. In place of this implied warranty protecting new home buyers, GSH substituted an "Express Limited Warranty" (the Warranty) through a third party, StrucSure Home Warranty.

The header at the top of the Sales Contract states: "**CONTRACT SUBJECT TO ARBITRATION (S.C. Code 15-48-10)**." (Emphasis in original). The Sales Contract later provides in an unnumbered, standalone paragraph on page 3:

> **ARBITRATION:** Any dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof, including without limitation, disputes relating to the property, improvements, or the condition, construction or sale thereof and the deed to be

[1] Mart has not alleged a construction defect or other problem with the house, nor has he asserted that GSH has defaulted on any warranty claim.

> delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third arbitrator pursuant to the South Carolina Uniform Arbitration Act [(SCUAA)[2]].

Earlier in the document, in unnumbered paragraphs on pages 2 through 3, the Sales Contract addresses the Warranty:

> LIMITED WARRANTY: The Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller. This limited warranty shall warrant workmanship for One (1) year and warrant the structure itself for Ten (10) years from date of closing. Said limited warranty shall be incorporated in the deed delivered at closing. Purchaser acknowledges that said limited warranty is not a maintenance agreement. FOR QUALITY ASSURANCE PURPOSES WARRANTY VISITS MAY BE VIDEO W/AUDIO TAPED.
>
> **This Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or impli[e]d, any warranty of habitability, suitability for residential purposes, merchantability, or fitness for a particular purpose is hereby excluded and disclaimed. Seller shall in no event be liable for consequential or punitive damages of any kind. There is no warranty whatsoever on trees, shrubs, grass, vegetation or erosion caused by lack thereof, nor on subdivision improvements, including but not limited to, streets, road[s], sidewalks, sewer, drainage or utilities. Purchaser agrees to accept said limited warranty in**

[2] S.C. Code Ann. §§ 15-48-10 to -240 (2005).

> **lieu of all other rights or remedies, whether base[d] on contract or tort.**
>
> The issuance of a certificate of completion or occupancy, or final inspection approval by any governmental entity shall constitute certification of completion of the improvements in substantial conformity with the terms of this contract and shall also constitute a final determination, binding on the Parties hereto, that the properties are in full compliance with all applicable laws, regulations and building codes.

(Emphases in original).

Before the arbitration provision appears on page 3, paragraphs addressing termite protection, a radon notice, risk of loss, and default follow the limited warranty section of the Sales Contract.

Later, on page 4, the Sales Contract's "**Miscellaneous**" section provides, in pertinent parts:

> b. This Contract embodies the entire Agreement between Seller and Purchaser with respect to the property. No amendment or modification of this Contract (including Contracts for charges in construction 'extras') shall be valid unless contained in a writing executed by both parties.
>
> . . . .
>
> h. The provisions of this contract shall survive closing and not merge in the deed.

GSH also provided Mart with a "Warranty Service Acknowledgment" form (the Acknowledgment), stating "GSH provides a **limited** warranty on the original installation of the materials and workmanship (as defined by the SC Residential Construction Standards) of your home for the first year of occupancy from the date of closing." It describes issues not covered by the limited warranty and provides

instructions for reporting a claim; Mart signed this Acknowledgement along with the Sales Contract on July 18, 2015. However, in an affidavit filed in opposition to GSH's motion to dismiss and compel arbitration, Mart noted GSH did not provide the separate StrucSure Warranty until closing, five months after Mart signed the Sales Contract.[3]

At closing, Mart completed a "Home Enrollment Application" (the Application) through StrucSure Home Warranty, LLC. Pursuant to this document, Mart agreed "to resolve any claims, disputes, and controversies with the Builder [GSH], the Administrator, and/or the Insurer through binding arbitration and not litigation." Mart was charged a fee of $95 in conjunction with this Application.

The Warranty named StrucSure Home Warranty as "Warranty Administrator" and further provided:

> (1) This warranty is an insurance-backed, Express Limited Warranty provided to You by Your Builder. This warranty coverage booklet embodies the entire extent of the Express Limited Warranty.
>
> . . . .
>
> (10) This Express Limited Warranty is separate and apart from any contracts between You and Your Builder, including any sales agreements. It cannot be altered, affected or amended in any manner by any other agreement except only through a formal written agreement signed [by] the Builder, the Insurer, the Administrator, and You.
>
> . . . .

[3] GSH also gave Mart a "Home Sale Information Sheet" when it provided the Sales Contract and Acknowledgement. Mart claims this Information Sheet was the cover page for the Sales Contract. GSH disputes this, asserting the Information Sheet was not part of the Sales Contract and noting the Sales Contract contained the "appropriate statutory language" for arbitration. GSH further notes the Sales Contract was the first document it provided to Mart.

> (13) The Warrantor provides no warranties which extend beyond this document. All other warranties, express or implied, including, but not limited to, all implied warranties of fitness, merchantability, or habitability are disclaimed and excluded to the extent allowed by law. The warranties established herein supersede all implied warranties.

The Warranty also contains its own, separate arbitration provision detailing the matters subject to its arbitration requirement:

> The parties to this Express Limited Warranty intend and agree that any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to this Express Limited Warranty, any alleged Defect and/or Deficiency in or to the subject Home or the real property on which the subject Home is situated, or the sale of the subject Home by the Builder, including, without limitation, any claim of breach of contract, negligent or intentional misrepresentation, or nondisclosure in the inducement, execution, or performance of any contract, including this arbitration agreement, or breach of any alleged duty of good faith and fair dealing, shall be settled by binding arbitration in a manner consistent with this arbitration agreement. Agreeing to arbitration means You are waiving Your right to a trial by a judge and/or a jury.

The Warranty further notes the parties "shall mutually agree" on an arbitration service for submission and resolution of claims and, if no agreement can be reached, claims are submitted to Construction Dispute Resolution Services. The Warranty language specifies arbitration would be governed by the Federal Arbitration Act,[4] and requires Mart to cover the initial arbitration costs; thereafter, the arbitrator may award or apportion costs and fees.

[4] 9 U.S.C. §§ 1 to 307.

The Warranty limits the maximum aggregate liability to the home's sale price and does not cover "special, incidental, indirect, or Consequential Damages and [does] not reimburse parties for their attorney's fees or costs." Should a Warranty provision be found void or in violation of law, the Warranty provides it will be "deemed modified to the extent necessary so that it is no longer void or in violation of law or public policy." The Warranty outlines numerous potential issues that might arise with a home and notes appropriate "Builder Correction" remedies. Finally, the Warranty provides Mart with an avenue to appeal an arbitration decision.

GSH moved to dismiss Mart's complaint and to compel arbitration, relying upon the language of the arbitration clause in the Sales Contract.[5] Following a hearing, the circuit court found the arbitration clauses in the Sales Contract and the Warranty both covered claims "arising out of or relating to" the Sales Contract and "these arbitration clauses are in conflict in numerous material respects." Thus, the circuit court denied GSH's motion, concluding "there was no mutual assent between Mart and Great Southern as to any arbitration procedure; and, therefore, there was no meeting of the minds as to an agreement to arbitrate" claims arising out of or related to the Sales Contract. GSH did not file a Rule 59(e), SCRCP motion but timely appealed.

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[5] Although GSH cited in its motion the Sales Contract's provision providing arbitration would be conducted pursuant to South Carolina's Uniform Arbitration Act, it argued, "although the Contract itself identifies the South Carolina Uniform Arbitration Act, the Federal Arbitration Act preempts state law." In support of its contention before the circuit court that the FAA governs any arbitration under the Sales Contract (or the Warranty), GSH provided the affidavits of two employees, along with purchase orders noting the implications of this transaction for interstate commerce. Although Mart and GSH dispute whether Mart merely purchased a newly constructed home or had GSH build the home according to Mart's specifications, the Sales Contract describes the transaction as a "building job." In its briefing to this court, GSH asserts "each contract has its own arbitration provision which provides for different methods of selecting arbitrators and other details such as the latter [Warranty] provides for arbitration under the FAA and the former [Sales Contract] under the South Carolina Uniform Arbitration Act."

Standard of Review

"Arbitrability determinations are subject to de novo review. However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47–48, 790 S.E.2d 1, 3 (2016) (internal citation omitted).

Law and Analysis

I. *Damico* and the Sales Contract's Arbitration Provision

GSH raises several points challenging the circuit court's order, but the underlying inquiry boils down to whether the circuit court erred by incorporating the provisions of the Express Limited Warranty into the parties' Sales Contract when examining the parties' agreement to arbitrate pursuant to the independent arbitration agreement in the Sales Contract. GSH frames the question as "whether two separate contracts, each with a distinct purpose and related arbitration provision, can be conflated to produce a result of no arbitration whatsoever."

"Arbitration clauses are separable from the contracts in which they are imbedded." *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 366, 887 S.E.2d 534, 539 (Ct. App. 2023) (quoting *Hous. Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003)). Whether an arbitration clause is valid "is distinct from the substantive validity of the contract as a whole." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Huskins*, 439 S.C. at 366, 887 S.E.2d at 539–40 (quoting *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008)).

In considering the arbitration requirement in the Sales Contract, the circuit court incorporated the provisions of the separate Warranty document to ultimately find "there was no meeting of the minds as to an agreement to arbitrate claims arising out of and related to the Contract for Sale." Before we consider the merits of this finding, we note the relationship between the FAA and the parties' express contractual language in this transaction involving interstate commerce. In *Munoz*, our supreme court referenced the United States Supreme Court's acknowledgement

in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468 (1989), that "parties are free to enter into a contract providing for arbitration under rules established by state law rather than under rules established by the FAA." *Munoz*, 343 S.C. at 538 n.2, 542 S.E.2d at 363 n.2. The *Munoz* court explained:

> The FAA preempts state laws that invalidate the parties' agreement to arbitrate "[b]ut it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself." Such a result would be inimical to the FAA's primary purpose of ensuring that arbitration agreements are enforced according to their terms.

Id. (citations omitted); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."); *but see Hicks Unlimited, Inc. v. UniFirst Corp.*, Op. No. 28158 (S.C. Sup. Ct. filed June 14, 2023) (Howard Adv. Sh. No. 23 at 22) ("To the extent *Munoz v. Green Tree Fin. Corp.* and *Damico v. Lennar Carolinas, LLC* have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves interstate commerce, we clarify now they do not.").

As noted above, we find our supreme court's decision in *Damico* governs our inquiry in this dispute.[6] There, several homeowners in The Abbey subdivision in Berkeley County brought a construction defect suit against their homebuilder and general contractor, Lennar Carolinas, LLC. *Damico*, 437 S.C. at 603, 879 S.E.2d at 750. Lennar moved to compel arbitration, citing the provisions in a series of contracts signed by all but one of the homeowners when they purchased their homes. *Id*. As the court of appeals' *Damico* opinion explains, "[t]he circuit court denied the motion, finding the arbitration agreement included not just the arbitration section of the parties' sales contract but also sections from a separate

[6] The United States Supreme Court denied Lennar Carolinas' petition for a writ of certiorari on June 5, 2023. *Lennar Carolinas, LLC v. Damico*, 143 S.Ct. 2581 (2023).

warranty agreement (as well as parts of the deeds and covenants), and that the arbitration agreement was unconscionable." *Damico v. Lennar Carolinas*, LLC, 430 S.C. 188, 194–95, 844 S.E.2d at 70 (Ct. App. 2020), *aff'd in part, rev'd in part*, *Damico*, 437 S.C. at 624, 879 S.E.2d at 762. Due to this conflation of the various provisions, the court of appeals reversed the circuit court's denial of Lennar's motion to compel arbitration, concluding "the FAA, rather than the SCUAA applies, and the circuit court erred in not considering the arbitration section as an independent arbitration agreement." *Id*. at 195, 844 S.E.2d at 70. The court of appeals further found the FAA required enforcement of the valid agreement to arbitrate and concluded "the circuit court erred by considering the contract as a whole rather than, as *Prima Paint* demands, focusing on the discrete arbitration provision." *Id*. at 199, 844 S.E.2d at 72; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (holding the validity of an arbitration agreement is considered separately from the substantive validity of the contract in which the arbitration provision is found; the court does not consider unconscionable terms outside of the arbitration provision).

Upon review of the homeowners' certiorari petition, our supreme court unanimously affirmed the portion of the court of appeals' *Damico* opinion finding "the circuit court impermissibly considered the terms found in the limited warranty booklet" when analyzing the arbitration provision of the purchase and sales agreement. *Damico*, 437 S.C. at 607–08, 879 S.E.2d at 753. However, the supreme court nonetheless agreed with the homeowner petitioners that Lennar Carolinas' sales contract's "arbitration provisions—standing alone—contain a number of oppressive and one-sided terms, thereby rendering the provisions unconscionable and unenforceable under South Carolina law." *Id.* at 604, 879 S.E.2d at 751. That is the distinction here: the arbitration provision in the GSH Sales Contract—standing alone—contains no such oppressive or unconscionable term. Challenged terms may be found elsewhere in the Sales Contract and/or the Warranty agreement, but controlling case law does not permit us to consider the language of the separate limited Warranty or the propriety of the waiver of implied warranties in analyzing the standalone arbitration language of the Sales Contract. *Cf. D.R. Horton*, 417 S.C. at 48–49, 790 S.E.2d at 4 (in which a majority of the court found the arbitration agreement itself broadly encompassed the entirety of the "Warranties and Dispute Resolution" section of the home purchase agreement).

The crux of Mart's complaint is that GSH's sales practice of seeking "a disclaimer of critical warranty rights implied by law in South Carolina and designed to protect

the new homebuyer, who the law recognizes is at a significant disadvantage in sophistication and bargaining power with a large volume homebuilder such as Great Southern" is in itself unconscionable. And, while the circuit court's order did not address whether the specific terms of the Sales Contract's arbitration clause were unconscionable, Mart did not concede this point and raised unconscionability in his opposition to GSH's motion to dismiss and compel arbitration. But Mart's purported challenge to the standalone arbitration provision was merely an argument that the court "should read the [a]rbitration paragraph of the [Sales] Contract . . . in conjunction with the limitation on remedies provisions *contained under separate paragraphs* of the agreement." (emphasis added). This very argument illustrates the difference between the arbitration paragraph in the present case and the one in *D.R. Horton*. *See supra*. Mart was required to show that the language in the arbitration section alone was unconscionable. Because Mart did not separately challenge the standalone arbitration provision in the GSH Sales Contract as unconscionable or as lacking material terms, we are handcuffed with respect to Mart's challenge of the validity of the waiver of implied warranties. *See, e.g.*, *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020) ("Because an arbitration provision is often one of many provisions in a contract covering many other aspects of the transaction, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine."); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 62 n.6, 791 S.E.2d 286, 292 n.6 (Ct. App. 2016) ("In *Prima Paint*, the United States Supreme Court ruled that an arbitration agreement is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.").

II. Meeting of the Minds and Unconscionability

Because we agree with GSH that the circuit court erred in considering the terms of the Warranty—as opposed to the standalone arbitration provision in the Sales Contract—we need not further examine the circuit court's findings that the arbitration provisions of the two documents "directly and materially conflict with one another." However, "[t]he 'making' or formation of—in the sense of the very existence of—the agreement to arbitrate is always a question for the court, not the arbitrator." *Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 5, 881 S.E.2d 646, 648 (Ct. App. 2022), *cert. denied* (Mar. 30, 2023).

Here, the circuit court properly found South Carolina law requires a meeting of the minds as to all essential and material contract terms. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement."). And, we look to South Carolina contract law to consider whether, as Mart asserts, there 1) was no meeting of the minds, or 2) the arbitration mandate "is unenforceable under South Carolina law because it violates S.C. Code § 15-48-10(a) and is unconscionable."[7] *See Simmons*, 438 S.C. at 7, 881 S.E.2d at 649 (holding that whether the parties have an agreement to arbitrate is decided applying South Carolina law, and the parties must "manifest a mutual intent to be bound").

In support of their respective positions, both parties cite to Judge Geathers' opinion in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013); the circuit judge noted *York* in her order as well. In *York*, this court held the trial court did not err in finding the parties were bound by valid arbitration agreements applicable to their vehicle purchases "because each Appellant entered into an arbitration agreement that (A) complied with the Federal Arbitration Act (FAA); (B) evidenced intent to arbitrate; (C) was not unconscionable; and (D) was not void as against public policy." *Id.* at 78, 749 S.E.2d at 145.

We find *York* supports GSH's position. Although the circuit court correctly noted *York*'s acknowledgement that where the material terms of a contract are inconsistent and conflicting, there can be no meeting of the minds, we find no such inconsistency or conflict here. The standalone arbitration provision in the Sales

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[7] The circuit court did not separately address Mart's argument that the arbitration clause is invalid under 15-48-10(a), perhaps because the court's "meeting of the minds" finding was dispositive. In any event, the required statutory language is found on the first page of the Sales Contract and even if it were not, where interstate commerce is involved, "the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." *Zabinski, supra,* 346 S.C. at 592–93, 553 S.E.2d at 116; *see also* S.C. Code Ann. § 15-48-10(a) (2005) ("Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.").

Contract contains no inconsistent or conflicting terms and, as noted above, it was error to incorporate the language of the separate Warranty document to find inconsistency. Absent the inconsistencies noted in the circuit court's order, Mart's argument that there was no "meeting of the minds" cannot prevail. Without some proof that the parties did not mutually assent to arbitration or a finding that the arbitration clause itself is unenforceable, the parties are bound by their agreement.

Finally, we note that as in *Damico*, while the Sales Contract here is certainly an adhesion contract, "a take-it-or-leave it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice. Rather, to constitute unconscionability, the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755 (internal citations omitted). "The distinction between a contract of adhesion and unconscionability is worth emphasizing: *adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756 (emphasis in original). The standalone arbitration clause here differs from those found unconscionable in South Carolina cases considering adhesion contracts between sophisticated builders and individual new home purchasers. *See, e.g.*, *Damico*, 437 S.C. at 615-17, 879 S.E.2d at 757–58 (finding, among other things, that Lennar's ability to ensure there was never "mutuality of parties" at arbitration by exercising its "sole election" to choose the parties would potentially force purchasers to litigate against subcontractors separately in circuit court, rendering the arbitration agreement "unconscionable and unenforceable as written"); *D.R. Horton*, 417 S.C. at 50, 790 S.E.2d at 5 (finding arbitration provision unconscionable and unenforceable where relief was left "to the whim of D.R. Horton while simultaneously allowing no monetary recuperation" when repairs were inadequate); *Huskins*, 439 S.C. at 369–71, 887 S.E.2d at 541–42 (finding unconscionable and unenforceable the final two sentences of an arbitration clause that effectively shortened the statutory limitations period to ninety days (or thirty days in certain circumstances) would "disproportionately affect the homebuyer's ability to bring a claim" but severing the offending language from the remainder of the arbitration clause and thus affirming as modified the circuit court's order compelling arbitration). Thus, to the extent the question of unconscionability is properly before this court, we find the standalone arbitration provision of the Sales Contract here is not unconscionable.

Conclusion

For the reasons stated, we reverse the order of the circuit court and remand this matter for arbitration.[8]

REVERSED AND REMANDED.

KONDUROS and GEATHERS, JJ., concur.

[8] Because we remand this matter pursuant to the arbitration provision of the Sales Contract, we need not consider GSH's remaining appellate issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating a court need not address remaining issues when another issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: Trustgard Insurance Company,
Appellant/Respondent,

In Re:

Terence Graham, Plaintiff,

v.

Full Logistics, Inc., Defendant.

Of whom, Terence Graham is the Respondent/Appellant.

Appellate Case No. 2019-001506

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 6027
Heard February 15, 2023 – Filed September 13, 2023

AFFIRMED

Shelley Sunderman Montague and Jessica Waller Laffitte, both of Gallivan, White & Boyd, P.A., of Columbia, for Appellant/Respondent.

William Franklin Barnes, III, of Barnes Law Firm, LLC, of Hampton, and Brian T. Smith, of Brian T. Smith Law Offices, of Greenville, both for Respondent/Appellant.

KONDUROS, J.: This cross-appeal arises out of the circuit court's grant of Trustgard Insurance Company's motion to intervene and denial of Trustgard's motion to set aside default judgment. Trustgard appeals the denial of its motion to set aside the default judgment, and Terence Graham appeals the grant of the motion to intervene. We affirm.

FACTS/PROCEDURAL HISTORY

On January 29, 2014, Johnnie William Foster had a single-vehicle motor vehicle accident while driving a commercial truck in Dorchester County during a winter storm. Graham was in the sleeping compartment of the truck when the accident occurred. Full Logistics, Inc., a commercial trucking company, owned the truck and employed both Foster and Graham. Graham suffered severe, permanent injuries including traumatic brain injury and other bodily injuries. Full Logistics had a commercial motor vehicle insurance policy with Trustgard[1] at the time of the accident. Drico Fuller (Fuller) owned Full Logistics as the sole shareholder with no other officers or agents. The South Carolina Secretary of State's records reflected that Fuller was the registered agent for the company.

Trustgard was notified of the accident on January 31, 2014, two days after it took place, and began an investigation. Around March 3, 2014, Trustgard received a letter of representation and a spoliation letter from Graham's attorney, Brian T. Smith. In March of 2014, Trustgard made the tractor available for Smith to inspect at Smith's request.

Over the next two years, Trustgard's representatives attempted to obtain information from Smith or his office. In an April 14, 2014 letter to Smith, a Trustgard claims representative stated she tried to reach him by phone and asked him to call her. On June 30, 2015, Jon Barrett, another claims representative, sent Smith a letter acknowledging he had spoken to Smith's office that day to verify Graham was in the course and scope of his employment with Full Logistics at the time of the accident and that Barrett would follow up with Smith after completing

[1] The insurance company is also referred to as Grange Insurance Company in the record. Trustgard and Grange Insurance Company are both member companies of Grange Mutual Holding Companies.

a review of the file. On September 4, 2015, Fuller replied to an email from Barrett, confirming Graham was a Full Logistics employee, among other details. Barrett responded, requesting documentation confirming Graham's employment status but did not receive any further reply. On September 11, 2015, Barrett sent a letter to Smith stating there were questions concerning coverage for Graham's injuries. On November 2, 2015, and December 1, 2015, Barrett sent letters to Smith asking if Graham was still receiving medical treatment and to confirm Graham's employer at the time of the accident. Smith failed to provide requested medical documentation of Graham's injuries or other requested information, including whether Graham was an employee of Full Logistics.

The Secretary of State's Office administratively dissolved Full Logistics on June 22, 2015. On December 30, 2015, the South Carolina Workers' Compensation Commission informed Graham's counsel it was unable to show Full Logistics was subject to the Workers' Compensation Act by regularly employing four or more people in South Carolina. On February 19, 2016, Graham's attorney notified the Workers' Compensation Commission he had discovered only two people worked for Full Logistics and both were independent contractors.

On June 15, 2016, Barrett, on behalf of Trustgard, sent a letter to Smith, stating Trustgard had reviewed the insurance policy and Graham's claim was denied. The letter indicated there was no liability coverage under the policy because Graham was an employee of Full Logistics at the time of the accident and workers' compensation "would be his only recourse for recovery."

On January 23, 2017, Graham filed a summons and complaint against Full Logistics.[2] Graham alleged negligent hiring, supervision, training, and entrustment against Full Logistics. He sought actual and punitive damages.

Graham made multiple attempts to serve Fuller as agent of Full Logistics. On January 28, 2017, a process server, Karen Garrett, attempted service at the last known address for Full Logistics but the location was under construction. On March 23, 2017, Garrett attempted service at another Greenville address but the person who answered the door did not know Fuller. Garrett ran a "skip trace" on

[2] The complaint also named Foster, the driver of Full Logistics' truck, as a defendant and alleged negligence and negligence *per se* causes of action against him. Foster filed an answer on March 15, 2017.

Fuller and found a third address, 11 Cog Hill Drive in Simpsonville. Garrett attempted service at that address on March 24, 2017, but no one answered the door and she left her card.

Garrett found a mobile phone number for Fuller. When she called the number, Fuller answered the phone. She asked if he still lived at 11 Cog Hill Drive, and he responded he did not and he had moved to North Carolina. He would not specify where. She stated she informed him she was a process server and had legal documents with which she needed to serve him as the registered agent for Full Logistics. She provided he told her "he no longer had this company because he wasn't making any money with it." She stated she told him he still needed to be served the documents because they related to when he did own Full Logistics. However, she indicated Fuller stated "he was told he didn't have to worry about this because the company had been dissolved." She stated she informed him he did need to be served but he hung up on her.

On April 27, 2017, Smith filed an affidavit seeking an order to allow service by publication on Full Logistics, attaching affidavits from Garrett, which described her unsuccessful attempts to serve Full Logistics through Fuller. Smith's affidavit described unsuccessful attempts to serve Full Logistics through Fuller and represented to the court an inability to serve Fuller through traditional means and need for an order to serve Full Logistics by publication.

On May 1, 2017, the Honorable Perry H. Gravely issued an order for service on Full Logistics by publication stating, "[A]fter due diligence, [Graham] is unable to make service of the Summons and Complaint in this action upon . . . Full Logistics, Inc., and that [Full Logistics] cannot be found within this county and this state although diligent efforts have been made." The record contains no indication publication was ever made.

On April 30, 2018, Graham filed an affidavit of default, which stated the summons and complaint were served on Full Logistics on April 28, 2017, by process server, Paul Silvaggio. An affidavit of service from Silvaggio was included as an exhibit and indicated Full Logistics was served at 11 Cog Hill Drive in Simpsonville

> via Drico Monte Fuller's wife, Bridget Lovone Hunter-Fuller [identified by residential address, verification of Mrs. Fuller that Drico Fuller is her husband of the same

> residence, a mail package on the front porch in the recipient name of Drico Fuller, Verification through the Certified 10 Year Driver Records obtained of Drico and Bridget Fuller along with TLO / TransUnion Verification of the residential address and verification through the SCDMV - Vehicle License Division] . . . .

(Brackets in original).

On May 15, 2018, Judge Gravely signed an order of default as to Full Logistics, which stated "Full Logistics, Inc. was served the Summons and Complaint on April 28, 2017, and no Answer has been filed on behalf of Defendant, Full Logistics Inc." On June 21, 2018, Graham mailed to Fuller at the 11 Cog Hill Drive address a notice of the damages hearing set for June 26, 2018.

The Honorable Letitia H. Verdin presided over the damages hearing. Full Logistics did not appear at the hearing. On July 24, 2018, Judge Verdin issued an order finding Graham "provided credible testimony" of his injuries. Judge Verdin stated Graham's actual medical expenses presented at the hearing totaled $57,536.85 and a doctor provided a cost projection for future medical expenses of $456,912.88. Judge Verdin awarded actual, compensatory damages of $1,843,349.73 and punitive damages of $1 million and entered judgment against Full Logistics for $2,843,349.73.

In October of 2018, Graham, via his attorney Smith, contacted Trustgard requesting it tender the $1 million insurance policy limits for Full Logistics. Trustgard hired Collins & Lacy, P.C. to investigate the claim and demand. Michael Burchstead, an attorney with Collins & Lacy, made several attempts to contact Fuller regarding the circumstances of service of process and his knowledge of the complaint. Burchstead's attempts to contact Fuller using numerous telephone numbers were unsuccessful. On October 29, 2018, Burchstead sent an email to Fuller at fulllogistics@hotmail.com and stated:

> I am an attorney in Columbia, SC and my firm has been retained by [Trustgard] in connection with an accident that took place in January 2014 involving one of your trucks and a lawsuit arising out of that accident. I have been trying to reach you to discuss certain matters

> regarding this accident and lawsuit, but I am unsure if my contact information is correct. Can you please give me a call at . . . as soon as you are able?

Collins & Lacy asked Larry Nelson, an investigator it employed, to look into service of the summons and complaint on Fuller. On October 30, 2018, Nelson successfully contacted Fuller. After identifying himself, Nelson requested Fuller's help with information regarding the April 28, 2017 alleged service of the summons and complaint on Fuller's wife, Bridget, at 11 Cog Hill Street. Fuller informed Nelson that nobody served Bridget but the papers were left on the porch. Fuller also stated Bridget was not an officer or shareholder at Full Logistics, she did not have anything to do with the company, and he did not give her authorization to accept service on behalf of the company. Fuller stated he was not in Greenville and instead was in North Carolina and he would call his attorney and have him call Collins & Lacy. Nelson gave Burchstead's name and telephone number to Fuller and asked Fuller to have his attorney contact Burchstead. Nelson asked Fuller the name of his attorney, which Fuller stated was Michael Johnson of Charlotte, North Carolina. About fifteen minutes later, Fuller called Nelson, and Fuller stated he talked with his attorney, who advised him the case was from four years ago, it was over, and it had nothing to do with him. Fuller then ended the call.

Burchstead searched for all attorneys licensed in North Carolina and South Carolina with the name of Michael Johnson and found several possibilities. Burchstead contacted several of the options but could not locate an actual attorney with that name who confirmed he represented Fuller.

On November 8, 2018, Collins & Lacy, on behalf of Trustgard, rejected Graham's demand to tender the $1 million policy limits to settle Graham's claim. The letter stated Trustgard did not receive notice of the lawsuit and there was no coverage because Graham was a Full Logistics' employee.

On November 28, 2018, Fuller called Burchstead. Burchstead characterized Fuller's tone as agitated and felt as though Fuller interrupted any attempt to ask him questions or otherwise engage in the conversation. Fuller told Burchstead "he was receiving a lot of letters from attorneys about th[e] lawsuit," he did not know why, and he was personally served process and not his wife. However, Fuller would not answer any questions about the timing and circumstances regarding the service of process. Fuller referenced being served on or in his truck but would not

provide any more details. Burchstead informed Fuller of the large default judgment and asked him to cooperate with the defense attorneys Trustgard had assigned him. Fuller disputed Trustgard did not have notice of the lawsuit but when pressed would not provide further details, and Burchstead believed Fuller was being evasive. According to Burchstead, after he asked Fuller additional questions, Fuller's tone grew more agitated and he abruptly hung up the phone.

Trustgard retained on Full Logistics' behalf separate counsel, attorneys Kerri Rupert and Ronald Diegel of Murphy & Grantland, P.A. On November 29, 2018, a motion to vacate and/or set aside the judgment for default damages was filed on behalf of Full Logistics.

Between December 3 and 13, 2018, Fuller exchanged text messages with Keith Johnson, a private investigator Rupert hired. On December 3, Fuller stated via text "I got served[.] I sent everything to the insurance company[.] [Y]'all dropped the ball[.] I am done with it. Please leave me alone." Fuller reiterated a few times that he had been served and he sent the information to the insurance company. Fuller denied Bridgett had been served. Johnson referenced an affidavit in the texts that Full Logistics' counsel wanted Bridget to sign that contained the following statements: "I recently discovered a $2.8 million judgment was entered against Full Logistics, Inc. because Full Logistics, Inc. did not answer a lawsuit filed against them"; I noticed papers for a lawsuit were left at my home . . . . I did not know what to do with them"; and "I did not provide these papers to the insurance company."

On December 10, 2018, during the time period the text messages were exchanged, Trustgard sent Full Logistics a letter stating it received notice of the lawsuit and hired a law firm to represent Full Logistics' interest. Trustgard's letter stated Full Logistics may want to hire personal counsel because the damages may exceed the policy limits and the plaintiff seeks punitive damages and obtained a judgment for punitive damages, which the policy did not cover.

On January 8, 2019, the Honorable Edward W. Miller conducted a hearing on the motion to vacate and/or set aside the judgment for default damages on behalf of Full Logistics. Rupert argued the service on Bridget as described in Silvaggio's affidavit, which Rupert described as leaving the papers on Bridget's porch, was improper under 4(d)(3), SCRCP. Judge Miller asked, "Why is that proper service? Seems like gutter service to me." Attorney William Barnes, who had been recently

retained as cocounsel for Graham, responded the complaint had been served by Silvaggio. Barnes explained:

> [B]asically what [Silvaggio] did is he went to the address, 11 Cog Hill Drive, where Mr. Fuller lived. And his wife was there, verified a package on the front porch that was in the name of Drico Fuller. I think that's where . . . Rupert may be getting that this was left on the front porch. And he talked to her. We have provided a supplemental affidavit from . . . Silvaggio setting forth his credentials working for the Greenville County Sheriff's Office and all of that.
>
> He talked to her, found out that Drico Fuller lived in the home. They resided together. He asked her about that. That's Exhibit 3. His supplemental affidavit, [Bridget] told him, being . . . Silvaggio, that he was not home and verified that there was a mail package on the home front porch addressed to Drico Fuller. He also asked in his supplemental affidavit, what he attest[ed] to, is he also inquired whether [Bridget] was an authorized agent of Full Logistics and she replied that she was when the company was operating.

Barnes further stated, "In this record before the [c]ourt, there is no affidavit from Mr. Fuller. There is no affidavit from [Bridget], or anything to that effect." Barnes argued, "[W]hat we have here on the service issue is, there is no evidence to rebut . . . Silvaggio's affidavit that he, in fact, served the wife of Drico Fuller and she was an agent of the company." Barnes concluded, "So we believe on that issue that service is proper. And Mr. Fuller is obviously here. I don't know what -- he may have gotten the complaint. He may be able to answer some questions. I don't know."

Fuller informed the court that he wished to be heard. Fuller testified, "I got served. I got the email stating where I sent everything to the insurance company. They dropped the ball. I gave them everything I had. When they served me, I sent it to them. We kept communication going." Fuller further stated, "Then they show up with a private investigator following my wife, trying to get her to sign an affidavit

stating that she got served. I got served, not my wife. He left the affidavit paper on the front porch."

Judge Miller questioned Fuller as follows:

> JUDGE MILLER: How did you get served?
> MR. FULLER: I got served at my place of business.
> JUDGE MILLER: Who served you?
> MR. FULLER: She gave it to me. She said, are you Drico Fuller? And she gave me the piece of paper. And I sent everything to the insurance company.
> JUDGE MILLER: Who was she?
> MR. FULLER: I don't remember her name.
> JUDGE MILLER: Was she white or black?
> MR. FULLER: She was white.
> JUDGE MILLER: How old was she?
> MR. FULLER: She was an older lady. White SUV, small SUV.
> JUDGE MILLER: Well, how old?
> MR. FULLER: About 50. In her 50s.

Judge Miller further questioned Fuller:

> JUDGE MILLER: What did they give you when this woman served you?
> MR. FULLER: She gave me a packet.
> JUDGE MILLER: What kind of packet? What was in it?
> MR. FULLER: A white packet. She gave it to me.
> JUDGE MILLER: Do you remember what --
> MR. FULLER: Not right off, your Honor, not right off.
> JUDGE MILLER: And do you remember about when that was?
> MR. FULLER: No, not right off. . . .
>
> . . . .

> JUDGE MILLER: Well, was this before or after the package was left on your front porch?
> MR. FULLER: I got served before.
> JUDGE MILLER: Do you know how much time passed?
> MR. FULLER: Not right off.
> JUDGE MILLER: Well, I mean, was it a year, or was it a month, or was it a week, that kind of thing. You don't have to be exact.
> MR. FULLER: About a year, I think.
> JUDGE MILLER: A year? Okay. So then you sent whatever that was to your insurance company?
> MR. FULLER: Yes.
> JUDGE MILLER: And I tell you what, you say you got a copy of the email?
> MR. FULLER: Yes. I got copies of what we had, communications and everything.

Judge Miller asked Fuller to let the lawyers review his documents. After reviewing, Rupert responded, "I don't see a copy of the lawsuit at all in the papers that were just handed to me. . . . [W]hen he said that he received -- he was served a year before the package was left on his doorstep, the summons and complaint hadn't even been filed then."

Judge Miller further questioned Fuller:

> JUDGE MILLER: Mr. Fuller, what did you do with the package that was left on your front porch?
> MR. FULLER: That was the affidavit they wanted me to sign to say that my wife got served.
> JUDGE MILLER: There was a package left on your front porch, right?
> MR. FULLER: An envelope.
> JUDGE MILLER: You got that?
> MR. FULLER: I got the affidavit. I got the copy of what he wanted me to sign to say my wife got served, which she didn't get served. I was the one that got served.

JUDGE MILLER: With the package on your porch? There are two different circumstances we are talking about. I am not talking about the one where the woman in the white SUV gave you --
MR. FULLER: Okay.
JUDGE MILLER: The second time.
MR. FULLER: Okay.
JUDGE MILLER: What happened with that package?
MR. FULLER: I am not even sure, your Honor. I don't even remember.
JUDGE MILLER: Did you ever see it?
MR. FULLER: I took it in the house, but I didn't even go through it. It was my understanding my insurance company was handling everything.
JUDGE MILLER: You didn't send that to him?
MR. FULLER: I sent everything to them from the first -- that I got.
JUDGE MILLER: The first time.
MR. FULLER: Yeah.
JUDGE MILLER: But the second time, that second time, you just took it in the house, you don't know what you did with it?
MR. FULLER: No, sir.

Judge Miller then continued the hearing. Subsequently, Rupert and Diegel, the attorneys for Full Logistics, filed a motion to be relieved as counsel.[3] On February 4, 2019, Graham's counsel sent a letter to Rupert and Diegel offering to settle the case for the $1 million policy limits as a full satisfaction of the approximately $2.84 million judgment against Full Logistics. On February 15, 2019, on behalf of Trustgard, Collins & Lacy rejected the demand and instead offered Graham $100,000 in exchange for a full release. The trial court granted Rupert and Diegel's motion to be relieved in an order filed March 5, 2019. Trustgard retained new counsel to represent Full Logistics, Dorothy H. Hogg of Fulcher Hagler, LLP.

On February 22, 2019, Trustgard filed a motion to intervene, either as of right under Rule 24(a), SCRCP, or permissively under 24(b), SCRCP, and upon grant of

[3] This motion was not included in the record on appeal.

an intervention, to set aside default judgment. The motion included an affidavit by Collins & Lacy's investigator, Nelson, about his October 2018 investigation of the service of the summons and complaint on Fuller.

On April 3, 2019, Graham's counsel sent Hogg, Full Logistics' new counsel, a letter requesting that Full Logistics withdraw its Rule 60(b), SCRCP, motion. It asserted improper service and surprise were no longer an issue because Fuller appeared and testified to receiving service and turning it over to Trustgard, which it contended text messages exchanged over a month prior to the January 8 hearing between Fuller and Johnson, the investigator hired by Rupert, confirmed.

On April 15, 2019, Trustgard filed a memorandum in support of its motion to intervene and set aside default judgment. Trustgard indicated if it "is not allowed to intervene, it will have difficulty protecting its financial interest in this case." As to the motion to set aside the default judgment, Trustgard argued first, under Rule 60(b)(4), SCRCP, the judgment was void because of improper service of process. Alternatively, it maintained the judgment should be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud under Rule 60(b)(1) and (3), SCRCP, because Graham's counsel engaged in settlement negotiations with it, then failed to notify it when the suit was filed. Trustgard also argued "[a] meritorious defense existed on the issue of damages, among other defenses, given that at the default damages hearing[,] [Graham] presented $57,536.85 worth of medical bills and received a judgment of $2,843,349.73. Further, Trustgard contended Graham would suffer no prejudice by having to pursue the case on the merits.

On April 23, 2019, Graham filed a memorandum in opposition to Trustgard's motion. As to the default judgment, Graham argued Fuller testified he was served, waiving any argument as to defective service. Graham also argued service on Bridget was proper. Graham further argued his counsel's conduct was proper and not a basis for Rule 60(b)(1) relief and Trustgard could not show a meritorious defense.

On April 24, 2019, the Honorable Robin B. Stilwell held a hearing on Full Logistics' motion to set aside default judgment and Trustgard's motion to intervene and to set aside default judgment. Full Logistics argued the evidence regarding service was conflicting but stated Fuller "wishes to stand on [his] testimony" from the prior hearing that he received service. Judge Stilwell took the motions under advisement for thirty days to allow the parties to attempt settlement. On July 3,

2019, Judge Stilwell notified the parties of his decision to grant Trustgard's motion to intervene but deny its motion to set aside the default judgment. On July 18, 2019, after receiving Judge Stilwell's letter and before a formal order had been issued, Trustgard filed a motion to stay a formal ruling pending its request to conduct discovery in the issue of service.

On August 9, 2019, Judge Stillwell issued an order granting Trustgard's motion to intervene for the purpose of posing its motion to set aside the default, denying Trustgard's and Full Logistics' motions to set aside the default judgment, and denying the motion for a stay so that additional discovery could be conducted. The order stated:

> Fuller testified under oath . . . on January 8, 2019 that he was personally served . . . . Fuller not only acknowledged service in his testimony but also made a voluntary appearance on January 8, 2019. Rule 4(d), SCRCP ("Voluntary appearance by defendant is equivalent to personal service"). In his testimony on January 8, 2019, Fuller never wavered from his position that he received notice of the lawsuit and did not contest proper service. . . . Based on Fuller's testimony regarding personal service, the [c]ourt has personal jurisdiction. The judgment is not void for lack of process . . . .

Additionally, the court found "[b]ased on Fuller's sworn testimony [on January 8, 2019,] acknowledging service, there is no mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct that warrants setting aside the default judgment." The court found Fuller's testimony he received personal service was corroborated by his communications with Burchstead and Johnson. The court found setting aside the default judgment would prejudice Graham by reopening the proceedings and delaying the close of the case by several years. The court denied Trustgard's request to conduct discovery on the issue of service, stating it saw "little profit in conducting additional discovery based on a party's hope that the testimony of witnesses or the evidence will change." The court stated it "conducted a deliberate inspection of the circumstances of default"

and found "[a]ny inconsistencies in the affidavit of service are overcome by Fuller's acknowledgement and acceptance of service."[4]

These cross-appeals by Trustgard and Graham followed.[5]

LAW/ANALYSIS

I. Trustgard's Appeal

A. Lack of Evidentiary Support for Fuller's Testimony

Trustgard contends the circuit court erred in accepting Fuller's testimony at face value notwithstanding a lack of evidentiary support and factual contradictions between this testimony and the proof of service supporting the default judgment. Trustgard asserts that giving credence to the testimony necessitates a conclusion that the default judgment is void. Trustgard further argues judicial estoppel bars Graham from changing his version of facts as to service of process.[6] Finally,

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[4] Four days after Judge Stilwell's order and prior to Trustgard filing its notice of appeal, Trustgard filed a declaratory judgment action in federal court against Graham, Foster, and Full Logistics, seeking the court declare the policy did not provide liability coverage for the accident, Trustgard had no duty to defend or indemnify Full Logistics for the claims arising out of the accident, and if Trustgard is liable for the judgment, limiting its amount of liability. Complaint, *Trustgard Ins. Co. v. Graham*, No. 6:19-cv-02269-TMC (D.S.C. Aug. 13, 2019). Full Logistics filed an answer and counterclaim, alleging "Trustgard attempted to have its insured commit perjury and falsely state it was not served." Answer & Counterclaim at 6, *Trustgard Ins. Co. v. Graham*, No. 6:19-cv-02269-TMC (D.S.C. Nov. 8, 2019). Full Logistics asserted counterclaims for insurance bad faith, negligence, and attorney's fees under the South Carolina Claims Practice Act, sections 38-59-10 to -50 of the South Carolina Code (2015). *Id*. at 4-11. The district court stayed the case pending the outcome of this appeal.

[5] Full Logistics did not file an appeal and is not a party to these cross-appeals.

[6] Graham asserts Trustgard's argument on judicial estoppel is unpreserved because it did not mention judicial estoppel in either its memorandum in support of its motion or at the hearing on the motion, the circuit court did not rule on the issue, and Trustgard did not file a Rule 59(e), SCRCP, motion to reconsider. "Issues and arguments are preserved for appellate review only when they are raised to and

Trustgard maintains Fuller's testimony should not have been considered without appropriate evidentiary support. We disagree.

"The trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard." *Graham L. Firm, P.A. v. Makawi*, 396 S.C. 290, 294-95, 721 S.E.2d 430, 432 (2012). "Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003). "Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to [circuit] court findings where matters of credibility are involved." *Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017) (alteration by court) (quoting *S.C. Dep't of Soc. Servs. v. Forrester*, 282 S.C. 512,

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ruled on by the lower court." *Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004)). Trustgard maintains the issue was preserved because it argued to the circuit court that Fuller's statements at the hearing and Silvaggio's statements in his affidavit conflicted and Graham was bound by the statements regarding service in the Silvaggio affidavit. It asserts it did not have to use the term judicial estoppel. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue."); Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 186 (3d ed. 2016) (noting that "[a] party need not use the exact name of a legal doctrine in order to preserve" it as long as it is "clear the argument was presented on that ground"). Trustgard contends the circuit court considered this argument and therefore, the argument is preserved. Even assuming Trustgard sufficiently raised judicial estoppel to the circuit court, the circuit court did not rule on the issue. Accordingly, the issue of judicial estoppel is not preserved for our review on appeal. *See Caldwell*, 402 S.C. at 576-77, 741 S.E.2d at 589 ("[When] an issue has not been ruled upon by the trial [court] nor raised in a post-trial motion, such issue may not be considered on appeal." (quoting *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993))); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue [to] the [trial] court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

516, 320 S.E.2d 39, 42 (Ct. App. 1984)). In *RRR, Inc. v. Toggas*, this court determined "the circuit court did not abuse its discretion in finding one witness's testimony more credible than another's in denying [a] motion to set aside [a] judgment." 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008), *aff'd*, 381 S.C. 490, 674 S.E.2d 170 (2009) (per curiam). Our supreme court has noted, "Without explicit findings of fact by the circuit court, [an appellate court's] decision can only be based on the implicit credibility determination of the circuit court." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 652, 661 S.E.2d 791, 796 (2008).

"The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend." *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 8-9, 753 S.E.2d 537, 541 (2014) (quoting *State v. Sanders*, 118 S.C. 498, 502-03, 110 S.E. 808, 810 (1920)). "[P]arties are generally permitted to agree to particular methods of service or waiving service altogether." *Id.* at 9, 753 S.E.2d at 541. "[W]here service is accomplished in a manner consented to by the defendant, service of process is valid and a court has jurisdiction over the defendant for purposes of entering judgment." *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 565, 683 S.E.2d 486, 491 (2009). "[A] defendant may waive personal service by consent or by designating an agent to receive service of process." *Myrtle Beach Lumber Co. v. Globe Int'l Corp.*, 281 S.C. 290, 292, 315 S.E.2d 142, 143 (Ct. App. 1984). "Furthermore, allowing for the waiver of service is consistent with the principle that a defendant can waive personal jurisdiction." *White Oak Manor, Inc.*, 407 S.C. at 9, 753 S.E.2d at 541.

"Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised." *Bakala v. Bakala*, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003); *see also* Rule 4(d), SCRCP ("Voluntary appearance by [a] defendant is equivalent to personal service . . . ."). "A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Waiver requires a party to have known of a right and known that right was being abandoned." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (citation omitted), *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009).

Although the circuit court did not make any explicit findings on credibility, it did find Fuller was served based on his own testimony. By such a finding, the circuit court implicitly found Fuller credible. The circuit court found Fuller's service was

supported by his communications with Trustgard's and Full Logistics' legal teams; the record reflects that prior to the hearing held by Judge Miller on the motion to vacate and/or set aside default judgment, Fuller had informed Burchstead as well as Rupert's investigator that he had been personally served. While we recognize the record also contains evidence to support the position that Fuller himself was not served, because the evidence is conflicting, we will defer to the circuit court. Accordingly, the circuit court did not abuse its discretion in finding based on Fuller's testimony Full Logistics was served.[7]

B. Discovery

Trustgard asserts the circuit court erred in refusing to permit it to conduct discovery on the issue of service of process. Trustgard submits the circuit court erred in rejecting its request for a stay and the opportunity to conduct limited discovery into the circumstances of service of process. It asserts neither Graham nor Fuller have provided Trustgard any information into the circumstances of service, not even the date Fuller was allegedly served or what papers he was purportedly handed. Trustgard asserts its need for discovery is not frivolous and it should also be provided a full and fair opportunity to conduct discovery. We disagree.

In *Graham Law Firm, P.A.*, our supreme court looked at this court's previous explanation of the "application of due process concerns to issues of personal jurisdiction." 396 S.C. at 299, 721 S.E.2d at 435 (citing *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 151-52, 723 S.E.2d 835, 839-40 (Ct. App. 2011)). In *Sullivan*, this court stated, "When the plaintiff can show that discovery is necessary in order to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless plaintiff's claim appears to be clearly frivolous." *Id.* (quoting *Sullivan*, 397 S.C. at 151, 723 S.E.2d at 839). This court qualified that when "a plaintiff's claim of personal jurisdiction appears

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[7] Graham contends as an additional sustaining ground for the circuit court's denial of the motion to set aside the default judgment he properly served Full Logistics through Bridget. We need not address this issue based on our determination the trial court did not err in finding Full Logistics was served based on Fuller's testimony. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address an issue when other issues are dispositive of the matter).

to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the court need not permit even limited discovery confined to issues of personal jurisdiction if it will be a fishing expedition." *Id.* (quoting *Sullivan*, 397 S.C. at 151, 723 S.E.2d at 839-40). This court found that "[w]hen a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery." *Id.* (quoting *Sullivan*, 397 S.C. at 151-52, 723 S.E.2d at 840).

In *Graham Law Firm, P.A.*, the supreme court recognized "*Sullivan* dealt with minimum contacts analysis for out-of-state defendants, but the same reasoning applies to the question of whether a plaintiff is entitled to discovery in order to obtain evidence tending to show that the court has jurisdiction over an in-state defendant." *Id.* at 299 n.3, 721 S.E.2d at 435 n.3. "The *Sullivan* court further noted that 'a plaintiff is not required to assert he will be "meritorious" on personal jurisdiction; rather, he must demonstrate enough facts to support a prima facie showing [of jurisdiction].'" *Id.* (alteration by court) (quoting *Sullivan*, 397 S.C. at 152, 723 S.E.2d at 840). "The plaintiff may allege the necessary facts in the complaint or present them by way of affidavit." *Id.*

In *Graham Law Firm, P.A.*, the court concluded the plaintiff's claim the defendant corporation was served through a restaurant hostess at one of its properties was not necessarily so "conclusory, frivolous, or attenuated" as to not permit discovery. *Id.* at 300, 721 S.E.2d at 435. The court found the plaintiff's claim it served another employee of the corporation who may have had authority to accept service was likewise not so "conclusory, frivolous, or attenuated," as to deny the plaintiff's request for discovery. *Id.* The court held the plaintiff "must receive a full and fair opportunity to be heard on the matter, because the findings with regard to service of process may determine the merits of the case in chief." *Id.*

"The rulings of [the circuit court] in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). "An abuse of discretion occurs when the [circuit court's] ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support." *Id.*

Typically, a plaintiff is seeking discovery to establish its service upon a defendant was sufficient to confer personal jurisdiction. In this case, instead, Fuller, as agent

of the defendant, appeared at the motion to set aside default and confessed his receipt of service. Based on our determination that the circuit court did not abuse its discretion in finding Fuller accepted service, we find the circuit court did not err in failing to allow Trustgard to conduct discovery to determine if Fuller was actually served. We affirm the circuit court's denial of Trustgard's motion to stay entry of the order pending discovery.

C. Failure to Set Aside

Trustgard maintains the circuit court erred in ruling that the judgment should not be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud due to Graham's counsel Smith's presuit conduct and failure to notify Trustgard of the default judgment. We disagree.

"For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)[, SCRCP]." Rule 55(c), SCRCP. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for" reasons including "mistake, inadvertence, surprise, or excusable neglect;" "fraud, misrepresentation, or other misconduct of an adverse party;" or "the judgment is void." Rule 60(b)(1), (3), (4), SCRCP.

"Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). "The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." *Id.* "[R]elief from default judgment under Rule 60(b), SCRCP, 'requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party."'" *ITC Com. Funding, LLC v. Crerar*, 393 S.C. 487, 494, 713 S.E.2d 335, 339 (Ct. App. 2011) (quoting *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888); *see also Hill v. Dotts*, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct. App. 2001) ("In determining whether a default judgment should be set aside under Rule 60(b)(1), '[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant.'" (alterations by court) (quoting *N.H. Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)). "The different standards

under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888-89.

The discretion given to the trial court in deciding whether to grant relief from default makes "clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." *Ricks v. Weinrauch*, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1987). "[C]ourts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292 (1981). "The [c]ourt does not attempt . . . to decide the case on its merits, but only decides whether a prima facie showing has been made of a meritorious defense." *Lanier v. Lanier*, 251 S.C. 117, 119, 160 S.E.2d 558, 559 (1968) (quoting *Jenkins v. Jones*, 208 S.C. 421, 427, 38 S.E.2d 255, 257 (1946)). When a party has made "a good faith mistake of fact" and has not attempted "to thwart the judicial system," the court has a basis to vacate a default judgment. *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986).

"The [supreme c]ourt has never required exacting compliance with the rules to effect service of process, but instead looks to whether the plaintiff substantially complied with the rules such that the court has personal jurisdiction over the defendant and the defendant has notice of the proceedings." *White Oak Manor, Inc.*, 407 S.C. at 10, 753 S.E.2d at 542. "[N]othing in the South Carolina Rules of Civil Procedure requires the service of a courtesy copy of the summons and complaint on opposing counsel." *Id.* at 12, 753 S.E.2d at 543.

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial [court]." *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* "An abuse of discretion in setting aside a default judgment occurs when" some error of law controlled the court issuing the order "or when the order, based upon factual, as distinguished from legal conclusions," lacks evidentiary support. *Id.* (quoting *In re Est. of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)); *see also Fassett v. Evans*, 364 S.C. 42, 49, 610 S.E.2d 841, 845 (Ct. App. 2005) ("[T]he power to set aside a default judgment is addressed to the sound

discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.").

Based on our determination of the previous issues, we affirm as to this issue because Trustgard has not set forth a sufficient basis for setting aside the default judgment.

D. Meritorious Defense

Trustgard maintains the circuit court erred in failing to find that it had presented a meritorious defense. It asserts one of those defenses was on the issue of damages; Graham presented $57,536.85 worth of medical bills and received a judgment of $2,843,349.73. Trustgard also submits that the issues it has raised regarding service of process constitute a meritorious defense, notwithstanding that to prevail on the service of process issues themselves, a meritorious defense is not required.

This court has previously noted, once it had "concluded the trial court did not abuse its discretion in finding the Appellant was not entitled to relief on any of the grounds specified in Rule 60(b), SCRCP, we need not address whether the Appellant has a meritorious defense." *Crerar*, 393 S.C. at 496, 713 S.E.2d at 339-40. Because the record in the present case contains evidence in the form of Fuller's testimony that Full Logistics was served, we do not need to reach the issue of meritorious defense.[8]

[8] Trustgard also argues the circuit court erred in finding that Fuller's testimony satisfied the service of process requirements under Rule 4, SCRCP. It asserts Fuller's testimony did not constitute a valid voluntary appearance under Rule 4(d), SCRCP. It further contends Fuller's testimony did not otherwise comply with Rule 4. This finding of a voluntary appearance was not the only ground for finding that Full Logistics has been served. Based on our determination the circuit court did not abuse its discretion in ruling Fuller was served based on his testimony, we need not address this argument. *See I'On, L.L.C.*, 338 S.C. at 420, 526 S.E.2d at 723 ("It is within the appellate court's discretion whether to address any additional sustaining grounds."); *Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (declining to address an issue when other issues are dispositive of the matter).

II. Graham's Appeal

Graham maintains the circuit court abused its discretion in granting Trustgard's motion for permissive intervention when its arguments are identical to other parties. We disagree.

Intervention is allowed by Rule 24, SCRCP. The Rule provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement[,] or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24, SCRCP.

"To warrant intervention under Rule 24(b) an applicant should ordinarily show . . . he has a claim or defense involving a question of law or fact in common with the

main action. A mere general interest in the subject matter of the litigation is not sufficient." *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 262, 368 S.E.2d 72, 75 (Ct. App. 1988). This court has previously found an applicant seeking to intervene "could not become a party to suit where its claim or defense would be identical to" a current party. *Id.* at 263-64, 368 S.E.2d at 76.

"Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *Stoney v. Stoney*, 425 S.C. 47, 63, 819 S.E.2d 201, 210 (Ct. App. 2018) (quoting *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007)). "Thus, this court 'should consider the practical implications of a decision denying or allowing intervention.'" *Id.* at 63-64, 819 S.E.2d at 210 (quoting *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. at 138, 644 S.E.2d at 702). "The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 411, 581 S.E.2d 161, 168 (2003).

The circuit court did not err in allowing Trustgard a permissive intervention. Trustgard demonstrated that its position was not the same as Full Logistics. Accordingly, we affirm the circuit court's grant of Trustgard's motion to intervene.[9]

CONCLUSION

The circuit court's denial of Trustgard's motion to set aside the default judgment and grant of Trustgard's motion to intervene are

AFFIRMED.

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

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[9] Trustgard further contends that as an alternative sustaining ground, it was also entitled to intervene as of right. Based on our determination the circuit court did not abuse its discretion in granting Trustgard's motion for permissive intervention, we need not address this argument. *See I'On L.L.C.*, 338 S.C. at 420, 526 S.E.2d at 723 ("It is within the appellate court's discretion whether to address any additional sustaining grounds."); *Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (declining to address an issue when other issues are dispositive of the matter).