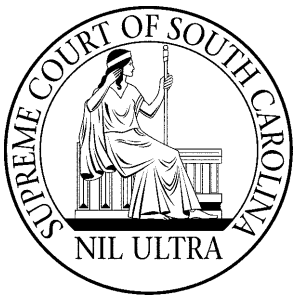


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 42**
**December 1, 2021**
**Patricia A. Howard, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Curt O. Hall, Plaintiff,

v.

UBS Financial Services Inc. and Mary Lucy Reid, Defendants.

Appellate Case No. 2020-001195

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**CERTIFIED QUESTION**

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ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Timothy M. Cain, United States District Judge

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Opinion No. 28068
Heard April 14, 2021 – Filed December 1, 2021

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**CERTIFIED QUESTIONS ANSWERED**

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Townes B. Johnson III, of Townes B. Johnson III, LLC, of Greenville, for Plaintiff.

Ashley P. Cuttino and Evelyn A. Norton, of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Defendants.

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**JUSTICE JAMES:** We accepted three certified questions from the United States District Court for the District of South Carolina. In this case, Curt Hall sued UBS Financial Services Inc. (UBS) (his former employer) and Mary Lucy Reid, a former co-worker, seeking to hold them liable for damages he allegedly incurred when he was fired by UBS. Hall's claims against UBS include one for breach of the implied covenant of good faith and fair dealing, and Hall's claims against Reid include one for tortious interference with contractual relations. The certified questions concern the nature of Hall's at-will employment and the viability of Hall's causes of action in the employment at-will context. Hall does not concede he was an at-will employee.

The certified questions are as follows:

I. Are terminable-at-will employment relationships contractual in nature as a matter of law?

II. Does the implied covenant of good faith and fair dealing arise in the context of terminable-at-will employment relationships, and can an employer's termination of an at-will employee constitute a breach of the relationship such that it may give rise to a claim by the former employee against the employer for breach of the implied covenant of good faith and fair dealing?

III. Can an employer's termination of an at-will employee, which results from a third-party employee's report to the employer, constitute a breach of the relationship such that it may give rise to a claim by the former employee against the third-party employee for tortious interference with a contractual relationship?

## Background

In this section, we recite Hall's allegations against UBS and Reid as they are set forth in the district court's certification order. We express no opinion as to whether they are true. Hall was the manager of the Greenville branch of UBS. On September 1, 2017, Hall organized an employee happy hour which several UBS employees, including Reid, attended.[1] Throughout the event, Reid mentioned she was having issues with her boyfriend and was scared to go home. Hall offered to let Reid stay at his home for the evening. At the end of the happy hour, Hall invited

[1] During oral argument, counsel for Reid referred to Reid as Hall's subordinate. This alleged fact is not in the certification order, and it has no bearing upon our answers to the certified questions.

everyone still present to dinner at a nearby restaurant, but only Reid and one of her friends joined him. After dinner, Reid and her friend gave Hall a ride home, with Reid joining Hall in the backseat while her friend drove. When they arrived at his home, Hall again asked Reid if she would be alright and she said she would be. Hall then gave Reid a "European-style consolatory cheek kiss" and exited the vehicle. Later that evening, Hall texted Reid to confirm she was okay. Hall repeated his offer for Reid to stay with him and told her he was outside his home with his dog. Reid responded to Hall's comment about his dog but did not respond to Hall's offer for her to stay with him.[2]

Reid reported her version of the events of the evening to UBS's human resources department (HR). HR questioned Hall about the evening, and Hall explained his version of events. According to Hall, Reid fabricated certain events of the evening and also fabricated Hall's general advances towards her and Hall's relationships with other employees in the Greenville office. UBS fired Hall a few weeks after Reid's report. This action followed. Pertinent to the certified questions are Hall's cause of action against UBS for breach of the implied covenant of good faith and fair dealing and Hall's cause of action against Reid for tortious interference with contractual relations.

## Discussion

In South Carolina, employment is presumed to be at will. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). In an at-will employment relationship, either party may terminate employment "at any time, for any reason or for no reason at all" without incurring liability. *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 334, 516 S.E.2d 923, 925 (1999); *see also Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 245, 422 S.E.2d 91, 92 (1992) ("The doctrine in its pure form allows an employer to discharge an employee without incurring liability for good reason, no reason, or bad reason."). "The termination of an at-will employee normally does not give rise to a cause of action for breach of contract." *Prescott*, 335 S.C. at 334-35, 516 S.E.2d at 925. We have recognized "exceptions" to employment at will that can apply to impose liability on an employer

[2] During oral argument, Hall's counsel stated Hall's wife and child were home with Hall. This alleged fact is not in the certification order, and it has no bearing upon our answers to the certified questions.

who terminates an at-will employee.[3] We answer the district court's questions under the assumption that no exception applies.

**I. Are terminable-at-will employment relationships contractual in nature as a matter of law?**

In their brief, Defendants begin their argument on this point by stating at-will employment relationships in South Carolina "do not allow for a cause of action to be brought by an employee against an employer on matters that arise out of termination of the at-will employment relationship." That is a correct statement of the law, but it misses the point of the district court's question. It appears Defendants have conflated the question of whether the at-will relationship is contractual with the question of whether termination of an at-will employee gives rise to a cause of action for breach of contract. As we will explain, we answer "yes" to the question put to us by the district court, but we emphasize that this "yes" answer does not light a path to a viable breach of contract action by the terminated employee against the employer.

In their brief, Defendants state that "[i]t has long been held that an at-will employee does not have a contractual relationship with their employer" and cite *Orsini v. Trojan Steel Corp.*, 219 S.C. 272, 64 S.E.2d 878 (1951), for that proposition. *Orsini* stands for no such proposition. In *Orsini*, we stated "[t]he general rule is that under ordinary circumstances a contract to furnish employment permanently, or so long as the employee's services shall be properly performed, or for a similar indefinite period, is no more than an indefinite hiring, terminable at the will of either party, and is therefore unenforcible [sic] as to its duration." *Id.* at 276, 64 S.E.2d at 879 (emphasis added). *Orsini* involved an oral employment agreement between an employer and an employee. We simply held that when the hiring is for an indefinite period, the employment is at will and the contract is unenforceable as to its duration. We did not hold the at-will employment relationship is non-contractual. In fact, we specifically referred to the relationship as a contract.

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[3] *See, e.g.*, *Conner v. City of Forest Acres*, 363 S.C. 460, 471-74, 611 S.E.2d 905, 911-12 (2005) (explaining an employer may not discharge an employee in violation of procedures set forth in employee handbook); *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011) (stating at-will employee may not be discharged in violation of a clear mandate of public policy).

In *Prescott*, we again referred to the at-will employment arrangement as a "contract." 335 S.C. at 334, 516 S.E.2d at 925 ("[A] contract for permanent employment, so long as it is satisfactorily performed which is not supported by any consideration other than the obligation or service to be performed on the one hand and wages to be paid on the other, is terminable at the pleasure of either party." (quoting *Shealy v. Fowler*, 182 S.C. 81, 87, 188 S.E. 499, 502 (1936))). In other decisions, however, we have suggested a contract arises only when parties to an at-will employment relationship enter into a contract altering that relationship. *See Mathis*, 389 S.C. at 309, 698 S.E.2d at 778 ("[E]mployment at-will is presumed absent the creation of a specific contract of employment."); *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011). In fact, the decisions of our appellate courts have seemingly contradicted each other on this issue when discussing the viability of claims for breach of the implied covenant of good faith and fair dealing and tortious interference with contractual relations—the subjects of the second and third certified questions. *Compare Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016) ("[A]bsent some alteration in at-will employment status, there is no contract into which we could imply [the implied covenant of good faith and fair dealing]."), *with Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 163, 321 S.E.2d 602, 607 (Ct. App. 1984) ("[A] contract terminable at will is a contract upon which an action for [tortious interference with contractual relations] may be brought."), *quashed in part*, 287 S.C. 190, 336 S.E.2d 472 (1985).

We agree with Hall that the answer to this certified question lies in general contract law. This Court has applied general contract law in determining whether contracts exist in the employment context. *See Prescott*, 335 S.C. at 336, 516 S.E.2d at 926 ("[T]o prove the existence of a definite contract of employment, the employee must establish all of the elements of a contract."). The *Prescott* Court also noted "[m]ost employment agreements are unilateral," and explained the elements of a unilateral contract are: "(1) a specific offer, (2) communication of the offer to the employee, and (3) performance of job duties in reliance on the offer." *Id.* (footnote omitted). We agree with the majority of jurisdictions that have addressed this issue, and we hold those elements are present in every at-will employment arrangement.

In *Spriggs v. Diamond Auto Glass*, the Fourth Circuit applied general contract law and held the typical at-will relationship is contractual in nature:

> [The employer] had offered, either expressly or implicitly, to pay [the employee] if he would perform the duties of customer service representative, and [the employee] accepted that offer by beginning

> work. [The employee's] performance of the assigned job duties was consideration exchanged for [the employer's] promise to pay. The parties' actions thus created a contractual relationship.

165 F.3d 1015, 1018 (4th Cir. 1999). A wide range of authority supports the Fourth Circuit's conclusion. *See Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984) ("[T]he contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace."); *Lake Land Emp't Grp. of Akron, LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004) ("At-will employment is contractual in nature. . . . In such a relationship, the employee agrees to perform work under the direction and control of the employer, and the employer agrees to pay the employee at an agreed rate." (citation omitted)); *Darlington v. Gen. Elec.*, 504 A.2d 306, 309 (Pa. Super. Ct. 1986) ("Every employment relationship is also a contractual relationship. Even at-will employment is formed by contract."), *overruled on other grounds by Krajsa v. Keypunch, Inc.*, 622 A.2d 355 (Pa. Super. Ct. 1993); 82 Am. Jur. 2d *Wrongful Discharge* § 6 (2013) ("The employment relationship is a contractual one, and therefore, it has been said that even at-will employees have employment contracts." (footnotes and citations omitted)).

In decisions allowing at-will employees to bring actions against their employers under 42 U.S.C.A. § 1981 (2019), many courts have held at-will employment arrangements are contractual. That statute does not define "contract," but it guarantees to all persons in the United States the same rights related to the making, performance, modification, and termination of contracts as are enjoyed by white citizens. *Id.* § 1981(a), (b). Thus, to bring an action under section 1981, the employee must have a contract. *See Skinner v. Maritz, Inc.*, 253 F.3d 337, 341 n.2 (8th Cir. 2001) ("Section 1981 only requires that the employee have a 'contract.'"). In *Spriggs*, the Fourth Circuit noted, "[w]e have seen no indication that, when drafting [section 1981], Congress intended the term 'contract' to have any meaning other than its ordinary one." 165 F.3d at 1018. At least six federal circuit courts have held the at-will employment relationship is contractual. *See id.* at 1018-19 (recognizing "an at-will employment relationship is contractual" and allowing a discharged at-will employee to bring a claim under section 1981); *Lauture v. Int'l Bus. Machs. Corp.*, 216 F.3d 258 (2d Cir. 2000) (same); *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048 (5th Cir. 1998) (same); *Walker v. Abbott Labs.*, 340 F.3d 471 (7th Cir. 2003) (same); *Turner v. Ark. Ins. Dep't*, 297

F.3d 751 (8th Cir. 2002); *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999) (same).

In *Sellers v. South Carolina Autism Society, Inc.*, 861 F. Supp. 2d 692 (D.S.C. 2012), the district court for South Carolina ruled at-will employees in South Carolina can bring section 1981 claims because at-will employment is contractual under South Carolina law. *Id.* at 697 ("[T]he court finds nothing so unique about South Carolina's employment at-will doctrine that it should be exempt from what appears to be the unanimous view of all federal appellate courts which have addressed application of Section 1981 to various states' at-will employment doctrines."). The *Sellers* court undertook a well-reasoned examination of South Carolina law and determined "at-will employment in South Carolina is contractual in nature and may support a claim under Section 1981." *Id.* at 697-98.

The same result is warranted outside the context of section 1981. All at-will employment relationships, whether they are memorialized in a written contract stipulating the at-will nature of the employment or orally formed simply out of circumstance, are contractual relationships. When an employer offers to pay an employee to perform a service for a price and the employee performs that service, a contract is formed. Of course, our recognition that at-will relationships are contractual does not alter the established rule allowing an employer to discharge an at-will employee for any reason without incurring liability. That is because under South Carolina law, the right to fire the employee at any time and for any reason is an integral term of the at-will contract. We answer the first certified question "yes."

**II. Does the implied covenant of good faith and fair dealing arise in the context of terminable-at-will employment relationships, and can an employer's termination of an at-will employee constitute a breach of the relationship such that it may give rise to a claim by the former employee against the employer for breach of the implied covenant of good faith and fair dealing?**

Question II is a two-part question. Part A asks if the implied covenant of good faith and fair dealing (the covenant) exists in at-will employment relationships. Part B asks if an employer's termination of an at-will employee can give rise to a claim by the former employee against the employer for breach of the covenant. We answer part A "yes," and we answer part B "no."

**A. Does the covenant arise in at-will employment relationships?**

The answer to part A lies in the principle that "[t]here exists in every contract an implied covenant of good faith and fair dealing." *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). The at-will employment relationship is contractual, so it appears we should easily conclude the implied covenant of good faith and fair dealing is a term of the at-will employment contract. However, as Defendants note, both this Court and the court of appeals have concluded the covenant does not arise in at-will employment relationships. *See Allegro*, 418 S.C. at 35, 791 S.E.2d at 146 ("[A]bsent some alteration in at-will employment status, there is no contract into which we could imply [the implied covenant of good faith and fair dealing]."); *Williams v. Riedman*, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000) ("[W]e have declined to apply [the covenant of good faith and fair dealing] to the employment at-will situation where no contract exists."); *Keiger v. Citgo, Coastal Petroleum, Inc.*, 326 S.C. 369, 374, 482 S.E.2d 792, 794 (Ct. App. 1997) ("[T]he implied covenant of good faith and fair dealing that is implied in every contract applies to employment contracts *that alter* the at-will employment status." (emphasis added)). As *Allegro*, *Williams*, and *Keiger* demonstrate, the rationale for refusing to apply the covenant was that "no contract" exists in the pure at-will setting. However, in light of our answer to the first certified question, this rationale is no longer valid. The implied covenant of good faith and fair dealing exists in at-will employment contracts.

**B. Can an employer's termination of an at-will employee give rise to a claim by the former employee against the employer for breach of the implied covenant of good faith and fair dealing?**

We first note this part of Question II suggests there is a cause of action for "breach of the implied covenant of good faith and fair dealing." The court of appeals has held that a claim for breach of the implied covenant of good faith and fair dealing is not a cause of action separate and distinct from a cause of action for breach of contract. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 472-73, 597 S.E.2d 881, 884 (Ct. App. 2004). As we explained above, every contract includes the implied covenant of good faith and fair dealing. It is clear then that if a party to a contract believes another party to the contract has breached the implied covenant of good faith and fair dealing, the cause of action is simply one for breach of contract. With that clarification, we will address this part of Question II.

Our appellate courts have consistently applied the covenant of good faith and fair dealing "to protect the intentions of the parties to the contract." *Williams*, 339 S.C. at 273, 529 S.E.2d at 39. "In the absence of an express provision therefor, the

law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made." *Id.* (quoting *Commercial Credit Corp v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966)). "[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Adams*, 320 S.C. at 277, 465 S.E.2d at 85. All at-will employment contracts contain a provision allowing the employer to discharge the at-will employee for "good reason, no reason, or bad reason" without incurring liability. *Culler*, 309 S.C. at 245, 422 S.E.2d at 92. It follows then that the implied covenant of good faith and fair dealing, while it exists in the at-will employment contract, does not infringe upon the employer's right to do what the contract allows him to do—terminate the employee for any reason. The employer's motive for firing the employee is immaterial, and the employer may fire the employee—even for a bad reason—without incurring liability for breach of the implied covenant of good faith and fair dealing.

We answer Question II in its entirety as follows: The implied covenant of good faith and fair dealing exists in an at-will employment contract; however, the employer's termination of the employee cannot form the basis of a claim that the employer breached the covenant of good faith and fair dealing.[4]

**III. Can an employer's termination of an at-will employee, which results from a third-party employee's report to the employer, constitute a breach of the relationship such that it may give rise to a claim by the former employee against the third-party employee for tortious interference with a contractual relationship?**

We revise this question to read as follows: Can an employer's termination of an at-will employee, which results from a third-party employee's report to the employer, give rise to a claim by the terminated employee against the third-party

[4] During oral argument, Hall stated his claim for breach of the implied covenant of good faith and fair dealing was not founded upon UBS firing him, but instead upon UBS's submission of a report detailing Hall's actions to the Financial Industry Regulatory Authority (FINRA). Since the record does not include Hall's complaint, we do not know what actions Hall alleged as the basis for his claim for breach of the implied covenant of good faith and fair dealing, and our answers to the district court's questions are based on the limited record before us. The district court can resolve any questions related to FINRA.

employee for tortious interference with a contractual relationship, even when the termination itself was not a breach of the at-will contract? We revise the question because the threshold viability of the terminated at-will employee's tortious interference claim against the third-party employee does not depend upon whether the employer's termination of the employee was a breach of the at-will contract; instead, the threshold viability of the claim depends upon whether the third-party employee, without justification, made a report to the employer which induced the employer to terminate the at-will employee.

The district court has presented the narrow question of whether a third-party employee's interference can be actionable. The majority view across the country extends liability not only to third-party employees but also to any third party who intentionally and unjustifiably interferes with the at-will relationship. As we answer the district court's narrow question, we will also answer the broader question.

Almost forty years ago in *Todd*, the court of appeals recognized the viability of a discharged employee's claim against a third party for interference with a terminable-at-will employment contract.[5] 283 S.C. at 163-64, 321 S.E.2d at 607. The *Todd* court stated:

> We conclude, along with a majority of jurisdictions, that where a third party induces an employer to discharge an employee who is working under a contract terminable at will, but which employment would have continued indefinitely except for such interference, a cause of action arises in favor of the employee against the third person.

*Id.* After holding the at-will employee's intentional interference claim was viable, the court of appeals ruled on the merits of his claim and held as a matter of law the third party did not induce the employer to fire the employee.

On certiorari, this Court quashed the portion of the court of appeals' decision upon the merits of the employee's interference claim and reinstated the jury verdict against the third-party "interferer," holding the court of appeals erred in "supplanting the jury's findings of fact with its own by ruling as a matter of law [the third party]

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[5] Although the court of appeals in *Todd* referred to the terminated employee's claim as one for "intentional interference," the elements for intentional interference are the same as those for tortious interference with contractual relations. 283 S.C. at 163, 321 S.E.2d at 607.

did not intentionally interfere with Todd's employment contract." 287 S.C. at 191, 336 S.E.2d at 473. However, we did not address the court of appeals' holding that the claim was viable in the first instance. The court of appeals decided *Todd* in 1984, and, until now, we have not had the occasion to address the court of appeals' holding on the viability of the claim.

The elements of a tortious interference with contractual relations claim are: "(1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007). "An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. . . . Where there is no breach of the contract, there can be no recovery." *Id.* at 481, 642 S.E.2d at 732 (citations omitted).

Citing *Eldeco*, Reid argues (1) an employer's termination of an at-will employee is not a breach of the at-will contract because employers can terminate at-will employees for any reason, and (2) absent a breach, the tortious interference claim fails because one of the elements of the claim is the defendant's intentional procurement of a breach of contract. We agree with Reid there is no breach of contract when an employer fires an at-will employee. However, the absence of an underlying breach does not shield a third party from liability when she intentionally and unjustifiably procures the termination of an at-will employee. As we will explain, we conclude the court of appeals in *Todd* was correct, and we answer this question "yes."

The majority of jurisdictions addressing this issue have recognized a third party's intentional interference with a terminable-at-will contract gives rise to a cause of action for tortious interference with contractual relations, even when the termination of the contract is not a breach of the contract. In *Bochnowski v. Peoples Federal Savings & Loan Ass'n*, 571 N.E.2d 282 (Ind. 1991), the Supreme Court of Indiana overruled contrary Indiana precedent and recognized the right of an at-will employee to bring an action for tortious interference with a contract against a third party. The court held "[t]he parties in an employment at will relationship have no less of an interest in the integrity and security of their contract than do the parties in any other type of contractual relationship." *Id*. at 284. The court then noted "The United States Supreme Court recognized this as far back as 1915," and quoted the following passage:

> The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.

*Id.* (quoting *Truax v. Raich*, 239 U.S. 33, 38 (1915)). The *Bochnowski* court also stated:

> An employee with an at will employment contract must be able to expect that his continued employment depends on the will of his employer and not upon the whim of a third party interferer. We therefore conclude that a claim for tortious interference with an employment relationship can be maintained upon a contract terminable at will. The plaintiff bringing such an action, however, must be prepared to show that the defendant interferer acted intentionally and without a legitimate business purpose.

*Id.* at 285. A majority of jurisdictions follow the *Bochnowski* court's approach. *See, e.g.*, *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689 (Tex. 1989) (holding "the terminable-at-will status of a contract is no defense to an action for tortious interference with its performance"); *Levens v. Campbell*, 733 So. 2d 753, 760 (Miss. 1999) (stating "a claim for tortious interference with at-will contracts of employment is viable in this state"); *Hall v. Integon Life Ins. Co.*, 454 So. 2d 1338, 1344 (Ala. 1984) (explaining the cause of action is not defeated by the plaintiff's at-will status); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 591 n.20 (W. Va. 1998) ("The existence of an at-will employment relationship does not insulate a defendant from liability for tortious interferences."); *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991) ("[A] tortious interference claim will lie for an at-will employment agreement. The at-will employment subsists at the will of the employer and employee, not at the will of a third party meddler who wrongfully interferes with the contractual relations of others."); *Feaheny v. Caldwell*, 437 N.W.2d 358, 364 (Mich. Ct. App. 1989) ("[A]n at-will employee who enjoys the confidence of his or her employer has the right to expect that a third party will not wrongfully undermine the existing favorable relationship."), *overruled on other grounds by Health Call of Detroit v. Atrium Home & Health Care Servs., Inc.*, 706 N.W.2d 843 (Mich. Ct. App. 2005).

Of the foregoing decisions, all but *Hall v. Integon* relied in part upon section 766 of the Restatement (Second) of Torts (1979) in determining a claim may arise for tortious interference with a contract terminable at will. Section 766 states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Importantly, comment *g* to section 766 discusses application of the rule in the terminable-at-will contract setting, and explains that although a party to the contract may terminate the agreement without incurring liability, other individuals cannot interfere with the contract: "Until [the party to the contract] has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it." In *Todd*, the court of appeals cited section 766 when discussing the viability of a claim for tortious interference with an at-will employment contract. 283 S.C. at 164, 321 S.E.2d at 607. Although the court of appeals did not discuss the "breach" requirement, the *Todd* decision listed the elements of an interference claim, including "intentional procurement of [the contract's] breach," immediately before holding the interference cause of action was viable in the at-will setting. *Id.* at 163, 321 S.E.2d at 607.

We now endorse the *Todd* court's recognition of the validity of a claim for third-party tortious interference with a terminable-at-will employment contract, and we hold the absence of an underlying breach by the terminating employer does not shield the third party from liability when she intentionally and unjustifiably procures the termination of an at-will employee. Therefore, we answer Question III, as modified, "yes."

**IV. Reid's additional arguments**

Reid raises two arguments in which she asserts facts she contends should affect our answers to the district court's questions. First, Reid claims she was a party to Hall's at-will employment agreement with UBS and therefore cannot be held liable for inducing UBS to fire Hall. We and the court of appeals have recognized that a claim for tortious interference with contractual relations lies only against a third party, not a party to the contract. *Ross v. Life Ins. Co. of Va.*, 273 S.C. 764, 766, 259

S.E.2d 814, 815 (1979); *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984) ("[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties. . . . [I]t does not protect a party to a contract from actions of the other party."). Second, in an argument directed at the fourth element of a tortious interference claim, Reid contends she cannot be held liable for allegedly interfering with Hall's contract because she was justified in reporting Hall's unwanted sexual advances to UBS or otherwise enjoyed a qualified privilege in doing so.

Resolution of these two issues depends upon an evaluation of facts to be developed as the case progresses. Since the district court has not asked us to address factual questions, we will not address these two issues.

## Conclusion

We answer the first question "yes." We answer part A of the second certified question "yes," and we answer part B of that question "no." We answer the third certified question, as modified, "yes," and we have added that potential liability extends to third parties who are not fellow employees of the terminated employee.

We have answered all questions under the assumption that no exception to the doctrine of at-will employment applies. In addition, our answers to these questions do not alter the established rule that, as long as an exception does not apply, an employer may terminate an at-will employee for any reason without incurring liability.

**CERTIFIED QUESTIONS ANSWERED.**

**BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in part and dissenting in part in a separate opinion.**

**JUSTICE FEW:** I appreciate the majority's very fine explanation of our answers to the district court's first and second questions. I completely agree with the majority's answer and explanation as to the first question. As to the second question, I agree with the answers given, but I would explain the answer to the second part of the question in slightly different terms. The manner in which I suggest we explain our answer to the second part of the second question—in my opinion—requires a different answer to the third question than the answer given by the majority.

I begin with the second part of the second question. Courts will find a term implied in a contract when the circumstances surrounding the relationship between the parties clearly indicate the term was intended by the parties as a part of their agreement, even though the term is not specifically expressed in the contract. We recognized this in *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966), when we wrote, "The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just [women or] men they ought to have made." 247 S.C. at 367, 147 S.E.2d at 484 (quoting 17 AM. JUR. 2d. *Contracts* § 255 (1964)).

Presuming, therefore, honest, fair, and just women and men intend to act—and expect others to act—in good faith, we have repeatedly held the law implies into every contract a promise between the parties to act in good faith in executing the contract. *See, e.g.*, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("There exists in every contract an implied covenant of good faith and fair dealing." (citing *Tharpe v. G. E. Moore Co.*, 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970))). In an at-will employment contract, however, the law superimposes on the contract the express provision that the employer may fire the employee "at any time, for any reason or for no reason at all." *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 334, 516 S.E.2d 923, 925 (1999). This includes a reason that may not be in good faith.

Thus, considering the circumstances surrounding an at-will employment relationship—in particular, the express provision of law that the employer may

fire the employee for any reason—the terms implied in the contract do not include the requirement that the employer have a good faith reason for firing the employee. *See Commercial Credit Corp.*, 247 S.C. at 367, 147 S.E.2d at 484 ("In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made." (quoting 17A C.J.S. *Contracts* § 328 (1963))). Stated differently, the implied promise to act in good faith does not protect the employee from being fired—no matter the reason—because the law specifically provides that the contract of employment permits *any* firing, even if it is not in good faith.

The "no" answer to the second part of the second question, therefore, derives not simply from the fact a firing "cannot form the basis of a claim," as the majority states. Rather, the "no" answer is required by the fact there can be no breach of the employment contract based on termination.

Thus, I would answer the second question in its entirety as follows: The implied covenant of good faith and fair dealing exists in an at-will employment contract; however, the covenant does not extend to an employer's termination of the employment because the law provides an employer may terminate an at-will employee at any time, for any reason, or for no reason at all, even for a reason that is not in good faith. Thus, there can be no breach of contract for firing an at-will employee.

This leads me to the third question. The theory of intentional interference with contractual relations requires proof of more than mere interference with the contract; it requires the plaintiff prove "intentional procurement of [the contract's] breach." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007). When an employer terminates an at-will employment contract, however, there can be no breach based on the termination. When there is no breach, there simply cannot be an "intentional procurement of [a] breach." As we held in *Eldeco, Inc.*, "Where there is no breach of the contract, there can be no recovery" for tortious interference with contractual relations. 372 S.C. at 481, 642 S.E.2d at 732. Therefore, it is not possible for "an employer's termination of an at-will employee . . . [to] give

rise to a claim by the terminated employee against the third-party employee for tortious interference with a contractual relationship." I would answer the third question "no."

There is an additional reason I would answer the third question "no." In this case, if Reid's report is accurate—in other words if Hall made sexual advances to her or otherwise treated her in a professionally inappropriate manner—then she did nothing actionable in reporting Hall's conduct to UBS. In that event, any consequences Hall faces result not from Reid's report but from his own wrongful conduct. Reid's report is actionable, and thus may be the cause of Hall's damages, only to the extent the report is false. In that event, Hall has other theories of recovery against Reid, such as defamation. I would require an employee who is fired from an at-will position as a result of a false report to the employer to rely on defamation, which provides defenses and privileges to the party making the report that the law holds appropriate in a civil action based on a false statement.

I concur as to the majority's "yes" answer to the first question. I also concur as to the majority's "yes" and "no" answers to the two parts of the second question, although I differ slightly as to the explanation of our answer to the second part. I dissent from the majority's answer to the third question. I would answer the third question "no."

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Shelton Lathal Butler Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000660

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**ORIGINAL JURISDICTION**

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Opinion No. 28069
Heard June 17, 2021 – Filed December 1, 2021

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**RELIEF DENIED**

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Jessica Elizabeth Kinard and Tommy Arthur Thomas, both of Irmo, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Chelsey Faith Marto, both of Columbia, for Respondent.

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**JUSTICE FEW:** Shelton Butler and two other men set out to rob two victims from whom they supposedly were going to purchase marijuana. During the robbery, one of the other men—Donavon Johnson—shot and killed one of the victims—Juan Rico Gutierrez. The State tried Butler for murder before trying the others. A jury convicted Butler on the theory the "hand of one is the hand of all." Two months later, the State tried the two others—Donavon and Charles. The trial court in that case granted Charles a directed verdict, and the jury found Donavon not guilty.

Butler asks this Court in our original jurisdiction to vacate his murder conviction because Donavon and Charles were found not guilty, claiming "there, by law, is no crime with which he could have been involved."

Under the theory the "hand of one is the hand of all," when two people join together to commit a crime, and during the commission of that crime one of the two commits another crime, both may be criminally liable for the unplanned crime if it was a natural and probable consequence of their common plan to commit the initial crime. *See State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017). In *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972), for example, the defendant and his cousin went to a poker club with guns, intending to rob the players. 258 S.C. at 265, 188 S.E.2d at 382. In the course of the robbery, the cousin shot and killed the victim. 258 S.C. at 264, 188 S.E.2d at 381. We held the homicide was a natural and probable consequence of their mutual plan to commit robbery, and therefore, the defendant who did not shoot the victim was "as guilty as the one who committed the fatal act." 258 S.C. at 265, 188 S.E.2d at 382.

For our purposes in reviewing the validity of Butler's conviction, the disposition of the indictments of his codefendants—or even whether they were charged or indicted in the first place—is not dispositive.[1] The important question is whether the State proved at Butler's trial what is necessary to convict Butler. *See State v. Cox*, 290 S.C. 489, 493, 351 S.E.2d 570, 572 (1986); *State v. Price*, 278 S.C. 266, 268-69, 294 S.E.2d 426, 428 (1982); *State v. Massey*, 267 S.C. 432, 443-46, 229 S.E.2d 332, 338-39 (1976). To meet this burden in this case, the State proved beyond a reasonable doubt Butler joined with Donavon and Charles to rob Gutierrez, and Donavon murdered Gutierrez in the course of the robbery. Because the State met this burden in Butler's trial, it does not matter to the validity of Butler's conviction that Donavon was subsequently acquitted of the murder in a separate trial.[2]

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[1] Nothing prevents any defendant from making a motion for a new trial based on previously unknown evidence revealed during the trial of a codefendant. *See* Rule 29(b), SCRCrimP.

[2] There are many reasons a jury may have acquitted Donavon. It is unnecessary to consider them, however, because Butler's guilt is based on what was proven in *his own trial*. *See Massey*, 267 S.C. at 446, 229 S.E.2d at 339 (discussing reasons).

**RELIEF DENIED.**

**KITTREDGE, JAMES, JJ., and Acting Justice Stephanie P. McDonald, concur. BEATTY, C.J., concurring in result only.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Meleke Da'Shawn Stewart, Appellant.

Appellate Case No. 2018-001916

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Appeal From Horry County
Thomas W. Cooper, Jr., Circuit Court Judge

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Opinion No. 5873
Heard May 13, 2021 – Filed December 1, 2021

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**AFFIRMED**

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Tommy Arthur Thomas, of Irmo, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Deputy Attorney General William M. Blitch, Jr., Assistant Attorney General William Frederick Schumacher, IV, and Assistant Attorney General Caroline M. Scrantom, all of Columbia, all for Respondent.

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**WILLIAMS, J.:** In this criminal appeal, Meleke Stewart asserts the trial court erred in admitting (1) evidence retrieved from a warrantless search of his cell

phone data and (2) a recorded confession he made during custodial interrogation. We affirm.

## FACTS/PROCEDURAL HISTORY

On June 16, 2014, at roughly 9:00 A.M., officers in the Myrtle Beach Police Department responded to a call regarding a suspicious car parked outside a hotel and found Alton Daniels (Victim) dead in his car. Officers obtained a search warrant for the vehicle and found two cell phones during their search. After obtaining a search warrant for the phones, the officers discovered Victim owned both. The search of one phone produced Victim's last communications, which occurred late the previous night with an unidentified phone number and discussed a meeting to exchange sex for money. Victim and the unidentified number negotiated the sexual encounter using text messages but began making short calls to each other around 12:40 A.M. A call log extracted from Victim's phone showed brief calls between Victim and the unidentified number at 12:40, 12:45, and 12:50 A.M. and a long call at 1:02 A.M. After the last call, Victim's phone did not send any texts or make any calls. At 1:17 A.M., Victim received an incoming call from another unidentified number, but the call was not answered.

Using a database, officers determined the first unidentified phone number belonged to a pre-paid phone and that Verizon was the service provider. Officers then contacted the pre-paid phone provider and requested the subscriber information related to the phone number. The phone provider named Stewart as the registered subscriber. Around 3:00 P.M. the same day, officers filed an emergency disclosure request[1] with Verizon, seeking subscriber details, cell site location information (CSLI), and call and text logs for Stewart's phone. Verizon informed officers that Stewart's phone had not connected to its network since 1:30 A.M. the morning of

[1] An emergency disclosure request is a form officers send Verizon to bypass the warrant requirement in gaining subscriber data if exigent circumstances exist. Officers request the form from Verizon by informing Verizon of the attendant facts, and Verizon determines if the circumstances qualify for an emergency disclosure form. In requesting Stewart's phone data, officers stated, "A murder occurred in Myrtle Beach and information from the victim's phone indicates he was supposed to meet the [unidentified number's subscriber.] At this time we don't know if [there is] another victim, in need of assistance, or if they are the perpetrator."

the murder and sent officers Stewart's subscriber information, incoming and outgoing call logs, text content, and real time tool (RTT) records.[2] Officers also filed a proper search warrant with Verizon, and the warrant was returned with the same information roughly a week after officers found Victim's body.

Using Stewart's CSLI data from the emergency disclosure form, officers determined that between 12:54 A.M. and 1:26 A.M. on the night of the murder, both Stewart and Victim were using the same service tower. A member of Charleston's cellular analysis survey team (CAST)[3] testified that both Stewart's and Victim's phones were within the same sector[4] of the tower between 1:16 A.M. and 1:17 A.M. He also stated both phones obtained service from a service area overlapping at the crime scene and that the overlapping service area was between seven-tenths and 1.21 miles wide.

Utilizing Stewart's subscriber information from the emergency disclosure form, officers learned his address in Chester County. Two days after discovering Victim's body, officers contacted Chester County police for assistance in locating Stewart and executing a search warrant on his home. After finding Stewart in Chester, Detective Will Kitelinger and a resource officer from Stewart's high school interrogated Stewart about his whereabouts on the night of Victim's murder.[5] Kitelinger read Stewart his *Miranda* rights, and Stewart signed a *Miranda* waiver form claiming he understood his rights. Thereafter, Stewart gave a videotaped confession detailing his participation in the murder. Stewart was with police in Chester for roughly two hours, and according to Kitelinger's written report, "after being confronted with the evidence, especially the text messages,

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[2] This data provided officers with Stewart's name and address; incoming and outgoing phone calls and texts, including dates, times, durations, numbers called or texted, cell towers connected to for each call or text, and verbiage of text conversations; voice logs; and CSLI data.

[3] CAST is a branch of the F.B.I. tasked with determining approximate locations of cell phones at a particular date and time based on CSLI data.

[4] A typical cell tower has a three-sided antenna with each side covering a 120-degree "pie-width shape," called a sector.

[5] Stewart was eighteen years old at the time of the murder and was enrolled as a student at Chester High School.

[Stewart] admitted to being in the victim's car and eventually shooting him."[6] Kitelinger also presented evidence to Stewart showing officers could place him in Myrtle Beach on the night of the murder.

The Horry County Grand Jury indicted Stewart for murder, possession of a deadly weapon during the commission of a violent crime, and attempted armed robbery, and the case proceeded to trial in October 2018. Prior to opening statements, the trial court heard arguments on Stewart's motions to suppress his confession and the phone data procured by the emergency disclosure form. Stewart objected to the State publishing his confession on the basis of the Sixth Amendment Confrontation Clause. Specifically, Stewart contended Kitelinger's interrogation amounted to testimony under *Crawford v. Washington*,[7] requiring suppression of the confession because Stewart did not have an opportunity to cross-examine Kitelinger before trial and he was unavailable to testify at trial. Further, Stewart argued the warrantless search of his data via the emergency disclosure form and the use of the data in his interrogation violated the Fourth Amendment.

The trial court denied both of Stewart's motions to suppress and ruled the videotaped confession was admissible regardless of Stewart's inability to cross-examine Kitelinger, stating *Crawford* was designed to protect a defendant against witnesses bearing testimony against him or her, not an officer's statements and questions during an interrogation. The court further ruled both the call and text logs were admissible under exigent circumstances, reasoning, "The protection of a[ potential] innocent third party engaged in communication with the decedent is a legitimate concern[,] . . . the only exigent circumstance which can be made to exist in this case." The trial court ruled, however, that exigent circumstances did not support the warrantless search of Stewart's CSLI data, which was not relevant to the protection of a third party, and it suppressed the CSLI data to the extent it was used in the interrogation or to link Stewart to the crime. The court ordered that any mention of the CSLI in Stewart's interrogation be redacted, but it ruled the same information found pursuant to the valid search warrant was admissible.

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[6] Neither Stewart's recorded confession nor Kitelinger's report were included within the record on appeal.

[7] 541 U.S. 36 (2004).

The jury found Stewart guilty as indicted, and the trial court sentenced him to an aggregate term of fifty-five years' imprisonment with credit for time served. This appeal followed.

## ISSUES ON APPEAL

I. Did the trial court err in denying Stewart's motion to suppress the CSLI data found during the warrantless search of his cell phone?

II. Did the trial court violate Stewart's Sixth Amendment right to confront adverse witnesses by admitting his recorded confession even though Kitelinger was unavailable to testify and Stewart had no prior opportunity to cross-examine Kitelinger?

## STANDARD OF REVIEW

In appeals involving a motion to suppress based on Fourth Amendment grounds, appellate courts apply a deferential standard of review and will reverse only in cases of clear error. *State v. Cardwell*, 425 S.C. 595, 599, 824 S.E.2d 451, 453 (2019). Under the "clear error" standard, an appellate court may not reverse a trial court's findings of fact merely because it would have decided the case differently. *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016). In reviewing Fourth Amendment cases, appellate courts must affirm a trial court's ruling if there is any evidence to support it. *Robinson v. State*, 407 S.C. 169, 180–81, 754 S.E.2d 862, 868 (2014).

## LAW/ANALYSIS

### I. Warrantless Search of Stewart's CSLI Data

Stewart argues officers violated his Fourth Amendment right against unreasonable searches and his right to privacy guaranteed under Article I, Section 10 of the South Carolina Constitution by collecting his CSLI data without a warrant. Specifically, Stewart asserts that the trial court erred in admitting the CSLI

evidence and his recorded confession as they were fruits of the illegal search. We disagree.[8]

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In this case, during the suppression hearing, the trial court ruled in Stewart's favor regarding the CSLI data and ordered that any mention of it in the recorded confession be redacted and that no "fruit" from the warrantless search was admissible at trial. *See Hutto v. State*, 376 S.C. 77, 81, 654 S.E.2d 846, 848 (2007) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." (quoting *State v. Copeland,* 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996))).

Stewart, in essence, won his motion to suppress all the evidence produced by the warrantless search of his CSLI data; on appeal, though, he argues the police exploited the ill-gotten CSLI data during his interrogation to produce the confession, making the entire confession fruit of the warrantless search. However, Stewart failed to include within the record on appeal his recorded confession or the redacted version published to the jury at trial, and therefore, he failed to provide an adequate record for this court's review. *State v. Tyndall*, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) ("An appellant has a duty to provide this court with a record sufficient for review of the issues on appeal."); *State v. Motley*, 251 S.C. 568, 164 S.E.2d 569, (1968) ("The general rule is that the admission of evidence is largely within the discretion of the trial judge and in order to constitute reversible error in the admission thereof, the accused must be prejudiced thereby; and the burden is upon him to satisfy this court that there was prejudicial error.").

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[8] At trial and in his appellant's brief, Stewart argued the trial court erred in admitting evidence of his subscriber information and call and text logs under the exigent circumstances doctrine. However, at oral argument, Stewart conceded he did not hold a reasonable expectation of privacy in his subscriber information or the call and text logs; therefore, we decline to address these issues. *See Bowaters Carolina, Corp. v. Carolina Pipeline Co.*, 259 S.C. 500, 505, 193 S.E.2d 129, 132 (1972) (per curiam) (stating appellate courts need not address issues conceded at oral argument).

Moreover, we find the trial court did not err in refusing to suppress the CSLI data under the South Carolina Constitution's express grant of privacy rights because the officers would have inevitably discovered the CSLI data under a valid search warrant. Article 1, Section 10 states, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." "[T]he inevitable discovery doctrine provides that illegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means." *State v. Moore*, 429 S.C. 465, 839 S.E.2d 882 (2020) (alteration in original) (quoting *State v. Cardwell*, 425 S.C. 595, 601, 824 S.E.2d 451, 454 (2019)). Here, only hours after the murder, officers utilized two valid warrants to search Victim's car and cell phones. A search of one phone disclosed all of Victim's recent phone calls and text messages with an unidentified phone number. Using a database, officers determined the unidentified number's service provider and contacted the provider to request the name of the individual associated with the phone number. The service provider named Stewart as the subscriber. Officers also legally obtained Stewart's address under the emergency disclosure form and had all of the text content between Victim and Stewart on the night of the murder. Finally, officers filed a proper search warrant with Verizon at roughly the same time they filed the emergency disclosure form, and Verizon provided the records a week after the murder, disclosing the same information and data as the emergency form. Because the officers legally obtained Stewart's name and address, and his CSLI data was legally obtained a week after the murder under a valid search warrant, we find the trial court did not err by refusing to suppress the CSLI data under Article 1, Section 10. *See id.* ("[I]llegally obtained information may nevertheless be admissible if the prosecution can establish by a preponderance of the evidence that the information would have ultimately been discovered by lawful means.").

Accordingly, we affirm on these issues.

## II. Confrontation Clause

Stewart argues the trial court violated the Sixth Amendment Confrontation Clause by admitting his recorded confession because Kitelinger was unavailable to testify

at trial. He contends Kitelinger's questions and remarks during the interrogation were testimonial, invoking his right to confront Kitelinger on cross-examination.[9]

The Confrontation Clause of the Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The right of a defendant to confront witnesses against him is not only applicable to state prosecutions under the Fourteenth Amendment, it is mandated by our state constitution. S.C. Const. art. I, § 14 ("Any person charged with an offense shall enjoy the right . . . to be confronted with the witness against him . . . .").

Out-of-court testimonial statements made by witnesses are inadmissible under the Confrontation Clause unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness. *See Crawford*, 541 U.S. at 68. The term "witness," as used in the Confrontation Clause, means those who "bear testimony" against the accused, and "[t]estimony . . . is . . . '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51 (second alteration in original) (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). Custodial examinations, confessions, and statements taken by police officers in the course of interrogation are all considered testimonial in nature. *Id.* at 51–52; *see also State v. Ladner*, 373 S.C. 103, 112, 644 S.E.2d 684, 688–89 (2007). The Confrontation Clause is directed at barring the *product* of police interrogation. *See Michigan v. Bryant*, 562 U.S. 344, 354 (2011). It has "no application outside the scope of testimonial hearsay." *Ladner*, 373 S.C. at 113, 644 S.E.2d at 689 (quoting Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 Tex. L. Rev. 271, 285 (2006)).

Here, we find Kitelinger's absence at trial and the admission of Stewart's recorded confession did not violate the Confrontation Clause. First, Kitelinger was not a witness "bearing testimony" against Stewart as defined in *Crawford*. Although Kitelinger was adversarial to Stewart in the sense that he was part of a legal system

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[9] Stewart also argues on appeal that Kitelinger's remarks were hearsay and therefore inadmissible at trial. However, he did not renew this objection at trial after raising this argument during the pre-trial hearing; thus, this argument is unpreserved for appellate review. *See State v. Turner*, 373 S.C. 121, 126 n.1, 644 S.E.2d 693, 696 n.1 (2007) (finding an issue is not preserved for appellate review when no objection is made at trial).

seeking to incarcerate him, Kitelinger was not making statements against Stewart as the subject of an interrogation; Kitelinger was conducting the interrogation. Second, an interrogating officer's questions or statements made during an interrogation cannot be testimonial as defined in *Crawford* because the nature of interrogation is inquisitive, not declaratory. *See Crawford*, 541 U.S. at 51 ("'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (alteration in original) (quoting Webster, *supra*)). Finally, the Confrontation Clause functions to bar the *product* of police interrogation that asserts incriminating facts against a defendant. The product of Kitelinger's interrogation—Stewart's responses to Kitelinger's questions—is testimonial, not Kitelinger's questions or statements. *See Bryant*, 562 U.S. at 354 ("The product of [interrogations solely directed at establishing the facts of a past crime], whether reduced to a writing signed by the declarant or embedded in the memory . . . of the interrogating officer, is testimonial." (quoting *Davis v. Washington*, 547 U.S. 813, 826 (2006))). Because Kitelinger's questions and statements made while interrogating Stewart were not testimonial, Stewart's recorded confession was not barred by the Sixth Amendment. *See Crawford*, 541 U.S. at 68 (finding nontestimonial statements are not barred at trial under the Confrontation Clause). Thus, we affirm on this issue.

**CONCLUSION**

Accordingly, Stewart's convictions and sentences are

**AFFIRMED.**

**THOMAS and HILL, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Elizabeth Campione, Appellant/Respondent,

v.

Willie Best, Respondent/Appellant.

Appellate Case No. 2018-002017

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Appeal From Richland County
Dana A. Morris, Family Court Judge

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Opinion No. 5874
Submitted May 3, 2021 – Filed December 1, 2021

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**AFFIRMED IN PART AND REVERSED IN PART**

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Victoria L. Eslinger and Marcus A. Manos, both of Nexsen Pruet, LLC, of Columbia, for Appellant/Respondent.

Suzanne L. Hawkins, of Duff Freeman Lyon, LLC, of Columbia, for Respondent/Appellant.

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**HILL, J.:** Elizabeth Campione and Willie Best divorced in 2008 after thirty-three years of marriage. The parties entered into property settlement agreements in 2008 and 2009, which were approved by and became non-modifiable orders of the Family Court. At the time of the divorce, Best owned numerous patents and other intellectual property, which he valued at $30 million on his financial declaration. Their settlement agreement included the following provision:

> Husband has been and is currently receiving payments from patents, trademarks, and licensing agreements. Husband anticipates continuing to receive such payments for current and future patents, trademarks, and licensing agreements. From the funds which are being paid from Husband's current and future patents, trademarks, and licensing agreements, Husband shall pay to Wife the sum of $50,000 per year, which shall be paid in equal consecutive quarterly installments of $12,500 per quarter . . . . The payments shall be made from the funds Husband earns from current and future patents, trademarks, and licensing agreements. If Husband earns less than $50,000, Wife shall receive all of that which Husband earns. If Husband earns in excess of $50,000, Husband shall have all the funds which exceed the $50,000.

The 2009 supplemental agreement also required Best to maintain Campione as the irrevocable beneficiary on Northwestern Mutual Life Insurance Policies Nos. 052 and 198. It is undisputed Best later substituted his company as the sole beneficiary in place of Campione on Policy No. 198 but simultaneously named Campione as beneficiary of a new policy with a similar benefit amount.

The parties' agreement further provided Best would pay Campione $12,000 in monthly alimony by direct deposit. After the divorce, Best paid his monthly alimony obligation by directly depositing his social security check into Campione's account, together with a second payment for the balance. Best's social security benefit increased over time, but he never reduced the amount of his second payment, resulting in an overpayment of alimony to Campione.

In 2016, Campione brought this contempt action against Best, claiming he had failed to make the quarterly payments and maintain her as the beneficiary on Policy No. 198. Best countered with his own contempt action, alleging he had overpaid Campione alimony.

Best claimed he ceased the quarterly payments because he sold all the patents to Char-Broil in 2009. In the sale, Char-Broil purchased the patents from Best for $20,625,000. In return, Best obtained a note wherein Char-Broil promised to pay him $375,000 per quarter through June 2023. Best had recently received advice

from a patent lawyer that the sale meant Char-Broil owned the patents and the sale proceeds were no longer subject to the quarterly payment provision.

The Family Court ruled the quarterly payments provision was broad enough to encompass the Char-Broil payments and Best must resume making them. It further ruled Best owed Campione $75,000 plus interest in missed payments. The Family Court refused to hold Best in "willful contempt because he has taken the position that he was, perhaps, relying on the advice of an attorney."

However, Best was held in contempt for removing Campione as beneficiary on Policy No. 198. As to Best's contempt action, the court found Campione did not violate the order by retaining the $26,025 in alimony overpayments but allowed Best to set the overpayments off against the $75,000 he owed Campione in past due quarterly payments. Finally, the Family Court awarded Campione $60,000 in attorney's fees and costs. Both sides now appeal.

## I. *Standard of Review for Civil Contempt*

Civil contempt occurs when a party willfully disobeys a clear and definite court order. *See Phillips v. Phillips*, 288 S.C. 185, 188, 341 S.E.2d 132, 133 (1986); *see also Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973) (to support contempt finding, language of court order "must be clear and certain rather than implied"). In the context of civil contempt, an act is willful if it is "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." *Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988) (citation omitted). Contempt must be proven by clear and convincing evidence, and the record must demonstrate the specific contemptuous act. *Ex parte Lipscomb*, 398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct. App. 2012); *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982). We review contempt orders for abuse of discretion, meaning we may only disturb them if they are based on incorrect law or inadequate evidence. *Means v. Means*, 277 S.C. 428, 431, 288 S.E.2d 811, 812–13 (1982).[1]

[1] Although *Stoney v. Stoney*, 422 S.C. 593, 595–96, 813 S.E.2d 486, 487 (2018), did not address family court contempt actions or overrule *Means*, we are mindful it may mean our standard of review is de novo rather than abuse of discretion. Even if we widened our scope of review to de novo as to each issue raised by this appeal, it

II.

A. *The Quarterly Payment Provision*

Best contends the Family Court erred in finding the Char-Broil payments were covered by the quarterly payment provision. Campione claims the Family Court erred in not finding Best in contempt of the provision.

A court order or judgment is construed like any written instrument. *Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014). Whether a court order is clear and unambiguous is a question of law for the court. Courts are empowered to interpret their own orders, and the interpretation does not typically require or permit translation by witness opinion. The Family Court quite correctly refused to allow Best's patent counsel to testify about his interpretation of the quarterly payment provision. *See Carter v. Bryant*, 429 S.C. 298, 313, 838 S.E.2d 523, 531 (Ct. App. 2020) (expert testimony on law generally inadmissible). In fact, there was no room for interpretation as the intent and meaning of the quarterly payment provision is readily revealed by its plain language. *Doe*, 407 S.C. at 135, 754 S.E.2d at 498.

We agree with the Family Court that the quarterly payment provision covers the Char-Broil payments as they represent funds Best continues to earn from patents. Viewing the record against the quarterly payment order, there is no fair ground to doubt the Char-Broil payments were subject to it. The payments are earnings from patents he owned at the time of the agreement, which comprise a fund from which he is being paid until 2023. To be sure, Best could have structured the 2009 sale to receive the entire sale price that same year and had that happened he would not have had to pay Campione from those funds beyond that date. But that is not what happened.

While we agree with the Family Court's reading of the quarterly payment provision, we agree with Campione that there is clear and convincing evidence Best willfully violated it. The provision was a clear and unambiguous order of the Court. That is likely why Best continued to make the quarterly payments for seven years after the Char-Broil sale. He boasted that after he signed the provision, he never read it again until this contempt action arose. This curious admission sinks Best's claim that he

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would not affect our resolution. We would decide each issue the same. *See also Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011).

sought the advice from patent counsel before stopping the payments and the contempt action began. It also puts to bed any idea Best was acting in good faith.

As to Best's reliance on the advice of counsel, we hold even had he obtained the advice before stopping the payments, it would be no defense to a civil contempt action. *Columbia Water Power Co. v. City of Columbia*, 4 S.C. 388, 401 (1873) (advice of counsel not a defense to contempt but may be a mitigation); *see also Ex parte Chambers*, 898 S.W.2d 257, 261 (Tex. 1995) (same); *see generally* 17 Am. Jur. 2d Contempt § 145; 17 C.J.S. Contempt § 61. We decline to permit the mere advice of counsel to immunize parties from claims of contemptuously disobeying plain and explicit court orders.

We acknowledge a party who attempts in good faith to comply with a court order should not be held in contempt. *Lipscomb*, 398 S.C. at 470, 730 S.E.2d at 324. But the record discloses Best's road to contempt was not paved with good faith but with cunning. *See State ex rel. Love v. Howell*, 285 S.C. 53, 55, 328 S.E.2d 77, 78 (1985). For instance, Best insisted the stream of payments from Char-Broil he has received since the 2009 sale were not earnings from his patents but from "the note." In the contempt context, failure to obey is not excused just because a party dons blinders and convinces himself a court order does not mean what it plainly says. We therefore reverse the Family Court order on this issue and hold Best willfully violated the quarterly payment provision.

B. *The Life Insurance Beneficiary Provision*

Best asserts the Family Court erred in finding he committed contempt by switching out the beneficiary on Policy No. 198. He maintains the switch caused Campione no harm because he named her as the beneficiary of a new policy in a similar amount. Best explained he made the switch to save on premiums and ease the financial stress he and his company were under after the recession. These events provided no license to disobey the court order. *See Means*, 277 S.C. at 431, 288 S.E.2d at 812–813 (holding ex-husband in contempt for removing wife as beneficiary of life insurance policy in violation of court order; ex-husband's claim that he was forced to cash in policy to pay for son's education unavailing). Besides, Campione was harmed. The record reverbs with concrete proof of the anxiety she endured and the needless time and energy she spent trying to restore the financial security the life insurance provision was designed to provide her. We therefore affirm that Best's removal of Campione as the beneficiary of Policy No. 198 constituted civil contempt.

C. *Set Off of Best's Alimony Overpayments Against His Quarterly Payment Debt*

Campione assails the Family Court's set off ruling on several grounds. She first claims set off was an affirmative defense Best failed to plead. This argument misfires, as the set off issue arose from Best's–not Campione's–contempt pleading. As such, the concept of an affirmative defense does not apply.

Next, Campione contends Best is equitably estopped from refund of the overpayment because he failed to monitor the amount of his social security benefit, causing Campione to rely on the additional alimony. Estoppel has numerous elements, including affirmatively misleading conduct by a party with the intent that the other party rely upon it to her detriment and that the relying party lacked knowledge of or the means to obtain knowledge of the true facts. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916–17 (2017). Best's conduct was more akin to inattention than intent, and estoppel does not bar his right to a refund, particularly as Campione knew or should have known of the overpayment when it hit her account. The Family Court based the set off on its equity powers, powers we conclude were sensibly used.

Finally, Campione claims the Family Court erred by receiving information after the final hearing about Best's historical social security benefit amounts and then ruling on the set off amount without convening an additional hearing. Despite opportunity, Campione never objected to this procedure, and consequently, the issue is not preserved for our review.

D. *Attorney's Fee Award*

Best protests the $60,000 attorney's fee award as being too much; Campione says it is too little. We agree with the Family Court that Campione's requested fees of $110,000 far exceeded the range of reasonableness for the issues tried. The correct measure for attorney's fees awards in civil contempt cases focuses on the reasonableness of the fees sought and the benefit obtained without regard to the financial impact of the award. *Miller v. Miller*, 375 S.C. 443, 463, 652 S.E.2d 754, 764 (Ct. App. 2007). Fee awards in contempt cases serve to reimburse a party for the reasonable fees and costs incurred to enforce a court order, not to punish. *Poston v. Poston*, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998). Therefore, the Family Court should have applied the *Miller* and *Poston* factors rather than the criteria for awarding fees in other types of family court matters as set forth in *E.D.M. v. T.A.M.*,

307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992) (entitlement to attorney's fees), and *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (amount). Fortunately, this is of no moment here as the Family Court order well analyzed the reasonableness of Campione's fees and the benefits she obtained. We therefore affirm the award of $60,000 in fees to Campione.

**AFFIRMED IN PART AND REVERSED IN PART.**[2]

**THOMAS and GEATHERS, JJ., concur.**

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