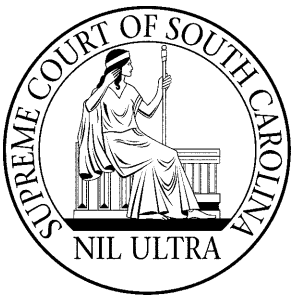

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 2, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gene B. Schwiers, Respondent,

v.

South Carolina Department of Health and Environmental Control and Stewart W. Heath, Respondents below,

Of whom South Carolina Department of Health and Environmental Control is the Respondent,

And

Stewart W. Heath is the Appellant.

Appellate Case No. 2016-002136

Appeal From The Administrative Law Court
Harold W. Funderburk, Jr., Administrative Law Judge

Opinion No. 5700
Heard May 6, 2019 – Filed December 31, 2019

REVERSED

Eugene LeRoy Nettles, III, of Nettles Turbeville & Reddeck, of Lake City, for Appellant.

Gene B. Schwiers, of Greenville, pro se.

Bradley David Churdar, of Charleston, for the South Carolina Department of Health and Environmental Control.

MCDONALD, J.: In this contested permitting matter, Stewart Heath appeals the Administrative Law Court's (ALC's) order denying his application to amend a critical area permit to modify his private dock. Heath argues the ALC committed errors of law in finding the proposed modifications failed to comply with the requirements of the Coastal Zone Management Act, specifically section 48-39-150 of the South Carolina Code (2008 & Supp. 2019), and critical area regulations 30-12(A)(1)(e) and (p) of the South Carolina Code of Regulations (2011). Heath further asserts the ALC erred in failing to consider the relevant site specific characteristics and disregarded regulation 30-11(A)(2)'s requirement that DHEC ensure consistent permit evaluations. We reverse.

Facts and Procedural History

In 2012, DHEC approved Heath's application for a permit to modify his existing private use dock on Main Creek in Garden City. In 2015, Heath applied to amend the permit to authorize him to shift his existing floating dock northward and add a second boatlift. After considering Heath's application and letters from neighboring property owners objecting to the proposed modifications, DHEC approved the amended permit. Gene Schwiers, the landowner of an adjacent parcel and dock, requested the South Carolina Board of Health and Environmental Control (the Board) conduct a final review of the permitting decision.[1]

After the Board declined to conduct a final review conference, Schwiers filed a request for a contested case hearing before the ALC. In her prehearing statement, Schwiers argued the proposed location of Heath's boatlift "would have a negative impact on [her] family's enjoyment of [their] property because it would be an impediment to [their] visual corridor." She noted other neighboring property owners were concerned DHEC's "continued approval of encroachment" could result "in the loss of value in the property owned by those impacted." In its

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[1] Schwiers is a general partner of Sparkling Waters, LP, the legal owner of the property adjacent to Heath's property.

prehearing statement, DHEC asked that the ALC affirm its issuance of the amended permit, explaining it determined Heath's requested modifications to the existing dock would cause no material harm to the policies of the Act[2] because the proposed modifications were consistent with other docks along the Main Creek corridor and the resulting dock spacing would be consistent with the spacing of other docks in the vicinity.

During the hearing before the ALC, Schwiers testified the proposed boatlift would interfere with her complete enjoyment of her dock and her family's ability to navigate a twelve-foot kayak between Heath's dock and her own dock. She acknowledged some docks in the area had two boatlifts but asserted less than half of the docks along her street had two boat storage structures. In her opposition letter to DHEC, Schwiers complained the addition to Heath's dock would "encroach on [her] dock drastically," leaving "little to no room" between their docks, "and completely block her ability to fish, crab, catch minnows, and [participate in] all other water activities to the north side." She also stated her nephew would no longer be able to swim in the inlet or kayak on the north side of the dock and her elderly mother's activities from the north side of the pierhead would be restricted.[3]

Christopher Stout, Wetlands Section Project Manager for DHEC's Office of Ocean and Coastal Resource Management (OCRM), was project manager for DHEC's review of Heath's application to amend his critical area permit. According to Stout, Heath satisfied Regulation 30-12's project standards for adding the boatlift in that "Mr. Heath has an existing dock and what he has asked for fits within the purview of square footage and the actual number of boat storage structures that are allowed by the regulation." Stout testified that although Heath's existing dock was outside of his extended property lines—and thus did not comply with the general agency standard—it had been "grandfathered" because its construction predated the Act. There were "a significant number of grandfathered structures" on Main Creek, some of which did not adhere to the general standard concerning extended property lines. In evaluating Heath's application, Stout considered that at its closest point, Heath's proposed boatlift would be sixteen feet from Schwiers's fixed

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[2] *See* S.C. Code Ann. §§ 48-39-10 to -360 (2008 & Supp. 2019).

[3] The ALC admitted opposition letters DHEC received from neighboring property owners as examples of documents DHEC reviewed in issuing the permit. Heath has not challenged the admission of these letters on appeal.

pierhead. Schwiers's stairs lead south, away from the Heath dock; thus, the boatlift addition would not impact her ability to access the water from the other sides of her dock. Stout also considered the characteristics of the area, noting portions of five docks belonging to other landowners crossed into Heath's own dock corridor, between his extended property lines. The ALC admitted an aerial image showing Heath's dock and the docks encroaching within his extended property lines.

The ALC reversed DHEC's decision and denied Heath's amended permit application, finding the proposed location of the boatlift violated § 48-39-150(A)(10) and regulation 30-11(B)(10)[4] because the addition would result in material harm to the policies of the Act as referenced in regulation 30-12(A)(1)(p). In referencing the testimony presented at the hearing, the ALC noted, "Petitioner's objection concerning the inability to fish or crab, deals exclusively with preference of location on her pier, and the boatlift would not significantly hamper Petitioner's ability to engage in that activity." However, "the whole of the proposed construction [would] take place on Petitioner's side of the joint extended property line, thereby causing material harm to the policies of the Act as referenced in S.C. Code Ann. [§] 48-39-150(A)(10); 2 S.C. Code Ann. Regs. 30-11(B)(10) and 30-12(A)(1)(p)."

Heath moved to reconsider, challenging the ALC's emphasis on Schwiers's extended property lines as error due to the site specific characteristics of this section of Main Creek. Heath further questioned the order's finding as to the proposed boatlift's impact on Schwiers's value and enjoyment of her property, arguing Schwiers presented no evidence "that the dock modification would negatively affect the *value* of [Schwiers's] property."

The ALC denied Heath's motion to reconsider but issued an amended final order. The ALC again concluded the proposed location of the boatlift violated § 48-39-150(A)(10) and regulation 30-11(B)(10) because "the proposed boatlift will affect the value and enjoyment of adjacent owners to the extent of producing material harm to the policies of the Act." The ALC found, "The ability to swim, kayak, and fish from Petitioner's dock is sufficiently impeded by the close proximity of the proposed second boatlift to constitute material harm to the policies of the Act."

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[4] S.C. Code Ann. Regs. 30-11(B)(10) (2011). The considerations of Regulation 30-11(B) mirror those of § 48-39-150(A).

Standard of Review

In an appeal from the ALC, the Administrative Procedures Act provides our standard of review. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014) (citing S.C. Code Ann. § 1-23-610(B) (Supp. 2019)). Appellate courts must confine their analysis to whether the ALC's decision is:

> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id.

"Thus, this court can reverse the ALC if the findings are affected by error or law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 64, 663 S.E.2d 497, 501 (Ct. App. 2008).

In determining whether the decision of the ALC was supported by substantial evidence, a reviewing court "need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC." *Kiawah Dev. Partners II*, 411 S.C. at 28, 766 S.E.2d at 715. "However, the court may reverse the ALC decision where it is in violation of a statutory provision of it is affected by an error of law." *Id*.

Law and Analysis

I. Section 48-39-150(A) and Material Harm to the Policies of the Act

The General Assembly passed the Coastal Zone Management Act in 1977. *See* §§ 48-39-10 to -360. Section 48-39-20 of the Act sets forth the following relevant legislative findings:

> (A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.
>
> (B) The increasing and competing demands upon the lands and waters of our coastal zone . . . have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.
>
> . . . .
>
> (D) The coastal zone . . . may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.
>
> (E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

According to § 48-39-30(A), "[T]he basic state policy . . . [of the Act] is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." The Act sets forth the following relevant state policies:

> (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment . . . ;
>
> (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
>
> . . . .
>
> (5) To encourage and assist state agencies . . . . to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

§ 48-39-30(B).

The Act provides that in determining whether to approve or deny a permit application, DHEC

> shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:
>
> (1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.
>
> (2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. . . .
>
> (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural

> resources in a particular area including but not limited to water and oxygen supply.
>
> (4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.
>
> (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.
>
> (6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.
>
> (7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.
>
> (8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.
>
> (9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.
>
> (10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

§ 48-39-150(A). The Act further requires that "[a]fter considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the department finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit." § 48-39-150(B).

Heath argues the ALC erred in basing its decision solely on § 48-39-150(A)(10)'s "value and enjoyment" factor while ignoring the nine other statutory considerations

DHEC must examine when determining whether to approve or deny a critical area permit. He contends the proposed boatlift would only affect Schwiers's ability to swim, kayak, and fish from the northern side of her dock—she would still be able to pursue these activities from the other sides of her dock. Heath asserts any such limitations were recreational only and did not affect the value of Schwiers's property, deep water access from her dock, or her ability to use or access her property.[5] Finally, Heath contends the ALC erred in finding the potential impact upon recreational activities in a private dock dispute rose to the level of causing "material harm to the policies of the Act." We agree.

Although our appellate courts have considered contested dock permits in a number of cases, few have addressed an ALC's finding that the location of a private dock constitutes a material harm to the policies of the Coastal Zone Management Act. In *White v. South Carolina Department of Health & Environmental Control*, this court reviewed an ALC order requiring the Coffin Point Homeowners Association to rebuild its community dock in accordance with its permit as originally issued. 392 S.C. 247, 257–58, 708 S.E.2d 812, 817–18 (Ct. App. 2011), *overruled by on other grounds by Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 810 S.E.2d 856 (2018). Although the drawing attached within Coffin Point's original application showed its proposed dock would be twenty feet from White's extended property line, the dock as constructed crossed over the extended property line, causing substantial disruption to White's commercial dock, where he sold fuel and ice to shrimpers. *Id.* at 251, 708 S.E.2d at 814. White testified his business earnings had steadily declined since the installation of the community dock; additionally, two of his customers testified about the adverse impact of the dock's location, explaining the distance between the docks combined with the size of their shrimp boats presented a danger of their boats colliding with the community dock. *Id.* at 257, 708 S.E.2d at 817–18. Thus, the ALC concluded the location of the dock constituted a material harm to the policies of the Act with respect to both the public's ability to navigate the creek and White's ability to conduct his business. *Id.*

[5] Schwiers presented no evidence of impact the second boatlift might have on the value her property. Although very little of Schwiers's testimony was included in the record, her opposition letter was admitted during the hearing. The opposition letter does not address property value.

In analyzing Coffin Point's challenge to the ALC's decision, the court was careful to differentiate between private navigational disputes and the disruption of a commercial enterprise and its customers, explaining:

> Coffin Point cites the case of *Dorman v. South Carolina Department of Health and Environmental Control* in support of its argument that policing disputes between neighboring dock owners is not within the policies of the Act. 350 S.C. 159, 171, 565 S.E.2d 119 (Ct. App. 2002). *Dorman* involved objections to a proposed boat dock from neighbors on both sides of the applicant's property. 350 S.C. at 162-63, 565 S.E.2d at 121. The neighboring property owners objected on the grounds that the proposed dock would crowd too close to their existing docks and the roof would impinge their view. 350 S.C. at 163, 565 S.E.2d at 121. This court adopted OCRM's interpretation of Regulation 30-12, which included the position that any navigational issue between private docks is a private property issue. *Id*. at 171, 565 S.E.2d at 126. Specifically, the Appellate Panel of OCRM stated "It is not the policy of OCRM to police navigational disputes that should be dealt with among adjacent property owners." *Id*. at 163, 565 S.E.2d at 121 (internal quotation marks omitted). This court remanded the case to the ALJ to determine whether the permit should be granted in light of OCRM's interpretation of Regulation 30-12. *Id*. at 171-72, 565 S.E.2d at 126.
>
> In contrast, the present case involves the disruption of a commercial enterprise and its customers. The objection lodged by White does not involve merely a private dispute with Coffin Point, but also concerns the needs of White's customers, who themselves are members of the public, and the local shrimping industry in general. Unlike *Dorman,* this case does not involve a mere private navigational dispute. Therefore, the ALJ's conclusion that the location of Coffin Point's dock presents a significant navigational hazard does not conflict with OCRM'S

> policy of avoiding the regulation of private navigational disputes.

Id. at 256, 708 S.E.2d 812, 816–17.

In affirming the ALC's finding that the location of the Coffin Creek dock "constitute[d] material harm to the policies of the Act," the *White* court recognized § 48-39-150(A) requires DHEC "to base its evaluation on [a permit application's] individual merits." *Id.* at 257, 708 S.E.2d at 17. The court emphasized the unique circumstances of the case, noting a DHEC official's admission that "staff would consider any 'significant impact' on a neighboring dock to constitute material harm to the policies of the Act." *Id*. at 257–58, 708 S.E.2d 817–18; *see also Maull v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 349, 361, 768 S.E.2d 402, 409 (Ct. App. 2015) (distinguishing *White* from a permitting case involving two private docks because *White* involved a commercial enterprise and serious navigational safety concerns of the public).

Here, Schwiers has not demonstrated the "significant impact" described in *White*, and the record lacks the substantial evidence necessary to support the ALC's denial of the permit under § 48-39-150(10) alone. The ALC's amended order correctly cites *Olson*, 379 S.C. at 57, 663 S.E.2d at 497, as an example of a case in which impact on an adjacent owner's "value and enjoyment" supported the denial of a dock permit. However, in *Olson*, in addition to their testimony that the proposed dock would affect their recreational pursuits, both opposing property owners testified the proposed dock would lower their property values because of its close proximity to their existing docks. 379 S.C. at 67, 663 S.E.2d at 503; *see also White*, 392 S.C. at 257, 708 S.E.2d at 817–18 (in which the commercial dock owner testified his business earnings had steadily declined since the construction of the community dock). Moreover, the Olsons sought to construct a dock on non-waterfront property between two existing docks; the resulting space between the new and existing docks would have been seven and forty-four feet, respectively. *Olson*, 379 S.C. at 67, 663 S.E.2d at 503.

The ALC found DHEC's denial of the *Olson* permit was warranted based on both the impact of the dock on the adjacent owners' value and enjoyment and "the extent to which long-range, cumulative effects of the project may result with the context of other possible development and the general character of the area." *Id.* at 62, 663 S.E.2d at 500. This court affirmed, as substantial evidence supported both

findings. *Id.* at 66–68, 663 S.E.2d at 502–03. But the *Olson* considerations differed from those of this case because an alleged impact to value and enjoyment was not the *sole* basis for denial of the permit, and there is no indication that the site-specific characteristics of the non-waterfront Romain Retreat property at issue were similar to those here.

Schwiers conceded during oral argument that she presented no evidence to the ALC that the proposed boatlift would decrease the value of her property. The evidence in the record established the boatlift addition would not affect deep water access from Schwiers's dock nor her family's ability to access the property. Rather, the only testimony Schwiers presented during the ALC hearing was that the proposed location of the boatlift could interfere with her complete recreational enjoyment of the north side of her dock. In her opposition letter, Schwiers claimed the proposed boatlift would encroach on her dock by leaving little to no room between her dock and Heath's and would completely block her ability to fish, crab, and catch minnows from the north side of her dock. Neither the letter nor Schwiers's testimony addressed the value of Schwiers's property. Accordingly, we find the record lacks substantial evidence to support the ALC's finding that the proposed boatlift would significantly impact Schwiers's "value and enjoyment" under § 48-39-150(A)(10) to the extent it would rise to the level of a "material harm to the policies of the Act."

In addressing the nine other factors of § 48-39-150(A), the ALC found the boatlift addition would not harmfully obstruct the natural flow of navigable water; affect production of wildlife, habitats of endangered species or historic sites along the coastal zone; cause erosion or creation of stagnant water; or affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources. Such considerations fall clearly within the policies of the Coastal Zone Management Act as set forth in the legislative declaration of findings set forth in § 48-39-20 and the legislative declaration of policy detailed in § 48-39-30. Because we find the substantial evidence does not support the ALC's conclusion that the addition of the proposed boatlift to the already existing dock would result in material harm to the policies of the Act, we reverse the ALC's denial of the permit under § 48-39-150(A).

II. Violation of Regulation 30-12(A)(1)(p)

Heath next asserts the ALC erred by finding the proposed boatlift's construction over extended property lines constituted a material harm to the policies of the Act in violation of regulation 30-12(A)(1)(p). He further contends the ALC failed to consider the individual merits of his application, specifically the need for an alternative dock alignment given the characteristics of the site in relation to the other grandfathered docks in the area. Heath persuasively argues the ALC failed to give deference to DHEC's interpretation and application of its own regulations and that DHEC properly considered an alternative alignment across extended property lines under regulations 30-12(A)(1)(e) and (p) because portions of several other landowners' docks already lie within Heath's own extended property lines.[6]

During his testimony, Stout was asked about the application of regulation 30-12(A)(1) to DHEC's consideration of Heath's permit application. Regulation 30-12(A)(1) sets forth project standards for docks and piers constructed over and on South Carolina's tidelands and coastal waters, and provides in pertinent part that:

> (e) All applications for docks and piers should accurately illustrate the alignment of property boundaries with adjacent owners and show the distance of the proposed dock from such extended property boundaries. For the purpose of this section, the extension of these boundaries will be an extension of the high ground property line. The Department may consider an alternative alignment if site

[6] "[W]he[n] an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Kiawah Dev. Partners, II*, 411 S.C. at 34–35, 766 S.E.2d at 718 (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); *but see S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) (noting the agency's reviewing body, "not [agency] staff, is entitled to deference from the courts").

> specific characteristics warrant or in the case of dock master plans, when appropriate.
>
> . . .
>
> (p) No docks, pierheads or other associated structures will be permitted closer than 20 feet from extended property lines with the exception of joint use docks shared by two adjoining property owners. However, the Department may allow construction closer than 20 feet or over extended property lines where there is no material harm to the policies of the Act.

S.C. Code Reg. 30-12(A)(1)(e) and (p).

Stout acknowledged subsection (p) generally requires docks be constructed no closer than twenty feet from extended property lines but asserted the Regulation allows docks to be closer and to cross extended property lines if such would cause "no material harm to the policies of the Act." According to Stout, "the site-specific characteristics of this section of Main Creek warrant[ed] an alternative alignment" for Heath's dock because other existing docks in the area reached outside their own extended property lines and into Heath's dock corridor. Heath's requested spacing was consistent with the spacing of docks in the area, and several other docks in the area had two permitted boat storage structures.

Stout testified the distance between Heath's relocated floating dock and the adjoining property north of his was twenty-two feet. He characterized the area as "crowded" even though some docks were more than twenty feet apart due to construction on grandfathered docks outside their various dock corridors. While Stout recognized the addition of the boatlift would result in less open space between Schwiers's and Heath's docks, he noted the stairs for Schwiers's dock led south, away from Heath's dock, and would be the point of entry for her family to enter the water.

Unfortunately, Stout did not speak to Schwiers about her concerns and never met on site with her or the other property owners to discuss the activities they claimed the Heath boatlift addition might limit. Stout testified DHEC was required to contact citizens opposing a permit application only when clarification was needed

as to the nature of the opposition. Here, no such clarification was necessary because Schwiers's "comments and concerns were very clear." Schwiers cogently detailed her concerns and opposition to the boatlift addition in her written correspondence to DHEC.

Stout testified he considered "the use and enjoyment of adjacent docks in [his] decision making." He explained, "What we review is our site visit photographs, aerial photographs that can be produced either through the county's website, Google Earth or our GIS data reviews. We look at the features of your [Schwiers's] dock and where they sit in reference to the dock that's being modified." At the time of the contested case hearing, Stout had been doing dock permit reviews in this area of Main Creek for eight years and noted other docks in the immediate area with "much less than 16.5 feet" between them. Some docks had less than ten feet between them; others were almost touching. Finally, Stout noted DHEC's policies "actually encourage boatlifts" to keep boats off the bottom of the creek floor.

DHEC determined the site-specific characteristics of this area of Main Creek warranted an alternative alignment for the modification to Heath's dock—thereby allowing him to be closer than twenty feet from the extended property line—because his existing dock was already outside of the extended property lines, as were a number of other grandfathered docks in the area. In its prehearing statement, DHEC explained it found the boatlift addition would cause no material harm to the policies of the Act because the proposed modifications and spacing were consistent with other docks along Heath's street and in the vicinity.

The ALC concluded the proposed boatlift location in relation to extended property line constituted material harm to the policies of the Act because it "affected the value and enjoyment" of Schwiers's property. Because we find the ALC erred in finding the impact to Schwiers's recreational use rose to the level of "material harm to the policies of the Act," we likewise reverse any finding that permitting the proposed location of the boatlift outside of Heath's extended property lines would rise to the level of material harm to the policies of the Act under regulation 30-12(A)(1)(p).[7]

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[7] Heath also argues the ALC erred in failing to consider the provision of regulation 30-11(A)(2) requiring DHEC to ensure consistent permit evaluations. *See* R. 30-1(A)(2)(b) (stating "[t]hese rules and regulations are intended to . . . insure

Conclusion

For the foregoing reasons, the decision of the ALC denying Heath's application to amend his critical area permit is

REVERSED.

LOCKEMY, C.J., and SHORT, J., concur.

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consistent permit evaluations by the Department."). Because we reverse on other grounds, we decline to reach the merits of this issue. *See Futch v. McAllister Towing of Georgetown, Inc*., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the appellate court need not address the appellant's remaining issues when disposition of prior issues is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Bauckman, Respondent,

v.

Jennifer McLeod, Appellant.

Appellate Case No. 2017-000885

Appeal From Sumter County
George M. McFaddin, Jr., Family Court Judge

Opinion No. 5701
Heard September 10, 2019 – Filed December 31, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John Eagle Miles, Sr., and Everett Joseph Mercer, both of Sumter, for Appellant.

Richard Thomas Jones, of Jones Seth & Jones, LLP, of Sumter, for Respondent.

GEATHERS, J.: In this action to determine child support arrearages, Jennifer McLeod ("Mother") challenges the family court's final order, arguing the family court erred in 1) reducing the amount of child support arrearages owed by Robert Bauckman ("Father"); 2) failing to award judgment interest on the arrearage amount;

3) failing to modify Father's current support obligation; and 4) awarding attorney's fees and costs to Father. We affirm in part, reverse in part, and remand.

FACTS

Mother and Father were married on September 16, 1997. The parties have one son ("Child") who was born in 1999. The parties divorced on November 25, 2002, and the family court's final order required Father to pay $399 a month in child support. The order provided that payments were to be made directly to Mother but included a provision for payment through the court should Father ever be more than fourteen days late.

Around April 2008, Father began paying $240 a month in child support and made no payments during the summer months in which Child was visiting with Father.[1] In November 2015, Father resumed paying $399 a month in child support. On November 30, 2015, Father filed a summons and complaint, notice of motion, and motion for temporary relief in which Father asked the court to "increase" his child support payments to $399[2] a month and declare him current on his child support obligation. On January 4, 2016, Mother filed her answer and a counterclaim seeking an accounting of the arrearage on unpaid child support, including interest, and a modification of child support based on Father's increase in income. Father filed a reply on January 28, 2016, alleging the reduction of child support was not a unilateral decision and arguing that equitable estoppel precluded Mother from collecting the arrearages and interest on the unpaid child support.

A final hearing was held on May 25, 2016. At the hearing, Father stipulated that his arrearages totaled $17,430. Father testified that he remarried and now had two children with his new wife. Concerning the reduced child support payments, Father claimed that he called Mother in March 2008 to notify her that he was having a difficult time making the $399 payment and paying for Child's insurance. According to Father, Mother agreed that the court ordered child support was "a lot of money" and suggested he start paying $240 a month, indicating that amount "would be sufficient." Additionally, Father testified that Mother told him not to pay child support during the summer while Child was visiting with Father because he

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[1] Father is a resident of Oldham County, Kentucky.

[2] Father's request to have his child support obligation increased to $399 a month suggests that he acted under the assumption that his reduced payments modified the child support obligation of $399 a month established in the original divorce decree.

was taking care of Child and "footing the bill" for Child's airfare.[3] Father further indicated that Mother never complained about the reduced payments, filed an action for contempt, or filed an affidavit with the court to have child support paid through the clerk's office. To the contrary, Father testified that Mother had indicated Child "was well taken care of and she had no money issues."

Father further testified that he relied on Mother's assurances that he only had to pay $240 a month in child support. Additionally, Father testified that the entire arrearage issue had arisen over a pair of "Beats" headphones. Father indicated that his new wife had purchased Child a pair of "Beats" headphones for behaving and working on his summer-school assignments. However, Father's wife took the headphones away from Child as punishment for cutting up Father's youngest son's t-shirt. Mother called Father in November 2015 to discuss the headphones incident, but Father's wife answered the phone and the two got into a disagreement. According to Father, Mother sought to enforce the entire child support obligation after this incident, asserting that Father owed her $14,310 in arrearages. Finally, Father testified he never sought a child support modification from the family court but thought that he was doing the right thing.

Child's maternal grandmother, Patsy Royal ("Grandmother"), testified that Mother and Child lived with her for a period of time following Mother and Father's divorce. After Grandmother's mother died, she used some of her inheritance to buy a house for Mother and Child. Grandmother further testified the original $399 child support payments were not always enough to cover Child's expenses and Child's doctor did not accept Father's insurance. As a result, Grandmother testified she often helped pay for Child's doctor visits and would write checks for his school lunch account. Grandmother indicated Mother was struggling financially for a while and Grandmother helped co-parent Child because Mother needed the support.

Mother testified she remarried and has a two-year-old daughter with her new husband. Concerning the reduced child support payments, Mother indicated Father called to inform her that he had been receiving unemployment and would not be able to pay the full amount. Mother explained that she thought the reduced payment was a one-time thing and that Father would pay her back the next month. Mother further indicated $240 was not enough to provide for all of Child's needs and she did not have the excess income needed to cover the $159 difference. Mother testified that

[3] We note there is nothing in the original divorce decree granting Father relief from child support while Child was living with him during the summer months.

when she would ask Father to resume paying the full child support obligation, Father would respond that Child would suffer because of it. According to Mother, Father would often ask, "What are you going to do? Put [Child]'s dad in jail?," before asking her how this would make Child feel. Additionally, Mother indicated that if she asked Father to pay the full amount, he would respond by claiming that he would not be able to afford the airfare for Child's visits or Child's Christmas presents. As a result, Mother claimed she did not push the money issue or seek contempt charges because she was afraid Father would retaliate against Child.[4]

On February 13, 2017, the family court issued its final order. In its order, the court found the "circumstances clearly indicate that the parties did in fact have an agreement." Specifically, the court was convinced by the fact that Father paid $240 a month for seven and a half years without Mother filing a contempt action, filing an affidavit with the court, or otherwise raising any objections.[5] Additionally, the court found Father was more credible than Mother[6] and that Grandmother had testified all of Child's financial needs were met. The court further found,

> The conduct of the Mother was calculated to convey the impression that the [$240] payment and non-payment during the summer months from April[] 2008 through October[] 2015 was the agreement of the parties and conveyed to the Father the impression that the parties should follow that agreement. The Mother is now attempting to assert a completely different position. There was an intention, or at least an expectation, by the Mother that her conduct would be acted on by the Father.

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[4] Mother testified that Father planned to take Child out to eat while he was in town for the temporary hearing on January 4, 2016. However, Mother explained that after she filed her answer and counterclaim, Father refused to spend time with Child. According to Mother, Child called Father for an explanation and Father told Child that he was not "his top priority" and that "[h]e had a family to get back to."

[5] The court noted that Mother did not present any evidence of letters, text messages, emails, or other documentation of any objection to the reduced payments.

[6] The court determined Mother lacked credibility due to her fraudulent check convictions. The court also determined Grandmother was not credible because she testified that she was not aware of Mother's convictions.

The court determined that

> The Father relied upon the agreement of the parties from 2008 to 2015, and obviously, assumed [$240] to be the correct and/or acceptable child support payments, as there was no action to object to these payments for seven and one-half (7½) years. The Father conducted his personal and financial life in such a way that he was relying upon the payments being [$240.00] per month and non-payments during the summer. The Mother has now placed in her pleadings a request for the entire alleged arrearage being owed and also states in her pleadings that she is entitled to interest. If the Father had known the Mother would be seeking a different amount of child support seven and one-half (7½) years later, and especially seeking interest, he would have taken a different approach. The Father has therefore relied upon the agreement of the parties and upon the conduct of the Mother[,] and the Father has had a prejudicial change of position in reliance upon the conduct of the Mother and agreement of the parties.

Accordingly, the court found Father had proven the defense of equitable estoppel.

Pursuant to its estoppel finding, the court determined it would have been justified in finding Father paid in full, but ruled that Father owed $14,310.00 in arrearages. However, the court determined Father would not have to pay interest because Mother did not request it in her pleadings, had not presented evidence concerning interest, presented no evidence of Father's bad faith, and equitable estoppel barred Mother from receiving interest. The court further denied Mother's request to modify child support, finding Mother had not presented any testimony or evidence on the issue. Finally, the court ordered Mother to pay Father's attorney's fees. Mother filed a motion to reconsider on March 3, 2017, and the court denied the motion on March 16, 2017.[7] This appeal followed.

[7] Mother's motion to reconsider and the court's corresponding order do not appear in the record. However, both parties reference the motion and order in their briefs.

ISSUES ON APPEAL

1. Did the family court err in reducing the amount of child support arrearages owed by Father?

2. Did the family court err in failing to award judgment interest on the arrearage amount?

3. Did the family court err in failing to modify Father's current support obligation?

4. Did the family court err in awarding attorney's fees and costs to Father?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "Our standard of review, therefore, is *de novo*." *Id.*; *see also Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) ("[W]e reiterate that the proper standard of review in family court matters is de novo, rather than an abuse of discretion . . . ."). Accordingly, "[o]n appeal from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *S.C. Dep't of Soc. Servs. v. Polite*, 391 S.C. 275, 279, 705 S.E.2d 78, 80 (Ct. App. 2011). However, "*de novo* review neither relieves an appellant of demonstrating error nor requires [an appellate court] to ignore the findings of the family court." *Lewis*, 392 S.C. at 389, 709 S.E.2d at 654. Rather, an appellate court "will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by th[e appellate] court." *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012).

LAW/ANALYSIS

I. Equitable estoppel and retroactive modification of child support

Mother argues the family court erred in finding Father proved equitable estoppel because Father did not demonstrate any detrimental reliance or prejudicial change in position due to the purported agreement. Therefore, Mother argues the family court's order constituted a retroactive reduction in child support. Father argues the family court properly found that equitable estoppel applied because he conducted his personal finances in reliance on the purported agreement. Alternatively, Father argues that the family court did not err in reducing the child support arrearages because 1) South Carolina law does not preclude parents from making a private agreement to alter court-ordered support obligations; and 2) the family court has the power to alter the amount of child support originally granted if circumstances show an alteration to be equitable, and this power extends to installments that have already accrued. We agree with Mother.

Pursuant to section 63-17-310 of the South Carolina Code (2010),

> The family court has the authority to enforce the provisions of any decree, judgment, or order regarding child support of a court of this State . . . . This authority includes the right to modify any such decree, judgment, or order for child support as the court considers necessary upon a showing of changed circumstances. *No such modification is effective as to any installment accruing prior to filing and service of the action for modification*.

(emphasis added).[8] In interpreting this statute, our courts have acknowledged South Carolina's duty, as *parens patriae*, to protect and safeguard the welfare of its children. *Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992). Accordingly, the "[f]amily [c]ourt is vested with exclusive jurisdiction to ensure that, in all matters concerning a child, the best interest of the child is the paramount consideration." *Id*. Viewing the statute through this lens, our courts have indicated "[the precursor to section 63-17-310] was enacted to effect compliance with federal child support enforcement procedures *prohibiting retroactive modification of child*

[8] Section 63-17-310 was previously codified in identical language as section 20-7-933. Act No. 198 §1, 1987 S.C. Acts 2209.

support arrears, the rationale being that such payments, once accrued, are vested." *Id*. at 354, 415 S.E.2d at 393 (first emphasis added). Consequently, our courts have interpreted "[the precursor to section 63-17-310] as expressing the legislative intent that *the retroactive bar apply only to arrears that have accrued at the time a petition for modification is filed*." *Id*. (emphasis added).

"The family court has exclusive jurisdiction . . . to order support of a [] child . . . ." S.C. Code Ann. § 63-3-530(A)(14) (2010). As such, "[t]he general rule is that it is the obligation of the divorced spouse to pay the specified amounts according to the terms of the decree and *said spouse should not be permitted to vary these terms as a matter of convenience*." *Blackwell v. Fulgum*, 375 S.C. 337, 345, 652 S.E.2d 427, 431 (Ct. App. 2007) (emphasis added). Similarly, "[n]o agreement can prejudice the rights of children. More specifically, the basic right of minor children to support is not affected by an agreement between the parents or third parties as to such support." *Lunsford v. Lunsford*, 277 S.C. 104, 105, 282 S.E.2d 861, 862 (1981) (citation omitted); *see also* 67A C.J.S. *Parent and Child* § 184, Westlaw (database updated December 2019) ("An agreement between the parents may not affect the basic support rights of minor children."). With this in mind, when "a divorce decree has set the amount [that] a parent is to pay in child support[,] the parties to the decree cannot themselves reduce the amount. *Court approval is required*." *Peebles v. Disher*, 279 S.C. 611, 616, 310 S.E.2d 823, 825 (Ct. App. 1983) (emphasis added).

Despite our State's statutory bar against retroactive child support reductions and its strong precedent concerning the rights of a minor child to support, our supreme court has considered the doctrine of equitable estoppel as a defense to the enforcement of child support arrearages by a custodial parent. *See S.C. Dep't of Soc. Servs. on Behalf of State of Tex. v. Holden*, 319 S.C. 72, 77, 459 S.E.2d 846, 849 (1995) (finding the mother was not equitably estopped from seeking child support and arrearages when there was evidence that she consistently asked the father to pay support and the father presented no evidence that he changed his position in reliance on the alleged agreement); *see also Ables v. Gladden*, 378 S.C. 558, 567, 664 S.E.2d 442, 447 (2008) (finding the mother was not equitably estopped from seeking retroactive child support because she "never made any assurances or representations" to the father). However, we believe that even if the doctrine of equitable estoppel were considered, the courts' overarching responsibility to safeguard the welfare of children cannot be supplanted by an agreement between parents or third parties. That is, our jurisprudence concretely supports the courts'

jurisdiction to preclude any reduction in child support that would be inimical or prejudicial to the rights of children.[9]

"The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007).

> The elements of equitable estoppel as related to the party being estopped are:
>
> (1) conduct [that] amounts to a false representation, or conduct [that] is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those [that] the party subsequently attempts to assert;

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[9] *See Harris*, 307 S.C. at 353, 415 S.E.2d at 393 ("[The f]amily [c]ourt is vested with exclusive jurisdiction to ensure that, *in all matters concerning a child, the best interest of the child is the paramount consideration*." (emphasis added)); *Garris v. Cook*, 278 S.C. 622, 623, 300 S.E.2d 483, 484 (1983) (noting that a parent's wrongful act should not prejudice the minor child's right to support); *Lunsford*, 277 S.C. at 105, 282 S.E.2d at 862 ("No agreement can prejudice the rights of children. More specifically, the basic right of minor children to support is not affected by an agreement between the parents or third parties as to such support."); *S.C. Dep't of Soc. Servs. v. Polite*, 391 S.C. 275, 283, 705 S.E.2d 78, 82 (Ct. App. 2011) ("Here, the family court's ruling was not similarly driven by a child's best interests; rather, the family court feared a strict application of the relevant statutes would work an injustice on Polite. However, *Blackwell* instructs that an existing support agreement continues for the benefit of []minor children until the court calculates a proper reduction."); *Blackwell*, 375 S.C. at 345, 652 S.E.2d at 431 ("The general rule is that it is the obligation of the divorced spouse to pay the specified amounts according to the terms of the decree and said spouse should not be permitted to vary these terms as a matter of convenience."); *Peebles*, 279 S.C. at 616, 310 S.E.2d at 825 ("[W]he[n] a divorce decree has set the amount [that] a parent is to pay in child support[,] the parties to the decree cannot themselves reduce the amount. Court approval is required.").

> (2) the intention that such conduct shall be acted upon by the other party; and
>
> (3) actual or constructive knowledge of the real facts.

Id. Similarly, the party pleading estoppel must demonstrate: "(1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped." *Id*. at 84–85, 650 S.E.2d at 470.

Assuming the family court properly considered equitable estoppel as a defense to child support arrearages, we conclude that the court erred in finding Father presented sufficient evidence to establish the defense. *See Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003), *modified on other grounds by Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 454–55, 608 S.E.2d 859, 864 (2005) ("It is well established that a party pleading an affirmative defense has the burden of proving it."); *see also Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) ("[E]stoppel must be affirmatively pled as a defense . . . ."). First, Father did not present sufficient evidence establishing an agreement between Father and Mother for decreased child support payments. Father submitted no letters, text messages, emails, or other documentary evidence demonstrating such an agreement. Rather, the family court found that an agreement existed based on Father's testimony, Mother's lack of credibility, and the lack of documentary evidence indicating Mother objected to the reduced payments. *But see Strickland*, 375 S.C. at 85, 650 S.E.2d at 470 ("[C]ontesting the enforcement of a court order based on the affirmative conduct of the parties is less offensive to judicial authority than the emphasis on the *lack of* conduct by a party . . . ."). Without any documentary evidence concerning an agreement or objections to the reduced child support payments, the existence or non-existence of an agreement ultimately boiled down to a swearing match. Moreover, we disagree with the family court's finding that Mother's apparent acquiescence over time constituted evidence of an agreement necessary for a finding of estoppel. *Cf. id*. at 83–84, 650 S.E.2d at 469–70 ("[T]he concept of 'inexcusable delay' . . . is inconsistent with the judicial authority inherent in a court order. Because court orders awarding support and maintenance do not have an expiration date, allowing a party to avoid compliance based solely on the oblique notion of delay only serves to undermine the authority of the court."). Given that Father had the burden of proving an agreement by a preponderance of the evidence, we do not find Father's assertion that Mother agreed to reduced child

support payments, without more, is enough to establish the existence of such an agreement.

Second, Father did not present any evidence of a prejudicial change in position or detrimental reliance on the purported agreement. *See id*. at 84–85, 650 S.E.2d at 470 ("The party asserting estoppel must show . . . a prejudicial change of position in reliance on the conduct of the party being estopped."). The only testimony concerning Father's reliance on the purported agreement occurred during the following colloquy:

> Counsel: "Now, you testified, [t]hat your ex-wife told you to make payments of $240.00? Did you rely upon what she told you?"
>
> Father: "I did. I relied upon her."

The family court found Father detrimentally relied on the purported agreement in the way he conducted his personal finances. The court further indicated Father "would have taken a different approach" had he known Mother would enforce the entire arrearage amount. Additionally, Father argues on appeal that he relied on the purported agreement in paying for Child's insurance and travel expenses, and by not seeking legal counsel to have the agreement formalized. However, Father presented no evidence regarding the manner in which he conducted his personal finances to the family court, nor did he claim that he chose to provide Child with insurance and travel expenses in reliance on the reduced child support payments. Thus, Father failed to establish the third element of equitable estoppel. Therefore, the family court's findings are not supported by the evidence in the record.

Because the evidence does not support the application of equitable estoppel, Mother cannot be estopped from asserting her claim to the full amount of child support arrearages. As such, the family court's reduction of the total child support arrearages owed by Father constitutes a retroactive reduction in child support, which is precluded by statute. *See* § 63-17-310 ("No such [child support] modification is effective as to any installment accruing prior to filing and service of the action for modification."); *Harris*, 307 S.C. at 354, 415 S.E.2d at 393 ("[The precursor to section 63-17-310] was enacted to effect compliance with federal child support enforcement procedures *prohibiting retroactive modification of child support arrears* . . . ." (first emphasis added)). Accordingly, the family court erred in reducing the arrearages.

Father argues the family court did not err in retroactively reducing child support because parents may make private agreements altering the amount of court-ordered child support without court approval. We disagree. Even if Father could demonstrate that such an agreement existed, it would be unenforceable absent family court approval. *See Peebles*, 279 S.C. at 616, 310 S.E.2d at 825 ("[W]he[n] a divorce decree has set the amount [that] a parent is to pay in child support[,] the parties to the decree cannot themselves reduce the amount. *Court approval is required*." (emphasis added)). Additionally, Father argues the family court may *retroactively* reduce child support "if altered circumstances show such alteration to be equitable."[10] This argument is meritless, as our supreme court has specifically held "the statute does not bar retroactive child support *increases* in special circumstances . . . ." *Harris*, 307 S.C. at 353, 415 S.E.2d at 392–93 (emphasis added). Conversely, the court interpreted "[the precursor to section 63-17-310] as expressing the legislative intent that *the retroactive bar apply only to arrears that have accrued at the time a petition for modification is filed*." *Id*. at 354, 415 S.E.2d at 393 (emphasis added).

Based on the foregoing, the family court erred by reducing Father's child support arrearages, and Mother is entitled to the stipulated total of $17,430.00 in arrearages.

II. Arrearage Interest

Mother argues the family court erred in denying her interest on the child support arrearages because such interest is required as a matter of law even when the pleadings do not request such relief. Father concedes the general rule is that simple interest begins to accrue on past due child support from the date of each missed payment. However, Father argues the family court properly declined to award Mother interest under the doctrine of equitable estoppel. We agree with Mother.

Pursuant to section 34-31-20(B) of the South Carolina Code (Supp. 2004),[11] "All money decrees and judgments of courts enrolled or entered shall draw interest

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[10] Father relies on *White v. White*, 290 S.C. 515, 351 S.E.2d 585 (Ct. App. 1986), for this proposition. However, the court in *White* specifically held the family court had "the power to modify a decree as to installments of *alimony* [that] have already accrued." *Id*. at 520, 351 S.E.2d at 588 (emphasis added).

[11] Because Mother instituted the divorce action in 2002, we refer to the version of the statutory provision in effect at the time.

according to law." This statute was applied to family court awards in *Casey v. Casey*, where our supreme court found that "fixed awards of money for equitable distribution shall accrue interest at the post-judgment rate from the date of the judgment, or in the case of specified periodic payments, from the date each payment becomes due and owing." 311 S.C. 243, 245–46, 428 S.E.2d 714, 716 (1993). Our supreme court extended this rationale to child support payments in *Edwards v. Campbell*, holding "the *Casey* principle applies to periodic payments such as child support, and the interest is calculated on each installment from the time each payment became due." 369 S.C. 572, 577, 633 S.E.2d 514, 516 (2006). Furthermore, our courts have indicated that, because such interest is mandated by statute, parties do not have to include a demand for it in their pleadings. *See Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 17 (2000) ("Whe[n] the law allows interest as a matter of course, it is unnecessary to make demand for it in the pleadings.").

As indicated previously, the family court erred in finding Father satisfied the elements of equitable estoppel.[12] Accordingly, the family court erred in applying equitable estoppel to deny Mother's claim for interest on the arrearages. Additionally, the family court erred in finding Mother was not entitled to interest because she did not include a claim for it in her pleadings and presented no evidence on the issue. *See Calhoun*, 339 S.C. at 102, 529 S.E.2d at 17 ("Whe[n] the law allows interest as a matter of course, it is unnecessary to make demand for it in the pleadings."). Therefore, we find Mother was entitled to interest.

We note that the original divorce order did not specify a post-judgment interest rate for missed child support payments. Thus, the interest rate is equal to the statutory rate at the time the action accrued. *Casey*, 311 S.C. at 246, 428 S.E.2d at 716 (stating that when "no contrary provision is made by the decreeing court, a domestic money judgment bears post-judgment interest at the statutory rate"). Because Mother instituted the divorce action in 2002, the applicable statutory rate is twelve percent a year. *Collins Music Co. v. IGT*, 365 S.C. 544, 552, 619 S.E.2d 1, 4 (Ct. App. 2005) (indicating that under the prior version of section 34-31-20(B), the interest rate for causes of action accruing between January 1, 2001, and March 21, 2005, was "twelve percent a year" (quoting S.C. Code Ann. § 34-31-20(B) (Supp. 2004))). Additionally, such interest should be simple rather than compound. *See Edwards*, 369 S.C. at 577–78, 633 S.E.2d at 517 (indicating statutory interest is

[12] *See supra* Section I.

simple interest unless the Legislature indicates otherwise). As such, Mother is entitled to simple interest at a rate of twelve percent per year calculated on each installment from the time each payment became due. *Id*. at 577, 633 S.E.2d at 516 ("[T]he *Casey* principle applies to periodic payments such as child support, and the interest is calculated on each installment from the time each payment became due.").

III. Child support modification

Mother argues the family court erred in refusing to increase the amount of Father's current child support obligation established in the divorce decree because the parties' changes in income, new marriages, and new children constituted a material change in circumstances. Father argues the family court did not err in refusing to modify his child support obligation because there was no material change in circumstances. We agree with Father.

> The family court has the authority to enforce the provisions of any decree, judgment, or order regarding child support of a court of this State . . . . This authority includes the right to modify any such decree, judgment, or order for child support as the court considers necessary upon a showing of changed circumstances.

S.C. Code Ann. § 63-17-310. "The issue of child support is subject to continuing review by the family court." *Fischbach v. Tuttle*, 302 S.C. 555, 556, 397 S.E.2d 773, 773 (Ct. App. 1990). Accordingly, "[a] family court has authority to modify the amount of a child support award upon a showing of a substantial or material change of circumstances." *Miller v. Miller*, 299 S.C. 307, 310, 384 S.E.2d 715, 716 (1989). "A substantial or material change in circumstances might result from changes in the needs of the children or the financial abilities of the supporting parent to pay among other reasons." *Id*. at 310, 384 S.E.2d at 717. "The burden is upon the party seeking the change to prove the changes in circumstances warranting a modification." *Id*. at 310, 384 S.E.2d at 716. "Once a substantial and material change in circumstances is found, the court must review the facts and circumstances in order to determine an appropriate amount of child support." *Id*. at 312, 384 S.E.2d at 717.

In determining whether a party is entitled to modification, "[t]he fact alone that a parent has remarried and had other children is not sufficient to show a change of circumstances warranting modification of child support." *Fischbach*, 302 S.C. at 557, 397 S.E.2d at 774. "Further, general testimony regarding increased expenses,

without specific evidentiary support, is an insufficient showing of changed circumstances." *Upchurch v. Upchurch*, 367 S.C. 16, 26, 624 S.E.2d 643, 648 (2006), *disapproved of on other grounds by Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011). Moreover, "changes in circumstances within the contemplation of the parties at the time the initial decree was entered do not provide a basis for modifying a child support award." *Miller*, 299 S.C. at 310, 384 S.E.2d at 717.

We find the family court properly refused to increase the amount of Father's child support obligation because Mother presented insufficient evidence of a material change in circumstances. Mother asserted Father's income increased from the time of the original divorce decree but did not submit any evidence regarding Father's prior income. Similarly, while Mother testified to being unemployed, she did not present any evidence indicating her income at the time of the divorce decree and, on cross-examination, Mother conceded that her expenses were being covered by her current husband. Additionally, while Mother testified that she also has a two-year-old child, she did not submit any evidence that supporting her two-year-old child affected her ability to support Child, and she conceded that her husband was covering the daycare expenses. *See Fischbach*, 302 S.C. at 557, 397 S.E.2d at 774 ("The fact alone that a parent has remarried and had other children is not sufficient to show a change of circumstances warranting modification of child support."). Accordingly, we conclude that Mother did not submit sufficient evidence to entitle her to an increase of Father's child support obligation.

IV. Attorney's fees

Mother argues the family court erred in awarding Father attorney's fees. Father argues the family court properly awarded him attorney's fees because 1) Father is supporting two separate children and a spouse; 2) Mother's living expenses are being paid by her new spouse; and 3) Mother refused to accept Father's settlement offer. We agree with Mother.

"In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). However, while it is a factor to consider, a "[b]eneficial result alone is not dispositive of whether a party is entitled to attorney's fees." *Upchurch*, 367 S.C. at 28, 624 S.E.2d at 649. Similarly, in determining a reasonable amount of attorney's fees, the family court

must consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Here, the family court denied Mother's request for attorney's fees, finding Mother did not present any testimony or affidavits regarding the amount of fees she was seeking.[13] Conversely, the court found Father was entitled to $5,200 in attorney's fees. In reaching this conclusion, the court noted that Father had obtained beneficial results by way of the court's ruling as to the amount of arrearages, and the court's denial of interest on the arrearages and child support modification. Additionally, the court imputed a gross monthly income of $2,860 to Mother and noted that all of her living expenses were paid by her husband. Finally, the court determined that Mother's position in this case was unreasonable. The court then ordered that Mother pay Father's attorney's fees within ninety days.

In granting Father attorney's fees, we find the family court improperly applied the *E.D.M.* factors by placing too much emphasis on the beneficial results obtained by Father at the expense of the other factors. *See Upchurch*, 367 S.C. at 28, 624 S.E.2d at 649 ("Beneficial result alone is not dispositive of whether a party is entitled to attorney's fees."). First, the family court made no determinations concerning Father's ability to pay his own attorney's fees. Father's financial declaration indicated he was earning $4,093 in gross monthly income. As such, Father was more than capable of paying his own attorney's fees. Second, while the court considered Mother's financial condition and imputed income, the court failed to consider her income relative to Father's. Assuming the family court properly imputed $2,860 of gross monthly income to Mother,[14] her gross yearly income would equal $34,320. Using the $4,093 of gross monthly income in Father's financial declaration, his gross

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[13] Despite her failure to present evidence concerning her attorney's fees, Mother contends her claim is preserved by the filing of her motion to reconsider, which included the issue of attorney's fees. However, Mother has not included the motion to reconsider or the corresponding order denying her motion in the record on appeal. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact [that] does not appear in the Record on Appeal.").

[14] *See Patel v. Patel*, 359 S.C. 515, 532, 599 S.E.2d 114, 123 (2004) ("It is proper to impute income to a party who is voluntarily unemployed or underemployed."). Mother has not challenged the imputation of income on appeal.

yearly income would equal $49,116. Thus, Father was in a better position to pay his attorney's fees than Mother. Third, the family court did not consider the effect of paying Father's attorney's fees on Mother's standard of living. The family court found Mother presented no testimony concerning how payment of Father's attorney's fees would affect her standard of living. However, we believe this factor can be evaluated by looking to the financial information in the record. The $5,200 attorney's fees award constitutes roughly fifteen percent of Mother's gross yearly income, and paying the fees would leave her with $29,120. Conversely, the attorney's fees constitute roughly ten percent of Father's income, and paying them would leave him with $43,916. Additionally, because the family court ordered Mother to pay the fees within ninety days, she would only have $8,580 of gross income to pay $5,200 of fees. Thus, the fees would have a greater impact on Mother's standard of living than Father's. Accordingly, the family court erred in finding Father was entitled to attorney's fees.

Moreover, because we reverse the beneficial results obtained by Father, attorney's fees should be reconsidered. *See Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001) ("[Because] the beneficial result obtained by counsel is a factor in awarding attorney's fees, when that result is reversed on appeal, the attorney's fee award must also be reconsidered."). However, because Mother did not present testimony or affidavits regarding her attorney's fees at trial, and because we do not find either party to be in a superior financial position to pay the other's attorney's fees, we find that each party should be responsible for paying their own attorney's fees. *See Mazzone v. Miles*, 341 S.C. 203, 214, 532 S.E.2d 890, 895 (Ct. App. 2000) (indicating the family court properly refused the mother's request for attorney's fees after finding "neither party [wa]s in a superior financial position to pay for the other's attorney['s] fees").

CONCLUSION

Based on the foregoing, we affirm the family court's refusal to modify Father's child support obligation and reverse the family court's reduction of Father's arrearages, the denial of Mother's claim for interest, and Father attorney's fees award. Accordingly, this case is remanded for a calculation of interest on Father's child support arrearages consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Edward Primo Bonilla, Appellant.

Appellate Case No. 2016-001725

Appeal From Dorchester County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5702
Heard December 9, 2019 – Filed December 31, 2019

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, all for Respondent.

GEATHERS, J.: Edward Primo Bonilla was convicted of murder for the killing of Ashley Pegram and sentenced to life imprisonment. Bonilla appeals his conviction, arguing the circuit court erred in 1) finding Bonilla gave his attorney informed

consent to disclose the location of Ashley's body; 2) admitting evidence obtained from the search of Bonilla's mother's Hyundai Sonata; 3) admitting evidence obtained from the search of a van owned by Bonilla's employer; and 4) refusing to grant Bonilla an in camera hearing on the qualifications of Investigator Jeff Scott and the reliability of his testimony. We affirm.

FACTS

The investigation into Ashley's disappearance

Around March 15, 2015, Bonilla and Ashley Pegram[1] met on the online social site Meetme.com, and the two communicated for about a month using the messaging app "Kik." On April 3, 2015, Bonilla and Ashley arranged to meet in person and attend a bonfire hosted by Bonilla's brother. During their communications, Ashley indicated that she did not have a car, and Bonilla offered to pick her up from the house she shared with her parents in Summerville. Ashley then asked if he would pick up some beer for her, and Bonilla agreed. After Bonilla left his house, Ashley texted him her address, and he entered it into his phone's GPS. Shortly before 9:30 p.m., Bonilla arrived in a Hyundai Sonata, and the two left for the bonfire.

Ashley and Bonilla arrived at his brother's house for the bonfire around 9:30 p.m. While at the bonfire, Ashley had a few drinks before she and Bonilla left around 11:45 p.m. After leaving the bonfire, Ashley indicated she needed to use the restroom, and Bonilla stopped at a Sunoco gas station around 12:04 a.m. on April 4, 2015. At 12:11 a.m., the gas station's surveillance system captured Ashley reentering the vehicle, and the two left a minute later.

Later that morning, Ashley's mother reached out to Ashley's sister because Ashley had not returned from her date the previous night. Once Ashley's sister arrived at the house, the family looked through the phone Ashley shared with her mother for any clues as to her disappearance. In doing so, they found Kik messages between Ashley and a man with the username "E-Money Bon" discussing plans to go to a bonfire the night before. Additionally, they found a message from "E-Money Bon" at 3:29 a.m. that morning, reading "Hello. You still awake? Just making sure you made it home. Sorry I left at the gas station but you were too drunk to handle." Thereafter, the family called "E-Money Bon" from three different phones and messaged him on Kik, but he did not answer or respond. At some point, the family

[1] Ashley was a twenty-eight-year-old mother of three.

made contact with "E-Money Bon" on Ashley's daughter's phone. "E-Money Bon" identified himself as Edward Bonilla and indicated that he had left Ashley in front of a mobile home park, but he did not know what happened to her afterward.

After communicating with Bonilla, Ashley's family filed a missing persons report with the Dorchester County Sheriff's Office, and provided officers with Bonilla's phone number and screenshots of the messages between Ashley and Bonilla. As part of his investigation, Detective David Harris called Bonilla and advised him that he was looking for a missing person. Bonilla described his night out with Ashley before telling Detective Harris that he left Ashley on the side of the road around 2:00 a.m. after he let her out to use the restroom a second time.

On April 7, 2015, Ashley's missing persons case was assigned to Detective Andy Martin, who made contact with Bonilla and scheduled an interview for the next day. [2] On April 8, Bonilla arrived for the interview in his mother's Hyundai Sonata with his mother and girlfriend.[3] After Bonilla's mother and girlfriend left to run errands, Bonilla was taken to an interview room. During the interview, Bonilla summarized the events of the night, indicating the last time he saw Ashley was when he left her in front of a mobile home park after pulling over to let her use the restroom. Bonilla further indicated that he was unemployed due to an ankle injury. After the interview, Bonilla showed Detective Martin a shoeprint on the front quarter panel of his mother's Hyundai Sonata and told Detective Martin that Ashley had kicked the vehicle after exiting to use the restroom. Officers and volunteers later combed the area where Bonilla claimed he left Ashley, but they could not locate her.

On April 15, 2015, Detective Martin was contacted by Bonilla's brother's girlfriend, who attended the bonfire on April 3. During their conversation, she revealed that Bonilla was employed at Cauble Flooring in Charleston County. Detective Martin then contacted Robert Cauble, the owner of Cauble Flooring, and confirmed that Bonilla was one of his employees. Cauble also indicated that Bonilla had access to two work vans; a Chevy GMC that he typically worked out of with his brother and a Ford Econoline that the company used as a "floater" van. Detective Martin indicated that he needed to look at the vans in connection with a missing persons case, and the two agreed to meet at Cauble Flooring. Coincidentally, Bonilla

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[2] Detective Martin also requested the surveillance video from the Sunoco, obtained Bonilla's phone records, and contacted the South Carolina Law Enforcement Division ("SLED") for license plate reader information on the Hyundai Sonata.

[3] Bonilla was dating a woman named Jasmine in April 2015.

called Cauble moments after he got off the phone with Detective Martin and told Cauble that he needed to retrieve his cell phone from one of the vans.

Cauble was the first to arrive at Cauble Flooring and, acting on Detective Martin's inquiry, he pulled up the security footage from April 3 and 4, 2015. The footage from April 3 showed Bonilla and his brother arriving at the end of the work day in the Chevy GMC. However, while Bonilla's brother left in the Chevy GMC, Bonilla left in the Ford Econoline. On the footage from April 4, an unidentified person could be seen returning the Ford Econoline at 10:55 p.m., parking it in the same spot it had been taken from the day before. Additionally, a small car could be seen pulling in behind to pick up the person. Cauble also indicated that Bonilla texted him on April 4 at 4:50 a.m., indicating that he was sick and would not be in to work, and again on April 6, indicating the same.

Once everyone arrived at Cauble Flooring, Detective Martin confronted Bonilla for lying about his employment. Bonilla, in the presence of Cauble, claimed that he had started working at Cauble Flooring on April 14, 2015. However, Cauble indicated that Bonilla had been employed for eight months. Bonilla was charged with obstruction of justice the same day.

After Cauble signed a "consent to search and/or seizure" form, officers searched both vans. While searching the Chevy GMC, officers found Bonilla's cell phone. Upon searching the Ford Econoline, officers discovered multiple red hued stains. Investigator Jeff Scott field-tested four stains, one of which tested "presumptive positive" for blood, and officers arranged to have the van towed to Dorchester County. On the same day, officers located Bonilla's mother's Hyundai Sonata at an Enterprise Rent-A-Car in Charleston County. Records indicated that Bonilla's mother had rented a silver Chevy Cruze on April 4, 2015, at 11:01 a.m.[4] The Hyundai Sonata was then seized, in cooperation with the North Charleston Police Department, and towed back to Dorchester County. After seizing the Hyundai Sonata and the Ford Econoline, officers obtained search warrants for both from a Dorchester County magistrate.

On May 5, 2015, Bonilla was charged with murder. On May 8, 2015, he was transported to the Dorchester County Sheriff's Office where he met with his attorney, Mark Leiendecker, in a small conference room. During the meeting, Bonilla

[4] The Chevy Cruze was consistent with the vehicle that could be seen on surveillance footage picking up the individual from Cauble Flooring on the night of April 4, 2015.

provided the location of Ashley's body to Leiendecker and consented to its disclosure.[5] On May 9, 2015, after searching the location for two days, police found Ashley's body in a shallow grave in Harleyville.

The trial

Bonilla's case proceeded to trial on August 8, 2016. Prior to trial, Bonilla made several pre-trial motions. First, Bonilla moved to have his statement regarding the location of Ashley's body suppressed, arguing Leiendecker violated Rule 1.6 of the South Carolina Rules of Professional Conduct by disclosing the location without Bonilla's informed consent. The circuit court allowed testimony on the issue from Leiendecker and Bonilla. While testifying, Leiendecker took care not to reveal any more confidential discussions between he and Bonilla than necessary to determine the issue of informed consent. Leiendecker testified that he did not know the location of Ashley's body until Bonilla revealed it to him on May 8, 2015, but he asserted that he and Bonilla had discussed the decision to disclose the location in meetings and telephone calls prior to the date of disclosure. Leiendecker explained that disclosing the location of Ashley's body was a key part of Bonilla's defense of accident, as there would be no evidence to corroborate the defense without an autopsy to determine Ashley's cause of death. In discussing potential consequences, Leiendecker told Bonilla that if he disclosed the location of the body, Bonilla would not be able to deny that he knew what happened to Ashley, it would place him at the scene of an alleged murder, and it would open him up to other charges. When the two met on the date of disclosure, they further discussed the issue before Bonilla drew a map to Ashley's body on Leiendecker's iPad. According to Leiendecker, after further discussion, Bonilla consented to the disclosure of the information. Thereafter, Leiendecker shared the information with the Dorchester County Sheriff's Office. Bonilla did not speak to any officers during the process.

Bonilla testified that he and Leiendecker never discussed disclosing the body's location prior to May 8, 2015. Rather, Bonilla indicated that Leiendecker called him on May 8 to let him know that officers were transporting him to the Dorchester

[5] Leiendecker was assigned to represent Bonilla after he was charged with obstruction of justice on April 15, 2015. Leiendecker maintained that he and Bonilla had previously discussed the decision to disclose prior to the date of disclosure. After determining he would be called to testify about the disclosure, Leiendecker was conflicted out of the case. Bonilla was subsequently provided with alternate counsel.

County Sheriff's Office to disclose the location of the body. Bonilla testified that once he arrived at the sheriff's office, Leiendecker explained the benefits of disclosing the location but not the possible ramifications. Bonilla indicated that he felt like things were already in motion to the point that he was backed into a corner. However, Bonilla testified that he was ultimately "on board" with the decision to disclose, confirming that Leiendecker would have believed he had Bonilla's consent to disclose.

After hearing testimony from Leiendecker and Bonilla, the circuit court ruled on the issue. Using *McClure v. Thompson*[6] as a guide, the circuit court found that 1) Bonilla had given his consent to disclose the location of Ashley's body and 2) Leiendecker provided full legal guidance and a cautionary explanation of the benefits and consequences of disclosure. Thus, the circuit court found that Bonilla had given Leiendecker informed consent to disclose the location of the body. The circuit court further found Leiendecker to be more credible than Bonilla. Based on the circuit court's findings, Bonilla and the State agreed to stipulate to the fact that Bonilla had disclosed the body's location in lieu of calling Leiendecker to testify during trial.

Next, Bonilla moved to suppress evidence obtained from the Hyundai Sonata and the Ford Econoline. Bonilla argued the warrants were defective because they were both obtained from a Dorchester County magistrate even though the vehicles were seized from Charleston County. Bonilla further argued the warrant for the Hyundai Sonata was defective because the affidavit setting forth the basis for probable cause indicated that Ashley was seen entering the vehicle at the Sunoco around 1:12 a.m. rather than 12:12 a.m. As to the search warrants, the State argued that both were obtained after the vehicles were seized and brought to Dorchester County, placing both within the jurisdiction of the Dorchester County magistrate. Furthermore, the State asserted that the warrant for the Hyundai Sonata was proper because the underlying affidavit still supported a finding of probable cause to search the vehicle after the inaccurate information was removed. The State then argued the Hyundai Sonata was properly seized pursuant to the automobile exception to the warrant requirement, further asserting the vehicle could have been searched without a warrant under the same exception. Finally, the State argued Cauble had given his consent for the search and seizure of the Ford Econoline, adding that it was properly seized after a stain in the back tested "presumptive positive" for blood. The circuit

[6] 323 F.3d 1233 (9th Cir. 2003).

court ultimately determined the evidence to be admissible, finding both search warrants were proper and both vehicles were properly seized and searched under the automobile exception.

During the trial, the State presented multiple witnesses detailing the investigation into Ashley's disappearance. Bonilla's brother's girlfriend testified that Ashley was not overly intoxicated at the bonfire, but Bonilla was adamant that she continue drinking from a particular bottle of beer as they were leaving. The State also elicited testimony detailing Bonilla's inconsistent statements regarding Ashley's disappearance and his efforts to impede the investigation. Additionally, the State presented phone records and footage from surveillance cameras demonstrating Bonilla's travels on the night Ashley disappeared.

Before Investigator Scott's testimony, Bonilla objected to the admission of photographs depicting the results of several tests used to determine the presence of blood in the seized vehicles. Bonilla asserted that, because Investigator Scott would be giving his opinion that stains in both vehicles tested positive for Ashley's blood, he was entitled to an evidentiary hearing regarding the reliability of the tests. The circuit court noted that Investigator Scott was not qualified to give an opinion on whether the stains tested positive for Ashley's blood. The circuit court then asked Bonilla if he was objecting specifically to the admission of the photographs, to which he responded, "Yes, sir." Consequently, the circuit court indicated Bonilla would be required to object contemporaneously when the photographs were admitted.

During Investigator Scott's testimony, Bonilla objected to the admission of photographs depicting O-Tolidine, hexagon OBTI, and leucocrystal violet tests. The circuit court overruled each objection. However, Bonilla did not object when Investigator Scott described how each test was conducted, when he explained that a "presumptive positive" for blood would turn a certain color depending on the particular test, or when he indicated that stains in the van and the trunk of the Hyundai Sonata tested presumptive positive under each test. After Investigator Scott testified, SLED Agent Paul Meeh testified that the blood obtained from both vehicles matched Ashley's DNA.

Investigator Scott further testified that officers found a tube of Astroglide personal lubricant in the Ford Econoline.[7] Investigator Scott also recounted finding

[7] Cauble testified that Cauble Flooring did not use Astroglide in its day-to-day activities.

Ashley's body, indicating she was found nude from the waist down. Additionally, Investigator Scott indicated that there appeared to be something wrapped around Ashley's wrist and neck. Following Investigator Scott's testimony, the State presented an expert in bloodstain pattern analysis. The expert testified that multiple cast-off patterns were found on the ceiling of the van and a cessation cast-off pattern was found on the rear wheel well. He provided that these patterns were consistent with someone standing over a victim and taking multiple swings at the victim.

The State then presented Dr. Nicholas Batalis as an expert in forensic pathology. Dr. Batalis explained that he could not determine the specific cause of death because Ashley had been dead for an extended period of time and the body had undergone significant decomposition. Dr. Batalis testified that Ashley's body was nude from the waist down, her torn shirt and bra were around her upper chest area, and her glasses were tangled in her hair. Furthermore, Dr. Batalis indicated Ashley's neck and right wrist had been wrapped in black electrical tape, stating that the tape around the wrist was fashioned into two loops and appeared to resemble handcuffs.[8] Dr. Batalis testified that the tissue and internal organs were missing from Ashley's buttocks and vaginal area, suggesting that the area could have been a location of injury.[9] Regarding Ashley's cause of death, Dr. Batalis testified that Ashley had fractures on both sides of her thyroid cartilage, suggesting manual strangulation. Additionally, Dr. Batalis indicated that there was a circular defect on Ashley's scalp and areas of bluish-purple discoloration on her skull, suggesting blunt force trauma. Dr. Batalis also indicated that fluid from Ashley's chest cavity tested positive for low concentrations of alcohol and a muscle relaxer.[10] Dr. Batalis ultimately determined that the "cause of death in this case was homicidal violence."

After the State rested, Bonilla elected to testify in his own defense. Bonilla described the events leading up to and following the bonfire, indicating that he and Ashley returned to his house to drop off some marijuana after they left. Bonilla then explained that he tried to take Ashley home, but she was combative and could not

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[8] While Ashley's left wrist was not bound by the open loop of the "tape handcuffs," Dr. Batalis noted that it had decomposed down to the bone.

[9] Due to the lack of tissue, Dr. Batalis could not perform a sexual assault protocol on the body.

[10] Bonilla testified that his girlfriend was suffering from back and shoulder pain around the time Ashley was killed.

adequately provide directions.[11] Bonilla indicated that Ashley asked to stop and use the restroom twice, once at the Sunoco and once on the side of a private driveway. Bonilla asserted that the second time they stopped, he attempted to leave Ashley because she was being combative but while backing up, he accidentally hit Ashley with the back of his car. Bonilla claimed that when he got out to check on her, Ashley began attacking him. He alleged that he then wrapped Ashley in a "bear hug" in an attempt to restrain her and she died in his arms. Bonilla asserted that he did not know how Ashley died and he did not mean to harm her.

Bonilla testified he placed Ashley's body in the trunk of his mother's Hyundai Sonata. He then drove a while before leaving the body on the side of a dirt road. After going home, Bonilla indicated he returned to retrieve Ashley's body in the Ford Econoline. Bonilla claimed that he put a plastic bag over Ashley's head and taped it to her neck so that she would not bleed in the van. After placing Ashley's body in the van, Bonilla drove until he found a deserted road in a wooded area. Bonilla then removed Ashley's body from the van, hid the van, and dug a grave with a wooden board. Bonilla claimed that while he was dragging Ashley's body through the woods, her pants and underwear got snagged and fell off. After placing Ashley's body in the grave and covering it with dirt, Bonilla returned to the location where Ashley died. He picked up one of Ashley's sandals, discarding it and the bag he used to cover her head in a gas station dumpster.

After deliberations, the jury convicted Bonilla for murder. The circuit court then sentenced him to a term of life imprisonment. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding Bonilla gave his attorney informed consent to disclose the location of Ashley's body?

2. Did the circuit court err in admitting evidence obtained from the search of Bonilla's mother's Hyundai Sonata?

3. Did the circuit court err in admitting evidence obtained from the search of a van owned by Bonilla's employer?

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[11] The State presented Bonilla's phone records to demonstrate that Bonilla had previously searched Ashley's address in his phone's GPS app.

4. Did the circuit court err in refusing to grant Bonilla an in camera hearing on the qualifications of Investigator Scott and the reliability of his testimony?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Therefore, "[an appellate court is] bound by the [circuit] court's factual findings unless they are clearly erroneous." *Id*. at 6, 545 S.E.2d at 829.

Determination of informed consent

"In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." *State v. Parker*, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (quoting *State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997)).

Admission of evidence

"The admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). Therefore, "[a circuit court] has considerable latitude in ruling on the admissibility of evidence[,] and [its] rulings will not be disturbed absent a showing of probable prejudice." *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

Fourth Amendment

"When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the [circuit court]'s ruling if there is any evidence to support the ruling." *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). "The appellate court will reverse only when there is clear error." *Id*.

LAW/ANALYSIS

I. Confidentiality and informed consent

Bonilla argues the circuit court erred in finding that he provided his initial attorney, Leiendecker, with informed consent to disclose the location of Ashley's body. The State argues the circuit court properly determined that Bonilla gave informed consent. We agree with the State.

Pursuant to Rule 1.6(a) of the South Carolina Rules of Professional Conduct, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)[12]." Rule 1.6(a), RPC, Rule 407, SCACR. "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(g), RPC, Rule 407, SCACR.

At the outset, we find that a direct appeal is not the proper mechanism by which to adjudicate this issue for two reasons. First, even if Bonilla could demonstrate that he did not give informed consent, we do not believe this court could provide appropriate relief. At trial, Bonilla moved to suppress his statement to Leiendecker disclosing the location of Ashley's body. However, we note the exclusionary rule is meant to deter improper police conduct. *See State v. Brown*, 401 S.C. 82, 92, 736 S.E.2d 263, 268 (2012) ("[T]he exclusionary rule's *sole purpose* is to deter future [constitutional] violations [by law enforcement] and []where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'" (emphasis added) (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011)). Here, there was no improper police conduct to deter by suppressing Bonilla's statement, as Bonilla alleged that his attorney, not law enforcement, acted inappropriately. Additionally, even if the statement could be suppressed, we do not find that this would preclude the admission of evidence gathered when Ashley's body

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[12] Rule 1.6(b) provides eight exceptions under which an attorney may reveal information protected by Rule 1.6(a). Rule 1.6(b), RPC, Rule 407, SCACR. None of these exceptions are applicable to the case at bar.

was discovered. *Cf. United States v. Patane*, 542 U.S. 630, 633–34 (2004) (holding that, in the context of a *Miranda* violation, the exclusionary rule only applies to testimonial and not physical evidence); *see also Nickel v. Hannigan*, 97 F.3d 403, 409 (10th Cir. 1996) ("[C]ourts have refused to apply such a broad evidentiary rule of exclusion to breaches of privilege."); *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) (stating in dictum "that no court has ever applied [the 'fruits of the poisonous tree'] theory to *any* evidentiary privilege"). As such, because Bonilla is challenging the actions of his attorney, his claim regarding Rule 1.6 would best be addressed in an action for ineffective assistance of counsel,[13] which this court is precluded from hearing on direct appeal. *See Matter of Chapman*, 419 S.C. 172, 182, 796 S.E.2d 843, 847 (2017) ("Thus, on direct appeal, [appellate courts] will not consider claims involving ineffective assistance of counsel.").

Second, this court's scope of review is limited by the evidence in the record on appeal. *See* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact [that] does not appear in the Record on Appeal."); *see also Sanders v. Salley*, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984) ("This [c]ourt does not sit as a trial court to receive evidence on disputed issues of fact; our function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court."). Thus, this court's review is limited to the testimony provided by Bonilla and his attorney, who took care not to reveal the substance of his confidential discussions with Bonilla. Without more information regarding what Bonilla and his attorney actually discussed, this court cannot find that the circuit court's determination regarding informed consent was "clearly wrong." *See Parker*, 381 S.C. at 74, 671 S.E.2d at 622 ("In criminal cases, appellate courts are bound by fact finding in response to preliminary motions . . . where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." (quoting *Asbury*, 328 S.C. at 193, 493 S.E.2d at 352)).

If Bonilla believes he did not give Leiendecker informed consent to disclose the location of Ashley's body, post-conviction relief ("PCR") would be the proper

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[13] *See* Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 Wash. U. L.Q. 961, 990–92 (2003) (identifying ineffective assistance of counsel as the proper action by which to challenge an attorney's disclosure of confidential or privileged information to law enforcement).

mechanism by which to adjudicate this issue for several reasons. First, in PCR, Bonilla could challenge the finding that he gave informed consent and seek appropriate relief by bringing a claim for ineffective assistance of counsel. *See Matter of Chapman*, 419 S.C. at 181, 796 S.E.2d at 847 ("[T]he legislature provided an alternative procedure by which criminal defendants must assert claims regarding ineffective assistance of counsel: post-conviction relief (PCR)."). Second, the PCR court could receive additional evidence regarding the issue of informed consent. *See* S.C. Code Ann. § 17-27-80 (2014) ("The [PCR] court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing.") Finally, the PCR court would not be constrained by Rule 1.6 or attorney-client privilege. *See Drayton v. Indus. Life & Health Ins. Co.*, 205 S.C. 98, 108, 31 S.E.2d 148, 152 (1944) ("The general rule excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established[,] waives the privilege."); *see also* S.C. Code Ann. § 17-27-130 (2014) ("Where a defendant alleges ineffective assistance of prior trial counsel . . . as a ground for post-conviction relief . . . , the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant . . . to the extent necessary for prior counsel to respond to the allegation.").

Although we do not believe a direct appeal is the proper mechanism by which to challenge Leiendecker's disclosure, we will review the circuit court's finding of fact under our narrow scope of review.

Given the uncommon nature of this scenario, our jurisprudence on the issue is limited. Consequently, the circuit court applied the standard from *McClure v. Thompson*,[14] a Ninth Circuit habeas corpus case. In *McClure*, the Ninth Circuit found an attorney's failure to obtain informed consent before disclosing evidence would entitle a defendant to bring a claim for ineffective assistance of counsel. 323 F.3d at 1242–43. The court observed that "[t]he professional standard that allows disclosure of confidential communications when 'the client consents after consultation' has two distinct parts: consent by the client, and consultation by the counsel." *Id*. at 1243. Accordingly, the court provided that "the mere fact of consent is not sufficient to excuse what would otherwise be a breach of the duty of confidentiality. Consent must also be informed. That is, the client can provide valid consent only if there has been appropriate 'consultation' with his or her attorney."

[14] 323 F.3d at 1233.

Id. at 1244. "Even in cases in which the negative ramifications seem obvious[,] . . . we require that a criminal defendant's decision be made on the basis of legal guidance and with full cautionary explanation." *Id*. Due to the similarities between the standard espoused by the Ninth Circuit and our state's definition of informed consent set forth in Rule 1.0(g), we believe the circuit court properly relied on *McClure* as persuasive guidance in determining whether Bonilla provided informed consent.

Here, Bonilla conceded that he consented to Leiendecker's disclosure. Thus, applying the standard from *McClure*, the circuit court next determined whether Bonilla's consent was given after full consultation with his attorney. *See id*. ("[T]he mere fact of consent is not sufficient . . . ."). Leiendecker indicated that he had multiple conversations with Bonilla about disclosing the location of Ashley's body, described the benefits of disclosure, and explained the potential consequences of disclosure. Leiendecker further testified that, for the purpose of establishing Bonilla's accident defense, he did not believe there was any reasonable alternative to disclosure. Given Leiendecker's testimony, we conclude there is evidence in the record to support the circuit court's finding of informed consent. *See Parker*, 381 S.C. at 74, 671 S.E.2d at 622 ("In criminal cases, appellate courts are bound by fact finding in response to preliminary motions . . . where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." (quoting *Asbury*, 328 S.C. at 193, 493 S.E.2d at 352)); *see also* Rule 1.0(g), RPC, Rule 407, SCACR ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."); *McClure*, 323 F.3d at 1244 ("[T]he client can provide valid consent only if there has been appropriate 'consultation' with his or her attorney."). While Bonilla testified that Leiendecker did not explain the ramifications of disclosure, the circuit court found Bonilla's testimony to be less credible than Leiendecker's. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("[An appellate court is] bound by the [circuit] court's factual findings unless they are clearly erroneous."). Thus, given this court's limited scope of review, the circuit court's finding is not overcome by Bonilla's conflicting testimony. *See Parker*, 381 S.C. at 74, 671 S.E.2d at 622 ("In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony . . . ." (quoting *Asbury*, 328 S.C. at 193, 493 S.E.2d at 352)). Accordingly, the circuit court did not err in finding Bonilla gave Leiendecker his informed consent to disclose the location of Ashley's body.

II. Fourth Amendment challenges

a. Exceptions to the warrant requirement

Bonilla argues the circuit court erred in admitting the evidence obtained from the vehicles because both search warrants were defective. The State argues warrants were not required because Cauble gave his consent to search and seize the Ford Econoline, and the automobile exception to the warrant requirement applied to both vehicles. We agree with the State.

The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. "Evidence seized in violation of the Fourth Amendment must be excluded from trial." *Weaver*, 374 S.C. at 319, 649 S.E.2d at 482. "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant[.]" *Id*. at 653. Therefore, warrantless searches are generally *per se* unreasonable and violate the Fourth Amendment's prohibition against unreasonable searches and seizures. *Weaver*, 374 S.C. at 319, 649 S.E.2d at 482. "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of several well-recognized exceptions to the warrant requirement." *Id*.

One such exception to the warrant requirement is the automobile exception. *Id*. "Pursuant to the automobile exception, if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." *Id*. at 320, 649 S.E.2d at 482. "The automobile exception to the search warrant requirement is based on: (1) the ready mobility of automobiles and the potential that evidence may be lost or destroyed before a warrant is obtained and (2)

the lessened expectation of privacy in motor vehicles [that] are subject to government regulation." *Id*. Crucially, "[t]he automobile exception does *not* contain a separate exigency requirement." *Id*. (emphasis added). Therefore, "[i]f a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." *Id*. Moreover, "there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure." *Id*.; *see also Texas v. White*, 423 U.S. 67, 68 (1975) ("[P]olice officers with probable cause to search an automobile at the scene where it was stopped [may] constitutionally do so later at the station house without first obtaining a warrant."). "The justification to conduct such a warrantless search does not vanish once the car has been immobilized." *Weaver*, 374 S.C. at 321, 649 S.E.2d at 482; *see also Michigan v. Thomas*, 458 U.S. 259, 261 (1982) ("[W]hen police officers have probable cause to believe there is contraband inside an automobile . . . the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody.").

In determining whether the automobile exception was satisfied, "[t]he principal components of the determination of probable cause will be whether the events [that] occurred leading up to the search, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *State v. Morris*, 395 S.C. 600, 609–10, 720 S.E.2d 468, 472 (Ct. App. 2011) (quoting *State v. Brown*, 389 S.C. 473, 482, 698 S.E.2d 811, 816 (Ct. App. 2010), *rev'd on other grounds*, 401 S.C. at 82, 736 S.E.2d at 263). Probable cause exists where there is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available . . . at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." *State v. Bultron*, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

Voluntary consent to search is another exception to the warrant requirement. *See State v. Pichardo*, 367 S.C. 84, 105, 623 S.E.2d 840, 852 (Ct. App. 2005) ("Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent."). Once consent to search has been given, officers have the authority to seize effects after determining that there is probable cause that such effects contain evidence of a crime. *See Arizona v. Hicks*, 480 U.S. 321, 327 (1987) ("[P]robable cause [is] necessary for a seizure . . . .").

The Hyundai Sonata

Here, officers properly seized and searched the Hyundai Sonata under the automobile exception. First, Ashley was last seen entering the Hyundai Sonata with Bonilla at the Sunoco gas station. Second, Bonilla provided several inconsistent statements regarding the location where he left Ashley the night she disappeared. Third, Bonilla's mother gave several inconsistent statements regarding the location of the Hyundai Sonata. Finally, the Hyundai Sonata was found at an Enterprise Rent-A-Car, and the rental records revealed Bonilla's mother rented an alternate vehicle the day after Ashley disappeared.[15] *See United States v. Patterson*, 150 F.3d 382, 386–87 (4th Cir. 1998) (holding a vehicle believed to contain evidence of a crime may be seized if parked in public). Based on the totality of the circumstances, we find probable cause existed to search and seize the Hyundai Sonata pursuant to the automobile exception. *See Bultron*, 318 S.C. at 332, 457 S.E.2d at 621 (finding that probable cause exists where there is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available . . . at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved."); *see also Weaver*, 374 S.C. at 320, 649 S.E.2d at 482 ("If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.").

Under the automobile exception, officers were not required to search the Hyundai Sonata immediately. *See Weaver*, 374 S.C. at 320, 649 S.E.2d at 482 ("[T]here is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure."). Rather, officers were permitted to transport the vehicle and search it later. *See id*. at 321, 649 S.E.2d at 482 ("The justification to conduct such a warrantless search does not vanish once the car has been immobilized."). Therefore, once probable cause to seize the vehicle was established, officers had the authority to search the vehicle at the Dorchester County Sheriff's Office without obtaining a warrant. *See White*, 423 U.S. at 68 ("[P]olice officers with probable cause to search an automobile at the scene where it was stopped [may] constitutionally do so later at the station house without first obtaining

[15] We believe the acts of renting an alternate car and leaving the Hyundai Sonata at the rental car lot suggest an attempt to hide evidence from law enforcement.

a warrant."). Thus, any defects in the search warrant for the Hyundai Sonata would not render the search unconstitutional.

The Ford Econoline

Similarly, the officers properly seized and searched the Ford Econoline. At Cauble Flooring, officers obtained Cauble's consent to search and seize the van. *See Pichardo*, 367 S.C. at 105, 623 S.E.2d at 852 ("Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent."). Additionally, after searching the van, officers had probable cause to seize it because someone was seen on camera returning the van the night after Ashley disappeared, Bonilla lied about being employed at Cauble Flooring, and the van field-tested "presumptive positive" for blood. *See Bultron*, 318 S.C. at 332, 457 S.E.2d at 621 (finding that probable cause exists where there is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available . . . at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved."). Thus, officers properly seized the van.[16] *See Hicks*, 480 U.S. at 327 ("[P]robable cause [is] necessary for a seizure . . . .").

Moreover, because the officers had probable cause and Cauble consented to the van's seizure, the officers were not required to search the van immediately. *See Weaver*, 374 S.C. at 320, 649 S.E.2d at 482 ("[T]here is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure."). Rather, officers were permitted to transport the van and search it later. *See id*. at 321, 649 S.E.2d at 482 ("The justification to conduct such a warrantless search does not vanish once the car has been immobilized."). Therefore, once probable cause and consent to seize the vehicle were established, officers had the authority to search the vehicle at the Dorchester County Sheriff's Office without obtaining a warrant. *See White*, 423 U.S. at 68 ("[P]olice officers with probable cause to search an automobile at the scene where it was stopped [may] constitutionally do so later at

[16] Bonilla argues the seizure of the van exceeded Cauble's scope of consent. We find this argument meritless for two reasons. First, Cauble signed a form consenting to the seizure of "property of interest in reference to this investigation." Second, even if Cauble did not consent to the seizure, officers had authority to seize the van upon their assessment that they had probable cause to do so.

the station house without first obtaining a warrant."). Thus, any defects in the search warrant for the Ford Econoline would not render the search unconstitutional.

As discussed above, officers were permitted to search both vehicles without obtaining a warrant pursuant to the automobile exception. Despite such authority, officers prudently secured search warrants for both vehicles before processing them at the Dorchester County Sheriff's Office. Because officers were not required to obtain search warrants, we need not decide whether the warrants were defective. However, we will address Bonilla's contention that they were.

b. The warrants

Bonilla argues both search warrants were defective because the vehicles, which were seized from Charleston County, were not within the jurisdiction of the Dorchester County magistrate. Bonilla further argues the search warrant for the Hyundai Sonata is defective because it is based on an affidavit containing inaccurate information. The State argues the Dorchester County magistrate properly issued the search warrants because the vehicles had already been transported to Dorchester County at the time the warrants were issued. The State further argues the search warrant for the Hyundai Sonata is proper because the underlying affidavit still supports a finding of probable cause once the inaccurate information is removed. We agree with the State.

Pursuant to section 17-13-140 of the South Carolina Code (2014), "[a]ny magistrate . . . having jurisdiction over the area where the property sought is located[] may issue a search warrant to search for and seize . . . property constituting evidence of crime or tending to show that a particular person committed a criminal offense." The task of a magistrate when determining whether to issue a warrant is to determine whether the warrant is supported by probable cause. *State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). "A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Kinloch*, 410 S.C. 612, 617, 767 S.E.2d 153, 155 (2014). Therefore, if a warrant is issued based on an affidavit containing inaccurate information, the warrant will be not be defective so long as the affidavit supports a finding of probable cause once the inaccurate information is removed. *Cf. Franks v. Delaware*, 438 U.S. 154, 156 (1978) (finding the intentional inclusion of inaccurate information in an affidavit will void the warrant if, when the false material is set to the side, the affidavit is insufficient to establish probable cause); *see also*

State v. Davis, 371 S.C. 413, 416, 639 S.E.2d 457, 459 ("There will be no *Franks* violation if the affidavit . . . still contains sufficient information to establish probable cause." (quoting *State v. Missouri*, 337 S.C. 548, 554, 524 S.E.2d 394, 397 (1999)).

As discussed above, both vehicles were properly seized and transported to Dorchester County before the search warrants were issued. Thus, we agree that the search warrants were properly issued by the Dorchester County magistrate. *See* S.C. Code Ann. § 17-13-140 ("Any magistrate . . . having jurisdiction over the area where the property sought is located[] may issue a search warrant to search for and seize . . . property constituting evidence of crime or tending to show that a particular person committed a criminal offense.").

Moreover, the circuit court properly found that the inaccurate information in the affidavit did not invalidate the search warrant for the Hyundai Sonata. At trial, Bonilla argued the search warrant was defective because the affidavit provided that Ashley was seen at the Sunoco gas station around 1:12 a.m., rather than 12:12 a.m. Therefore, the circuit court properly considered the remainder of the affidavit to determine whether it supported a finding of probable cause. *Cf. Franks*, 438 U.S. at 156 (finding the intentional inclusion of inaccurate information in an affidavit will void the warrant if, when the false material is set to the side, the affidavit is insufficient to establish probable cause). Upon removing the inaccurate temporal information, the affidavit still provided that: 1) Bonilla was the last known person to see Ashley; 2) Bonilla provided detectives with information that had been proven false; 3) Bonilla picked Ashley up in the Hyundai Sonata; and 4) Ashley was seen getting into the Hyundai Sonata at Sunoco. Based on the totality of the circumstances, there is evidence in the record to support the circuit court's determination that, once the inaccurate information was removed, the affidavit still supported a finding of probable cause. *See Kinloch*, 410 S.C. at 617, 767 S.E.2d at 155 ("A warrant is supported by probable cause if, given the totality of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

III. In camera hearing on Investigator Scott's qualifications and testimony

Preservation

Bonilla argues the circuit court erred in refusing to grant him an in camera hearing on the qualifications of Investigator Scott and the reliability of his testimony. The State argues this issue is not preserved for appeal. We agree with the State.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "[Appellate courts] cannot consider issues raised for the first time on appeal." *State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 822 (Ct. App. 1991). Therefore, "[i]ssues not raised and ruled upon in the [circuit] court will not be considered on appeal." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94. Moreover, "[a] party may not argue one ground at trial and an alternate ground on appeal." *Id*. at 142, 587 S.E.2d at 694.

At trial, Bonilla did not object to the qualifications of Investigator Scott or the reliability of his testimony. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94 ("Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."). Rather, Bonilla objected to the admission of photographs depicting several tests conducted by Investigator Scott. *See id*. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."). In fact, the circuit court specifically asked Bonilla whether he was objecting to the admission of the photographs, and Bonilla indicated that he was. Thereafter, Bonilla did not object when Investigator Scott described how each test was conducted, when he explained that a "presumptive positive" would turn a certain color depending on the particular test, or when he indicated that stains in the van and the trunk of the Hyundai Sonata tested "presumptive positive" for blood.[17] *See id*. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]."). Accordingly, this issue has not been preserved for appellate review.

Harmless Error

Even if we determined that the issue was preserved and that the circuit court erred in refusing to grant Bonilla an in camera hearing, the State argues such error would be harmless. We agree.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). "Where a review of the entire record establishes the error is harmless beyond a

[17] Notably, Bonilla conducted a voir dire of the State's expert in bloodstain pattern analysis but did not ask to conduct a voir dire of Investigator Scott.

reasonable doubt, the conviction should not be reversed." *Price*, 368 S.C. at 499, 629 S.E.2d at 366. "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." *Id*.

We find any error in failing to grant Bonilla an in camera hearing would be harmless under two rationales. First, Investigator Scott's testimony is cumulative to Agent Meeh's testimony. Investigator Scott testified that several samples taken from the seized vehicles tested "presumptive positive" for the presence of blood. Agent Meeh then testified, without objection, that the samples contained human blood, further providing that the blood matched Ashley's DNA. Thus, Investigator Scott's testimony regarding the "presumptive positive" tests is cumulative and therefore harmless. *Cf. State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93–94 (2011) ("Improperly admitted hearsay [that] is merely cumulative to other evidence may be viewed as harmless.").

Second, any error in failing to determine Investigator's Scott's qualifications and the reliability of his testimony would be harmless when considering the overwhelming evidence of Bonilla's guilt. The evidence in the record shows that 1) Bonilla admitted to killing Ashley; 2) Bonilla took steps to cover up Ashley's killing; 3) Ashley's cause of death was homicidal violence; 4) several stains from the van and the trunk of the Hyundai Sonata tested positive for Ashley's blood; 5) Ashley was found nude from the waist down with her shirt and bra around her upper chest; 6) Ashley's body was discovered with electrical tape around her neck and electrical tape resembling handcuffs around her wrist; 7) the lack of tissue and internal organs around Ashley's buttocks and vaginal area suggested injury; 8) Ashley's body tested positive for the presence of a muscle relaxer; 9) a tube of personal lubricant was removed from the van; and 10) Bonilla gave several inconsistent statements to law enforcement and Ashley's family. Accordingly, we find that Bonilla's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Therefore, any error would be harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Bonilla's conviction is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David B. Lemon, Claimant, Appellant,

v.

Mt. Pleasant Waterworks, Employer, and State Accident Fund, Carrier, Respondents.

Appellate Case No. 2016-002321

Appeal From The Workers' Compensation Commission

Opinion No. 5703
Heard April 1, 2019 – Filed December 31, 2019

AFFIRMED IN PART, REVERSED IN PART

Carl H. Jacobson, of Uricchio Howe Krell Jacobson Toporek Theos & Keith, PA, of Charleston, for Appellant.

John Gabriel Coggiola, of Willson Jones Carter & Baxley, P.A., of Columbia, for Respondents.

MCDONALD, J.: David Lemon (Claimant) appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel), arguing it erred in offsetting his award of permanent and total disability benefits against prior benefits received for unrelated claims. We affirm in part and reverse in part.

Facts and Procedural History[1]

Claimant was involved in an admitted work accident on May 8, 2012, while pulling a device designed to provide leverage on a sewer line. He suffered an injury to his low back, affecting both legs. At the time of the accident, Claimant's average weekly wage was $636.04, yielding a compensation rate of $424.05 under the Workers' Compensation Act (the Act). Prior to the 2012 accident, Claimant suffered four separate workplace injuries resulting in workers' compensation claims against Mount Pleasant Waterworks (Employer) and the State Accident Fund (Carrier), including a March 4, 2009 injury to the back, an April 26, 2010 injury to the right shoulder, an April 13, 2011 injury to the right shoulder, and an October 3, 2011 injury to the back. As a result of the four prior claims, Claimant received 199 weeks of compensation benefits, both as temporary and permanent disability benefits.

Employer and Carrier (collectively, Respondents) provided Claimant with medical treatment through multiple medical providers, including Dr. James Aymond and Dr. Thomas Due. On June 20, 2013, Dr. Aymond found Claimant to be at maximum medical improvement (MMI) and assigned a 24% impairment to Claimant's back. On February 12, 2014, Dr. Due found Claimant to be at MMI and assigned him impairment ratings of 24% to the lumbar spine, 7% to the right lower leg, and 7% to the left lower leg.

Claimant filed a Form 50 request for a hearing, alleging injuries to the back and legs and seeking permanent and total disability benefits and lifetime medical treatment. Respondents timely filed both a Form 51 response and a Form 21 request for a hearing, seeking to stop payment of temporary compensation, a determination of permanent disability, and credit for overpayment of temporary compensation paid after the date of MMI. In addition, Respondents sought credit for the 199 weeks of benefits Claimant received in his four prior claims against Employer to be applied as an offset against his current award of permanent disability.

Following a hearing, the Single Commissioner issued an order setting forth a number of findings, including:

[1] There are no factual issues in dispute.

> 1. Based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code Ann. §42-9-30.
>
> 2. [Claimant] is entitled to lifetime causally related medical care.
>
> 3. [Claimant's] May 8, 2012 work accident was his fifth work accident as an employee of Respondent Mount Pleasant Waterworks, and he has previously received temporary or permanent disability compensation in the amount of 199 weeks;
>
> 4. By the date of the hearing, [C]laimant received 122 weeks of temporary total disability benefits related to his May 8, 2012 work accident.

The Single Commissioner found Claimant was entitled to an award of permanent and total disability;[2] however, he further found Respondents were entitled to 321 weeks of credit against a maximum 500-week award of permanent and total disability benefits, including credit under § 42-9-170(B) for 199 weeks of benefits from Claimant's prior unrelated workers' compensation claims and credit for 122 weeks of temporary disability benefits received on the current claim.

Claimant filed a Form 30 request for Appellate Panel review, arguing § 42-9-170(B) did not apply because the Single Commissioner awarded him permanent and total disability benefits under § 42-9-10(A), not § 42-9-10(B). Claimant further argued that even if § 42-9-170(B) applied, the Single Commissioner erred in failing to analyze each of the settlements of his prior claims to determine if there had been separate allocations of benefits paid for temporary total disability and permanent partial disability.

[2] Respondents have not challenged this finding.

The Appellate Panel heard oral argument and remanded the case to the Single Commissioner for (1) a determination of which subsection of § 42-9-10 the Single Commissioner applied in making the award in the present case; (2) a determination of the statutes under which prior awards were issued; and (3) any facts, analyses, or conclusions of law the Single Commissioner deemed necessary in the analysis of the § 42-9-170 determination.

On remand, the Single Commissioner reaffirmed all previous findings of fact from his prior decision and order "not inconsistent with the instant opinion" and found: Claimant was permanently and totally disabled under § 42-9-10(A); Claimant's previous awards for injuries sustained with the same employer were awarded under § 42-9-30; the phrase "receives a permanent injury" in § 42-9-170(B) referred to the present claim; and "another permanent injury in the same employment" referred to Claimant's prior injuries. The Single Commissioner concluded Claimant was subject to the 500-week cap on benefits and stated "upon expanding my research to other cases and statutes, I am even more convinced that the law allows that the [Respondents] be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks."

Claimant again requested Appellate Panel review, arguing the Single Commissioner erred in submitting a revised order that far exceeded the questions presented on remand. Claimant again argued the Single Commissioner erred in crediting Respondents for the 199 weeks of benefits Claimant received in his prior workers' compensation claims and in failing to analyze the prior claims. After hearing arguments, the Appellate Panel affirmed the Single Commissioner's second order.

Standard of Review

The Administrative Procedures Act provides the standard of judicial review for decisions of the Appellate Panel. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133–35, 276 S.E.2d 304, 306 (1981). "An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *see also* S.C. Code Ann. § 1-23-380(5) (Supp. 2019).

Law and Analysis

Claimant concedes Respondents are entitled to credit for 122 weeks of temporary total disability benefits paid on his current claim, however, he challenges the credit of 199 weeks related to benefits paid on his four prior claims. Claimant asserts the Single Commissioner and Appellate Panel erred in applying § 42-9-170 to award this credit because § 42-9-170 addresses benefits awarded under § 42-9-10(B), not § 42-9-10(A). We agree.

Claimant's May 8, 2012 work accident was the fifth work accident for which he received workers' compensation benefits while working for the same employer. Claimant previously received a combined 25.4286 weeks of temporary disability benefits and 75 weeks of permanent partial disability (PPD) benefits as a result of two injuries by accident to his right shoulder in 2010 and 2011. Additionally, Claimant received a combined 23.5714 weeks of temporary benefits and 75 weeks of PPD benefits as a result of two injuries by accident to his back in 2009 and 2011. Claimant received a total of 199 weeks of compensation benefits as a result of his four prior claims.

Claimant correctly asserts that the Act is created by statute, and as such, "when reading a workers' compensation statute, we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003); *see also Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 385, 769 S.E.2d 1, 3 (2015) ("Workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of [the Act]; only exceptions and restrictions on coverage are to be strictly construed.").

Here, the Single Commissioner found Claimant is "permanently and totally disabled" pursuant to Section 42-9-10(A) of the South Carolina Code (2015), which provides:

> When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-

> six and two-thirds percent of his average weekly wages, but not less than seventy-five dollars a week so long as this amount does not exceed his average weekly salary; if this amount does exceed his average weekly salary, the injured employee may not be paid, each week, less than his average weekly salary. The injured employee may not be paid more each week than the average weekly wage in this State for the preceding fiscal year. In no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C).[3]

Claimant submits the 500-week cap applies only to an injury arising from a single accident, not the sum of multiple accidents. Therefore, Claimant argues the injury he sustained as a result of this accident can result in a maximum award of 500 weeks, offset by any benefits received for temporary total disability benefits paid on the same claim. Claimant does not dispute the credit awarded to Employer for the 122 weeks of temporary total disability benefits he received as a result of the current accident and injuries.

However, Claimant challenges the application of the Act's language addressing permanent injuries sustained by an employee after he or she has sustained prior permanent injuries in the same employment. Section 42-9-170(B) states:

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[3] Section 42-9-170(C) is inapplicable here. It provides, "Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life." S.C. Code Ann. § 42-9-170(C).

> If an employee receives a permanent injury as specified in section 42-9-30[4] or section 42-9-10(B)[5] after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks. If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of section 42-9-35.[6] This subsection is effective on July 1, 2008.

S.C. Code Ann. § 42-9-170(B).

Respondents persuasively argue that § 42-9-170(B) reflects the goal of our workers' compensation system to encourage employers to bring injured workers back to work after they have suffered certain compensable injuries. However, by its own terms, § 42-9-170 applies only to § 42-9-10(B) awards. *See, e.g.*, *Wyndham v. R.A. & E.M. Thornley & Co.*, 291 S.C. 496, 500, 354 S.E.2d 399, 402 (Ct. App. 1987), *overruled on other grounds by Medlin v. Greenville Cty.*, 303 S.C.

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[4] Section 42-9-30 sets forth the schedule for which disabilities are deemed to continue and the resulting compensation paid for injuries to various parts of the body.

[5] "The loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section." S.C. Code Ann. § 42-9-10(B).

[6] Section 42-9-35 addresses evidence of preexisting injury or condition.

484, 401 S.E.2d 667 (1991) (explaining "[w]hen the Legislature wished to impose a five hundred week limit on successive injuries, it did so explicitly.").

Here, the Single Commissioner specified "the award in the present case is awarded under [§] 42-9-10(A)"; thus the Single Commissioner and Appellate Panel erred in applying § 42-9-170 to credit Respondents with 199 weeks of compensation paid for Claimant's prior benefits.

Medlin v. Greenville County does not dictate a different result. There, the claimant suffered a work-related injury to his spine in 1983 and was found to have sustained a greater than fifty percent loss of use of his back, therefore entitling him to the maximum compensation of five hundred weeks for total and permanent disability under §§ 42-9-10 and 42-9-30(19) of the South Carolina Code. 303 S.C. 484, 486, 401 S.E.2d 667, 667–68 (1991). Thereafter, the claimant returned to work for Greenville County. *Id.* In 1985, the claimant sustained a second work-related injury and again filed a claim for workers' compensation benefits, seeking total and permanent disability benefits. *Id.* Although the County admitted the second accident occurred, it denied the claimant was entitled to receive an award for permanent disability due to the prior award of total disability benefits for injury to the same body part injured in 1983. *Id.* Our supreme court explained:

> This case is substantially the same as *Hopper* [*v. Firestone Stores, et al.*, 222 S.C. 143, 72 S.E.2d 71 (1952)], in that employee, having already suffered a total and permanent loss of use of a body part, specifically in this case, his back, as a result of his first accident, is seeking total and permanent benefits for a successive injury to the same body part. Under *Hopper*, we find that employee is not entitled to any further benefits for loss of use to the same body part as the loss of use to his back has already been fully "written-off," and is non-existent in so far as the Act is concerned. Thus, there is no basis upon which employee can recover. Only if employee had suffered less than fifty percent loss of use to his back in the first accident, would he have been entitled to compensation for the degree of disability which would have resulted from the later accident. These principles would hold true in any case regardless of whether the

> successive injury occurred while working for the same or different employers. To the extent that *Wyndham v. R.A. & E.M. Thornley and Co.*, 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987) distinguishes between successive injuries incurred while working for the same rather than for different employers, it is overruled.

303 S.C. 484, 488, 401 S.E.2d 667, 669 (1991).[7]

Here, the Appellate Panel affirmed the Single Commissioner's second order finding Claimant permanently and totally disabled pursuant to § 42-9-10(A) and relied on § 42-9-170(B) to cut Claimant's award. However, the plain language of § 42-9-170 renders it inapplicable to § 42-9-10(A). Thus, we reverse the decision of the Appellate Panel as to the 199-week credit.[8]

Conclusion

For the foregoing reasons, we affirm as to 122 weeks credited to Employer and reverse as to the 199 weeks.

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[7] *Medlin* preceded the enactment of the 2007 statutes upon which Claimant's award is based. In any event, *Medlin* is inapplicable due to the plain language of § 42-9-170(B), the Single Commissioner's finding that Claimant's award was made pursuant to § 42-9-10(A), and the Appellate Panel's finding that pursuant to § 42-9-10(A), Claimant is permanently and totally disabled.

[8] The 199-week offset is also troubling because neither the Single Commissioner nor the Appellate Panel undertook any analysis of the four prior claims to determine whether the injuries for which they awarded the 199-week credit were in any way related to the current claim as the back injury in *Medlin* was. For example, several of the payments apparently credited were for temporary total disability benefits, which § 42-9-170(B) does not address. Further, one of the prior settlement agreements referenced a 25% impairment to the right shoulder but had no designation as to the specific number of weeks. Claimant's injury here was to the low back, with bilateral leg pain.

AFFIRMED IN PART, REVERSED IN PART.

LOCKEMY, C.J. and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frederick Robert Chappell, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000283

ON WRIT OF CERTIORARI

Appeal from Greenville County
Perry H. Gravely, Post-Conviction Relief Court Judge

Opinion No. 5704
Heard November 5, 2019 – Filed December 31, 2019

REVERSED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Taylor Zane Smith, of Columbia, for Respondent.

THOMAS, J.: Petitioner Frederick Robert Chappell appeals the dismissal of his post-conviction relief (PCR) application, arguing the PCR court erred in denying

his claim for ineffective assistance of counsel because his trial counsel did not object when the State's expert witness gave improper bolstering testimony. We reverse.

FACTS AND PROCEDURAL HISTORY

On December 14, 2010, a Greenville County Grand Jury indicted Chappell for first-degree criminal sexual conduct with a minor and lewd act upon a child, and the State called the case to trial in August 2012. On August 7, 2012, after a two-day trial, the jury convicted Chappell of both counts, and the trial court sentenced him to life in prison.[1] Chappell appealed, arguing this court should reverse his convictions because the State's expert witness gave improper vouching testimony. However, in June 2014, this court affirmed Chappell's convictions and held that Chappell's improper vouching claim was not preserved for review. *State v. Chappell*, Op. No. 2014-UP-272 (S.C. Ct. App. filed June 30, 2014).

On November 5, 2014, Chappell filed a PCR application, claiming he received ineffective assistance of counsel because his trial counsel failed to object when the State's expert gave improper bolstering testimony. The PCR court held an evidentiary hearing on December 17, 2015. In an order dated January 21, 2016, the PCR court dismissed Chappell's application, finding the State's expert did not make any improper vouching statements. In May 2018, this court granted a writ of certiorari to review the PCR court's ruling.

At trial, the nine-year-old victim testified her grandmother's former boyfriend, Chappell, had sexually abused her several times when she and her siblings visited her grandmother's home.[2] She alleged that Chappell touched her "private" and "bottom" with his hands and mouth and sometimes forced her to touch his "private." After the victim testified, the jury watched video of a forensic interview in which the victim described the abuse and identified Chappell as the perpetrator.

The court then held a hearing to determine the admissibility of testimony from the State's expert witness, Ms. Shauna Galloway-Williams. During voir dire, Galloway-Williams testified that she had never interviewed the victim and had not

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[1] The trial court sentenced Chappell to life imprisonment for the first-degree criminal sexual conduct with a minor and a concurrent term of fifteen years' imprisonment for the lewd act upon a child.

[2] The victim disclosed the sexual abuse in March 2010. She was seven years old.

seen the video of the victim's forensic interview. Over trial counsel's objection, the court qualified Galloway-Williams as an expert in child sexual abuse and treatment.

On direct examination, Galloway-Williams testified to why children who are victims of sexual abuse might not report the abuse right away. Then, without objection from trial counsel, the following exchange occurred between the prosecutor and Galloway-Williams:

> Q: . . . Do children lie?
>
> A: Yes.
>
> Q: Okay. Do children lie about things like – of a sexual nature or abuse? And can you tell us the dynamics of lying and sexual abuse?
>
> A: Children lie. Adults lie. But children are not sophisticated liars. And what I mean by that is they really – you know, children, generally, lie to keep themselves out of trouble, you know. If you ask them if they ate the cookie and they have crumbs on their face, and they say, no, I didn't eat the cookie, that kind of lie.
>
> Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge.

Chappell argues his trial counsel was ineffective for failing to object when Galloway-Williams improperly bolstered the victim's credibility by testifying, "Children don't often lie about sexual abuse incidents."

STANDARD OF REVIEW

PCR applicants have the burden of proving their allegations by a preponderance of the evidence. *Tappeiner v. State*, 416 S.C. 239, 248, 785 S.E.2d 471, 476 (2016). "[T]his [c]ourt will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018), *reh'g denied*, (June 12, 2018). This court reviews questions of law de novo and will reverse if the PCR court's decision is controlled by an error of law. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018), *reh'g denied*, (March 29, 2018).

INEFFECTIVE ASSISTANCE OF COUNSEL

When reviewing a claim for ineffective assistance of counsel, the "court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). To rebut this presumption and succeed on an ineffective assistance claim, a PCR applicant must show (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced the outcome of the trial. *Strickland*, 466 U.S. at 687.

A. Deficient Performance

Chappell argues his trial counsel's performance was deficient because she did not object to improper bolstering testimony. "To prove trial counsel's performance was deficient, a[] [PCR] applicant must show '[trial] counsel's representation fell below an objective standard of reasonableness.'" *Smalls*, 422 S.C. at 181, 810 S.E.2d at 840 (quoting *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). Thus, this court will find trial counsel's failure to object was deficient performance only if it was unreasonable under the prevailing professional norms at the time of trial. *Strickland*, 466 U.S. at 688.

1. Improper Bolstering Testimony

The PCR court found Galloway-Williams' testimony did not contain any vouching statements. Chappell argues Galloway-Williams improperly vouched for and

bolstered the victim's credibility by testifying, "Children don't often lie about sexual abuse incidents." We agree with Chappell.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Therefore, "even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). Moreover, a witness "may not . . . give testimony that improperly bolsters the credibility of the victim." *Briggs v. State*, 421 S.C. 316, 323, 806 S.E.2d 713, 717 (2017).

Improper bolstering is "testimony that indicates the witness believes the victim, but does not serve some other valid purpose." *Id.* at 325, 806 S.E.2d at 718. Improper bolstering also occurs when a witness testifies for the purpose of informing the jury that the witness believes the victim, or when there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth. *Id.* at 324, 806 S.E.2d at 717; *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142. However, an expert's testimony is not improper bolstering "when the expert witness gives no indication about the victim's veracity . . . ." *State v. Perry*, 420 S.C. 643, 663, 803 S.E.2d 899, 910 (Ct. App. 2017), *cert. granted*, (April 19, 2018).

In support of his ineffective assistance claim, Chappell cites several improper bolstering cases involving a witness who interviewed or treated the victim before trial. *See State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 340 (2015) (finding a forensic interviewer improperly bolstered the victim's credibility when she testified that she recommended the defendant not be allowed around the victim); *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (stating a forensic interviewer's testimony her interview with the victim led to a "compelling finding" of abuse was improper bolstering because it was equivalent to stating the victim was telling the truth); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (finding a forensic interviewer improperly bolstered the victim's credibility by noting in her report that the victims "provide[d] a compelling disclosure of abuse . . ."); *Smith*, 386 S.C. at 564, 568, 689 S.E.2d at 631, 633 (stating a forensic interviewer improperly bolstered the victim's credibility by testifying that the victim was believable and had no reason to lie); *State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (stating the victim's treating psychiatrist improperly bolstered the victim's credibility by testifying that the victim's symptoms were genuine); *State v.*

Dempsey, 340 S.C. 565, 569–71, 532 S.E.2d 306, 308–09 (Ct. App. 2000) (finding the victim's counselor improperly vouched for the victim's credibility by testifying that ninety-five to ninety-nine percent of allegations of child sexual abuse are true). Although we find these cases informative, we note that Galloway-Williams was an independent expert who had no contact with the victim before trial.

This court first considered whether an independent expert's testimony was improper bolstering in *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015), *abrogated on other grounds by State v. Jones*, 423 S.C. 631, 817 S.E.2d 268 (2018). There, the independent expert testified regarding the general behavioral characteristics of child sexual abuse victims. *Id.* at 345, 768 S.E.2d at 253. The court held there was no improper bolstering testimony because the independent expert "(1) [did] not testify[] as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report for her testimony, (4) did not express an opinion or belief regarding the credibility of child sex[ual] abuse victims' allegations, and (5) did not express an opinion regarding the credibility of the minor victims in th[e] case." *Id.* at 345, 768 S.E.2d at 252–53.

Later, in *State v. Anderson*, the supreme court warned that the State "runs the risk that the expert will vouch for the alleged victim's credibility" when it calls an expert who interviewed or treated the victim before trial. 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015). The court advised, "[t]he better practice[] . . . is . . . to call an independent expert." *Id*. at 218, 776 S.E.2d at 79.

Since *Brown* and *Anderson*, our supreme court has considered whether the testimony of an independent expert was improper bolstering and held that an independent expert does not improperly bolster the victim's credibility by testifying to only general behavioral characteristics of child sexual abuse victims. *See State v. Cartwright*, 425 S.C. 81, 96–97, 819 S.E.2d 756, 764 (2018) (finding the independent expert's testimony was not improper bolstering because she testified in general terms and "never interviewed the victims and never stated she believed the victims were telling the truth"); *Jones*, 423 S.C. at 637 n.2, 817 S.E.2d at 271 n.2 (finding the independent expert's testimony was not improper bolstering because she gave only "generalized testimony" and did not "evaluate or interview the victims").

As an initial matter, we disagree with the State's claim that Galloway-Williams' testimony was not improper bolstering simply because she was an independent

expert. Instead, the testimony of an independent expert, like the testimony of any witness, is improper bolstering if (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth. *Briggs*, 421 S.C. at 325, 806 S.E.2d at 718; *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94; *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142.

The State also argues Galloway-Williams' testimony was not improper bolstering because she did not indicate that the victim was telling the truth and gave only general testimony about the behavior of child sexual abuse victims. We disagree.

We note that much of Galloway-Williams' testimony was proper general behavioral testimony necessary to explain the often unexpected behavior of child sexual abuse victims. *See, e.g.*, *Jones*, 423 S.C. at 636, 817 S.E.2d at 271 ("[T]he law in South Carolina is settled: behavioral characteristics of sex[ual] abuse victims is an area of specialized knowledge where expert testimony may be utilized."). We find, however, that Galloway-Williams improperly commented on the victim's credibility when she testified, "Children don't often lie about sexual abuse incidents," because a comment on the credibility of a class of persons to which the victim belongs is a comment on the credibility of the victim. *See Wiseman v. State*, 394 S.W.3d 582, 586–87 (Tex. App. 2012) ("An expert who testifies that a class of persons to which the victim belongs is truthful is essentially telling the jury that they can believe the victim in the instant case as well." (quoting *Yount v. State*, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993) (en banc))); *id*. at 586 ("[It] is settled that an expert cannot give an opinion as to whether a person—or a class of persons to which the [victim] belongs—is truthful.").

Galloway-Williams' statement not only had the effect of improperly bolstering the victim's credibility; it also improperly invaded the province of the jury to determine the only issue in this case: whether Chappell sexually abused the victim. *See McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 ("The assessment of witness credibility is within the exclusive province of the jury."). Further, the State offered no permissible purpose for this testimony, and we see none. Thus, we find Galloway-Williams' statement cannot reasonably be interpreted to have served any purpose other than to improperly bolster the victim's credibility. *Briggs*, 421 S.C. at 325, 806 S.E.2d at 718 (stating improper bolstering testimony "indicates the witness believes the victim, but does not serve some other valid purpose").

Accordingly, we find the PCR court erred in finding Galloway-Williams' testimony contained no vouching statements.

The dissent would affirm Chappell's conviction because it would find that Galloway-Williams' statement was proper testimony regarding a general behavioral characteristic of child sexual abuse victims. But the practical result of Galloway-Williams' statement that "Children don't often lie about sexual abuse incidents" was to convey to the jury that the victim's allegations must be true and to encourage the jury to supplant their own credibility determination with that of Galloway-Williams. Both results are impermissible; thus, the statement was improper.

2. Law at the Time of Trial

The State alternatively argues that under the law existing at the time of trial, Chappell's trial counsel could not have known to object to Galloway-Williams' statement as improper bolstering. We disagree.

For an ineffective assistance claim, the PCR court must "determine whether counsel was ineffective *at the time of the alleged error*." *Pantovich v. State*, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019), *reh'g denied*, (September 27, 2019). Thus, the court must consider the law as it existed at the time of trial and "not as it has evolved today . . . ." *Id.* at 564, 832 S.E.2d at 601. Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law . . . ." *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

Chappell's trial was held in August 2012. At that time, our courts had not yet considered an improper bolstering case involving an independent expert. But as the State conceded at oral argument, in 2015, when this court decided the first improper bolstering case involving an independent expert, the court did not establish a new legal principle or change the existing law.[3] *See Brown*, 411 S.C. at 332, 768 S.E.2d at 246. Instead, the *Brown* court applied the existing law to a new

[3] At oral argument, the State asserted, "The *Brown* case [wa]s not necessarily a change in law as much as it [wa]s an application of the vouching line of cases to a new factual situation."

set of facts. Accordingly, we find the law at the time of Chappell's trial indicated an independent expert, like any other witness, may not testify whether another witness is telling the truth. *See McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 ("[W]itnesses are generally not allowed to testify whether another witness is telling the truth."); *see also Briggs*, 421 S.C. at 324, 806 S.E.2d at 717 ("[A] witness may not give an opinion for the purpose of conveying to the jury . . . that [the witness] believes the victim."); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper."); *McKerley*, 397 S.C. at 464, 725 S.E.2d at 141 ("The assessment of witness credibility is within the exclusive province of the jury."); *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) ("The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter."). Thus, Chappell's trial counsel should have known to object when Galloway-Williams testified, "Children don't often lie about sexual abuse incidents." Accordingly, we find the PCR court erred in finding Chappell's trial counsel was not deficient for failing to object.

B. Prejudice

Chappell argues he was prejudiced by trial counsel's failure to object to improper bolstering testimony because the outcome of his trial hinged on the jury's assessment of the victim's credibility. We agree.

In an ineffective assistance case, "trial counsel's deficient failure to object to [improper bolstering] testimony does not remove a[] [PCR] applicant's burden to prove prejudice." *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492. To establish prejudice, a PCR applicant must show "there is a reasonable probability that, but for [trial] counsel's [deficient performance], the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

"The determination whether a bolstering error [prejudiced the outcome of a trial] depends on whether the case turn[ed] on the credibility of the victim." *Chavis*, 412 S.C. at 110, 771 S.E.2d at 341. The outcome of a trial turns on the credibility of the victim when the State presents no physical evidence or "relie[s] solely upon the victim's testimony to establish the details of the crime . . . ." *Thompson*, 423 S.C.

at 248, 814 S.E.2d at 494; *see also Gilchrist v. State*, 350 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) (finding a PCR applicant was prejudiced by improper bolstering testimony because "believing [the bolstered witness] was the only way the jury could convict . . . .").

Here, we find the outcome of Chappell's trial hinged on the jury's assessment of the victim's credibility because the State presented no physical evidence, and the only evidence against Chappell was the victim's uncorroborated testimony. *See Gilchrist*, 350 S.C. at 228, 565 S.E.2d at 285 (stating the witness's credibility was essential to the decision to convict because the witness's testimony was the only evidence of guilt). Because the outcome hinged on the victim's credibility, we find there is a reasonable probability that the outcome of Chappell's trial would have been different had trial counsel objected when Galloway-Williams improperly bolstered the victim's credibility.

The dissent states that even if Galloway-Williams' statement that "Children don't often lie about sexual abuse incidents" was improper bolstering, it would find Chappell failed to show the outcome of his trial would have been different had trial counsel objected. However, our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime. *See Thompson*, 423 S.C. at 249, 814 S.E.2d at 494 (stating the PCR applicant was prejudiced by improper bolstering because the outcome of the trial "hinged on [the] [v]ictim's credibility, and there was otherwise an absence of overwhelming evidence of [the applicant]'s guilt"); *Briggs*, 421 S.C. at 333–34, 806 S.E.2d at 722–23 (finding improper bolstering testimony prejudiced the PCR applicant's trial because there was no physical evidence any sexual abuse occurred); *Anderson*, 413 S.C. at 219–21, 776 S.E.2d at 79–81 (finding improper bolstering testimony constituted reversible error because the trial turned solely on the credibility of the victim and there was no physical evidence of abuse); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 95 ("Because the children's credibility was the most critical determination of this case, we find the admission of the [forensic interviewer's] written reports was not harmless."); *Smith*, 386 S.C. at 569, 689 S.E.2d at 633 (finding the PCR applicant was prejudiced by improper bolstering testimony because "the outcome of the case hinged on the [v]ictim's credibility regarding identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of [] guilt."); *Gilchrist*, 350 S.C. at 228, 565 S.E.2d at 285 (finding a PCR applicant was prejudiced by improper bolstering

testimony because "believing [the bolstered witness] was the only way the jury could convict . . ."); *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989) (finding the admission of improper bolstering testimony mandated reversal because "the State relied solely upon [the] [v]ictim's testimony to establish the details of the crime and the identity of the perpetrator"). We see no reason to depart from those rulings.

CONCLUSION

For the foregoing reasons, we find evidence does not support the PCR court's dismissal of Chappell's PCR application. We reverse and remand for a new trial.

REVERSED.

GEATHERS, J., concurs.

SHORT, J., dissenting: Respectfully, I dissent and would affirm the PCR court. First, I find the State's independent expert's statements were not comments on the victim's credibility but were statements regarding a general behavioral characteristic of child sexual abuse victims; thus, there was no bolstering. Even if the comments were bolstering, I find Chappell has failed to establish the prejudice necessary for relief in a PCR action, which requires a showing that the result of the trial would have been different. In this case, although there was no physical evidence of abuse, the State produced a forensic video interview of the victim, the victim's own testimony before the jury, and the mother's testimony. In my view, the jury would have reached the same conclusion with or without the expert's statements. Thus, Chappell is unable to establish prejudice. I would affirm.