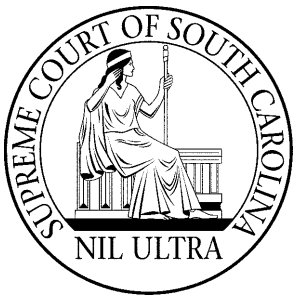

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 4, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jaron Lamont Gibbs, Petitioner.

Appellate Case No. 2020-001399

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 28125
Heard March 16, 2022 – Filed January 4, 2023

AFFIRMED AS MODIFIED

Jack B. Swerling, of Columbia, and Katherine Carruth Goode, of Winnsboro, for Petitioner.

Attorney General Alan Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody J. Brown, and Assistant Attorney General Julianna E. Battenfield, all of Columbia, and Solicitor W. Walter Wilkins, of Pickens, for Respondent.

JUSTICE JAMES: Jaron Lamont Gibbs was convicted of murder and possession of a weapon during the commission of a violent crime. He appealed, arguing the trial court erred in (1) allowing Detective Michael Arflin to present lay testimony about single and double action revolvers and (2) allowing the State to reference Arflin's testimony in its closing argument. The court of appeals affirmed Gibbs's convictions. *State v. Gibbs*, 431 S.C. 313, 847 S.E.2d 495 (Ct. App. 2020). We affirm the court of appeals' opinion as modified.

Background

The court of appeals' opinion presents the full background of this case. *Id.* at 316-20, 847 S.E.2d at 496-98. The following basic facts are sufficient for our review. This shooting occurred at a four-way intersection near Clemson while Gibbs was standing at the driver's side window of a vehicle occupied by Hunter Raby, Robby Porter, and Kalyn Meaders (Victims). Gibbs's revolver discharged into the car, and the bullet grazed the top of the Raby's head and struck Porter, who died the following day. Gibbs left the scene and was arrested in Atlanta two days later. The revolver was never recovered.

The central dispute at trial was whether the shooting was accidental or intentional. The State contended the shooting was intentional and stemmed from Gibbs's sale of drugs to Victims earlier that day. Raby testified Gibbs held the barrel of the revolver to the left side of his face inside the open driver's side window and told Raby he "had messed up and was really close to losing [his] life over it." Raby acknowledged that he pushed the revolver away with his palm, but he denied touching the trigger.

Gibbs conceded he held the revolver by the grip and pointed it barrel-first inside the driver's side window; however, Gibbs claimed he did so to offer the revolver as payment for a gambling debt he owed Victims. Gibbs contended the revolver discharged accidentally after Raby refused to accept the revolver and pushed it away. Gibbs testified the revolver was a "piece of junk," and he testified he was positive his finger was not touching the trigger when it discharged. Gibbs testified he left the scene because he thought no one was injured.

Gibbs argues the trial court committed reversible error in admitting a portion of lead detective Michael Arflin's testimony. Arflin testified he was familiar with revolvers, and the solicitor asked Arflin if he was familiar with how single and double action revolvers work. Gibbs objected on the ground that Arflin was not

qualified as an expert in firearms. The trial court overruled his objection, stating, "He says he understands so I'm going to allow him to testify to it. If we go much further, then we'll revisit your objection." The following testimony is the first subject of this appeal:

> **The State:** Detective Arflin, how do you fire a single action gun?
>
> **Arflin:** The hammer has to be cocked and then you fire – you pull the trigger and it discharges.
>
> **The State:** Will it fire without you cocking it?
>
> **Arflin:** That's kind of the rule behind single action. It has to be cocked.
>
> **The State:** A double action?
>
> **Arflin:** When you pull the trigger, the hammer both cocks and discharges.
>
> **The State:** Does it have a light trigger pull, a heavy trigger pull?
>
> **Arflin:** In double action, it's going to be a long, heavy trigger pull.

The second subject of this appeal concerns a portion of the State's closing argument that Gibbs contends the evidence presented at trial did not support. In her closing, the solicitor stated, "[G]uns do not accidentally go off." The solicitor also demonstrated the necessary steps for single and double action revolvers to fire. The solicitor argued that if the gun was a single action revolver, Gibbs "[w]ould have had to have gotten out of the car, cocked it before he put it to [Raby's] head. That's intent. That is a conscious effort." The solicitor then demonstrated that for a double action revolver to accidentally fire, "[Raby] would have to push the gun up like this, wrap his fingers around where the trigger is, pull it back and pull it up at the same time if this was a double action revolver. That simply does not make sense." Gibbs objected to this argument and demonstration, arguing there was no evidence to support the conclusion that a gun cannot accidentally discharge. The trial court overruled the objection. The jury found Gibbs guilty of murder and possession of a weapon during the commission of a violent crime.

Discussion

A. Arflin's Testimony

Gibbs argues Arflin's testimony about single and double action revolvers involved "scientific, technical, or other specialized knowledge" and, therefore, had to be given by an expert. *See* Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise.").

Relatedly, Gibbs argues the court of appeals erroneously held Arflin's testimony was admissible under Rule 701, SCRE. Gibbs also contends the court of appeals overemphasized the significance of Arflin's personal knowledge of revolvers when it held he presented proper lay testimony. We will begin by addressing these two arguments.

1. The court of appeals did not rely on Rule 701

Gibbs argues the court of appeals erred in holding Arflin's testimony was admissible under Rule 701. The State agrees the court of appeals relied on Rule 701 in holding Arflin presented proper lay testimony, but the State argues the court of appeals reached the correct result. We disagree with both parties because it is clear the court of appeals' holding was not based on Rule 701.

Rule 701 allows a lay witness to testify in the form of "opinions or inferences" that "(a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Although the court of appeals acknowledged Rule 701 allows lay opinion testimony if certain criteria are met, the court of appeals did not rely on Rule 701 in holding Arflin provided proper lay testimony. The court of appeals expressly noted Arflin "never offered anything resembling an opinion . . . ." *Gibbs*, 431 S.C. at 322, 847 S.E.2d at 499. Additionally, the court of appeals did not examine the three factors that must be satisfied for lay opinion testimony to be admitted under Rule 701. Instead, the court of appeals relied on Rule 602, SCRE, in holding Arflin gave admissible lay testimony. We will discuss the propriety of that holding momentarily.

The court of appeals was correct not to rely on Rule 701, as Arflin's testimony did not fall within the confines of that rule for two primary reasons. First, Arflin's testimony consisted only of a simple explanation of how single and double action revolvers fire. Arflin did not testify "in the form of opinions or inferences" as Rule 701 contemplates. Second, Arflin's testimony did not satisfy the first requirement of Rule 701. Rule 701 requires testimony that is based on the witness's "perception," i.e., things the witness observed firsthand in the factual underpinnings of the case—not the general or background experience of the witness. *See State v. Ostrowski*, 435 S.C. 364, 388-89, 867 S.E.2d 269, 281-82 (Ct. App. 2021). Arflin arrived at the crime scene roughly twenty minutes after the shooting; Gibbs had left the scene, and the revolver was never recovered. As such, Arflin's testimony was based on his general familiarity with revolvers—not specific perceptions or observations relative to the facts of this case. *See Hamrick v. State*, 426 S.C. 638, 648, 828 S.E.2d 596, 601 (2019) (holding lay opinion accident reconstruction testimony was not rationally based on the witness's perception because the witness "arrived on the scene forty-eight minutes after the incident occurred, and thus, he clearly did not perceive the location of the impact"); *Ostrowski*, 435 S.C. at 388-90, 867 S.E.2d at 281-82 (holding the trial court erred in admitting lay opinion testimony about the meaning of "drug jargon" because the witness was not personally involved in the surveillance and "interpreted the messages based on his 'general drug-investigation experience alone'" (quoting *United States v. Johnson*, 617 F.3d 286, 295 (4th Cir. 2010))).

2. The court of appeals overstated the significance of Arflin's "personal knowledge" in holding he presented proper lay testimony

As we stated above, the court of appeals relied on Rule 602, not Rule 701, in holding Arflin presented proper lay testimony. Rule 602 provides, in relevant part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The court of appeals held Arflin's personal knowledge of single and double action revolvers rendered his testimony proper. Citing Rule 602, the court of appeals stated that although Arflin's testimony was arguably "foreign," "[t]he key feature of lay testimony is the witness's personal knowledge, not whether the subject of the testimony is beyond the jury's ordinary experience." *Gibbs*, 431 S.C. at 321, 847 S.E.2d at 499.

Gibbs argues the court of appeals relied too heavily upon Rule 602 and Arflin's general familiarity with revolvers. Gibbs claims the distinction between lay and expert testimony "turns on whether the subject of the testimony is scientific,

technical, or specialized in nature[,]" and he argues Rule 602 and the witness's personal knowledge do not change the analysis. Gibbs claims the court of appeals erred in suggesting a witness's personal knowledge can remove otherwise technical or specialized testimony from the purview of Rule 702, SCRE. Gibbs is correct, but that does not require reversal.

The court of appeals held Arflin presented proper lay testimony under Rule 602 because he had personal knowledge of single and double action revolvers. That was error. Specifically, the court of appeals' statement that "[t]he key feature of lay testimony is the witness's personal knowledge, not whether the subject of the testimony is beyond the jury's ordinary experience" is too broad. While Rule 602 requires lay testimony to be grounded in the witness's personal knowledge, that rule does not give a lay witness license to testify about any subject simply because he has personal knowledge of the subject. Taken to its logical extreme, under that approach, even the most complicated subject matter would be exempt from the need for expert testimony if the witness had "personal knowledge" of it. That is not the rule. Even if a witness has personal knowledge, the general rule is that the witness must be qualified as an expert to testify about matters requiring scientific, technical, or other specialized knowledge. *See* Rule 702, SCRE.

We clarify that a witness's personal knowledge cannot remove testimony requiring scientific, technical, or specialized knowledge from the scope of Rule 702. We now turn to whether Arflin's testimony required Rule 702 analysis.

3. Arflin's testimony did not require Rule 702 analysis

Rule 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (emphasis added). Although Rule 702 states an expert witness may testify about matters involving scientific, technical, or specialized knowledge, we have held on several occasions that expert testimony is required when the subject matter of the testimony falls outside the realm of ordinary lay knowledge. *Watson v. Ford Motor Co.*, 389 S.C. 434, 445-46, 699 S.E.2d 169, 175 (2010);[1] *Graves v. CAS Med. Sys., Inc.*, 401

[1] We rely on *Watson* in this instance for its discussion of when expert testimony is necessary to present a jury question. We agree with Justice Few's explanation in his concurring opinion that *Watson* "was not a rewrite of the elements of Rule 702[,]"

S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *State v. Jones*, 423 S.C. 631, 635-36, 817 S.E.2d 268, 270 (2018). We have also recognized trial courts have broad discretion to determine whether the subject matter of a witness's testimony requires analysis under Rule 702. *Jones*, 423 S.C. at 636-37, 817 S.E.2d at 271. Accordingly, we must determine whether the trial court abused its discretion in concluding Arflin's testimony about single and double action revolvers was not beyond the scope of ordinary knowledge.

Gibbs argues the trial court failed to exercise any discretion in this case because it did not consider whether Arflin's testimony required analysis under Rule 702. *See State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion." (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997))). Gibbs claims Arflin's testimony required Rule 702 analysis because it dealt with "the manner and mechanics of the operation and functionality of a particular kind of firearm." Gibbs contends the court of appeals acknowledged that the subject matter of Arflin's testimony was outside the knowledge base of ordinary jurors when it stated, "[T]his subject matter may have been foreign to some members of the jury[.]" *Gibbs*, 431 S.C. at 321, 847 S.E.2d at 499.

The State, on the other hand, contends Arflin's testimony was within the common knowledge of most laypersons and "simply was not complicated enough to trigger Rule 702." The State claims the trial court recognized the low level of complexity of Arflin's testimony and properly concluded Rule 702 analysis was unwarranted. We agree with the State.

When the trial court overruled Gibbs's objection, it indicated it would restrict Arflin from providing anything more than a rudimentary explanation of how single and double action revolvers work: "We'll just see how far [Arflin's testimony] goes. I don't know if we're going much further with this. . . . If we go much further, then we'll revisit your objection." While the trial court did not specifically rule that Arflin's testimony was within the realm of ordinary knowledge, it is apparent the trial court concluded limited testimony about how single and double action revolvers fire did not require Rule 702 analysis. The trial court clearly understood certain

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and "[t]he idea of necessity in *Watson* related to the . . . issue of whether expert testimony was required, not to the Rule 702 issue of whether expert testimony was admissible."

subjects require Rule 702 analysis, as two prosecution witnesses—a SLED gunshot residue and trace evidence expert and a forensic pathologist—were offered as experts and pronounced qualified by the trial court. Although the better practice is for the trial court to make a specific finding that the challenged testimony is not outside the realm of ordinary knowledge, the lack of an explicit finding does not require reversal here.

Having concluded the trial court exercised some discretion in allowing Arflin's testimony, we must now decide whether the trial court exercised that discretion appropriately. The elementary content of Arflin's testimony is the key to this inquiry. Arflin briefly described how single and double action revolvers fire. He explained that a single action revolver will not fire before the hammer is cocked, and he explained that a double action revolver both cocks and fires when the trigger is pulled. Arflin also explained that double action revolvers require a "long, heavy trigger pull."

The trial court did not abuse its discretion in determining expert testimony was not required. We agree with the court of appeals' description of Arflin's testimony as "nothing more than the most rudimentary explanation of how someone discharges a revolver." *Gibbs*, 431 S.C. at 322, 847 S.E.2d at 499. In a different context, we have noted that it is proper for trial courts to assess the level of complexity presented by the testimony when deciding whether expert testimony is required. *See Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153-54, 747 S.E.2d 468, 481 (2013) (stating expert testimony is not required to establish the standard of care for the operation of a landfill "where a lay person can comprehend and determine an issue without the assistance of an expert" and noting trial courts should assess "the complexity and technical nature of the evidence" when determining whether a particular subject requires expert testimony). Even when subject matter is at the periphery of ordinary knowledge, expert testimony is not required when a witness can give an explanation of the concept that a reasonable juror can grasp instantly. Here, Arflin's testimony was so rudimentary that a reasonable juror could immediately understand it.

Finally, Gibbs's reliance on the court of appeals' statement that this subject matter may have been "foreign" to members of the jury is misplaced. As we explained above, because the court of appeals held Arflin's personal knowledge rendered the lay testimony proper, it did not squarely address whether the trial court erred in finding this subject matter was not outside the ordinary knowledge of most jurors. In any event, we have explained that the trial court did not abuse its discretion

in finding the testimony did not have to be given by an expert. We affirm the court of appeals as modified and hold the trial court did not err in admitting Arflin's lay testimony.

B. Closing Argument

"The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004).

The court of appeals held the trial court did not err in allowing the solicitor to state during closing argument that "guns do not accidentally go off." *Gibbs*, 431 S.C. at 322-23, 847 S.E.2d at 499-500. The court of appeals also held the solicitor's demonstration—in which she explained what would have to happen for a single or double action revolver to fire—was proper. Gibbs argues that if Arflin's testimony about single and double action revolvers was erroneously admitted, there was no evidence upon which the statement and demonstration could have been based. Gibbs further claims that even if Arflin's testimony was properly admitted, the testimony did not provide evidentiary support for the closing argument that guns do not accidentally discharge.

We agree with the court of appeals' analysis of this issue and hold the statement that "guns do not accidentally go off" was permissible advocacy. The solicitor's statement was imprecise, as the court of appeals noted, because Arflin was never asked about the possibility of a gun misfiring due to manufacturing defect or improper handling; however, considering the solicitor's closing in context, the statement was a permissible argument about how the jury should apply Arflin's testimony to the facts of the case. The solicitor immediately followed her statement with an explanation of why it was highly unlikely that the shooting was accidental. The solicitor stated that if Gibbs had a single action revolver, he would have had to cock it before it would fire—demonstrating malice. The solicitor explained that if Gibbs had a double action revolver, it would fire accidentally only if Raby had wrapped his finger around the trigger and pulled.

Additionally, the solicitor's statement was made in response to Gibbs's testimony that the gun went off accidentally. Gibbs testified he was positive his finger was not on the trigger when the gun fired, and one theory of his defense was

that Raby accidentally pressed the trigger. The solicitor's statement was certainly proper when viewed as a reply to Gibbs's theory of the case. Under the invited reply doctrine, conduct that would be improper otherwise may be appropriate if made in response to statements or arguments made by the defense. *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). We affirm the court of appeals' sound analysis and hold the trial court did not err with respect to the solicitor's closing argument.

Conclusion

For the foregoing reasons, we affirm the court of appeals' opinion as modified.

AFFIRMED AS MODIFIED.

KITTREDGE, J., concurs. FEW, J., concurring in in a separate opinion in which HEARN, J., concurs. HEARN, J., concurring in result only in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE FEW: I appreciate the majority's thoughtful discussion of the intriguing question of how to analyze Detective Arflin's explanation of how single- and double-action revolvers work. While I agree his testimony is clearly not lay opinion under Rule 701, SCRE, whether it should be treated as "specialized knowledge" under Rule 702, SCRE, is a more difficult question. The line separating what the majority calls "ordinary knowledge" and what Rule 702 calls "specialized knowledge" is not a bright line, and trial courts must—as the majority explains—conduct the type of thorough analysis shared by the majority to determine how to treat any particular testimony. In my view, however, Detective Arflin's explanation is specialized knowledge. Thus, I would have analyzed the testimony under Rule 702. Detective Arflin gained this knowledge through his experience, training, and education as a law enforcement officer. He was, therefore, an "expert" on the subject of how single- and double-action revolvers are fired. While I would have required Detective Arflin to provide a bit more explanation of the basis of his knowledge, I would have reached the same conclusion reached by the trial court, the court of appeals, and the majority of this Court: the testimony was admissible.

Also, I agree with Justice Hearn that *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 747 S.E.2d 468 (2013) is not directly applicable. The question before the Court in *Babb* was whether the plaintiff on a negligence claim against a landfill operator was required to present expert testimony to establish the standard of care. 405 S.C. at 153, 747 S.E.2d at 481. The question before the Court in this case is whether the evidence that was presented was required to be analyzed under Rule 702 as expert testimony. The point of law at issue in *Babb* and the point we address in this case are related, but they are not the same. The difference—though subtle—is important. In *Babb* and other cases in which the issue is whether expert testimony is required, whether the subject matter of the testimony is beyond the knowledge of a lay juror is dispositive. *See Babb*, 405 S.C. at 153, 747 S.E.2d at 481 (stating "where a subject is beyond the common knowledge of the jury, expert testimony is required"). In this case and other cases in which the issue is whether expert testimony should be admitted, whether the testimony is beyond the knowledge of a lay juror is relevant to the Rule 702 element that the testimony must "assist the trier of fact," but it is not dispositive of whether that element is satisfied or whether the testimony is admissible.

In some prior cases, we addressed both issues—the necessity and admissibility of expert testimony—at the same time. Statements we made in doing so—correct statements in those cases—can be confusing in a case in which the sole issue is the

admissibility of expert testimony. In *Watson v. Ford Motor Company*, 389 S.C. 434, 699 S.E.2d 169 (2010), for example, both questions were before the Court. Initially, this Court analyzed whether the testimony of two experts was admissible under Rule 702 and found the trial court erred in admitting the testimony of both experts. 389 S.C. at 448, 452, 699 S.E.2d at 176, 178. The question then became whether the jury verdict for the plaintiff could stand without expert testimony to support it. The Court concluded expert testimony was required, and reversed the jury's verdict. 389 S.C. at 452-53, 699 S.E.2d at 178-79. In the course of explaining those two holdings, the Court stated, "the trial court must make three key preliminary findings which are fundamental to Rule 702 . . . [, including], the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." 389 S.C. at 446, 699 S.E.2d at 175. The statement was a correct expression of the Court's resolution of the two issues before it, but it was not a rewrite of the elements of Rule 702 as some have interpreted it. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (finding the elements for the admissibility of expert testimony derive from Rule 702 and stating, "the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable"). The idea of necessity in *Watson* related to the *Babb* issue of whether expert testimony was required, not to the Rule 702 issue of whether expert testimony was admissible.

In this case, I have no problem with the majority using *Babb* to illustrate part of its analysis, but whether expert testimony was required in this case is not an issue. The State was clearly not *required* to present expert testimony to establish guilt. Once the State chose to present Detective Arflin's explanation of how single- and double-action revolvers work, however, the question became how the trial court should analyze the admissibility of the testimony. As the majority points out, this involves the trial court's discretion. As I have explained, I would have analyzed the testimony under Rule 702. In that analysis, there would be no consideration of necessity.

With these small differences, I concur in the majority opinion.

HEARN, J., concurs.

JUSTICE HEARN: Like Justice Few, I join in the majority's thorough discussion of the import of Rules 602, 701, and 702, SCRE. However, I disagree with the majority's reliance on *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 153-54, 747 S.E.2d 468, 481 (2013) as support for the trial court's decision to permit Detective Arflin to testify about the difference between single- and double-action revolvers. Trial courts must analyze whether a witness is testifying to something that requires specialized knowledge or not per Rule 702, SCRE. The "common knowledge exception" as articulated in *Babb* applies to proving deviations from the standard of care in negligence actions and is inapplicable here.

In *Babb*, this Court answered five certified questions from the federal district court related to odors emanating from a landfill. *Id.* at 136-37, 747 S.E.2d at 472. The plaintiffs sought recovery through various legal avenues, and we clarified that South Carolina nuisance law did not permit recovery where no physical invasion had occurred. *Id.* at 144-52, 747 S.E.2d at 476-80. We acknowledged that while such facts *could* alternatively give rise to negligence action, plaintiffs must allege a breach in the standard of care, likely through the use of an expert. *Id.* at 153-54, 747 S.E.2d at 481. Experts may not be required, we noted, when the common knowledge exception applies. *Id.* at 153, 747 S.E.2d at 481 ("'the common knowledge exception to the requirement of expert testimony in proving negligence depends on the particular facts of the case.' *Sharpe v. S.C. Dept. of Mental Health*, 292 S.C. 11, 14, 354 S.E.2d 778, 780 (Ct. App. 1987).")[2]

[2] The "common knowledge exception" is almost exclusively seen in negligence cases whereas the determination of whether an expert is required under Rule 702 deals with what the jurors understand without possessing specific specialized knowledge. *See, e.g.*, *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 349, 638 S.E.2d 96, 101 (Ct. App. 2006) ("[E]xpert testimony is not necessary to prove negligence or causation so long as lay persons possess the knowledge and skill to determine the matter at issue." (quoting F. Patrick Hubbard & Robert L. Felix, The Law of South Carolina Torts 167 (2d ed. 1997))); *Pederson v. Gould*, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986) ("Expert testimony is not required, however, in situations where the common knowledge or experience of laymen is extensive enough for them to be able to recognize or infer negligence on the part of the doctor and also to determine the presence of the required causal link between the doctor's actions and the patient's medical problems."); *King v. Williams*, 276 S.C. 478, 483, 279 S.E.2d 618, 620 (1981) ("The law is well-established that expert testimony is not required

As used by the majority, the isolated quotation from *Babb* would use an exception, known in the world of negligence actions, as support for general exception for the use of experts in any case—that is a bridge too far. I agree with Justice Few that this case presents a close question as to whether an expert was required to explain the facts in evidence under Rule 702 and would therefore affirm based on the discretion afforded trial courts in evidentiary rulings. However, I disagree that the common knowledge exception articulated in our civil jurisprudence is applicable here. Accordingly, I concur in result only.

BEATTY, C.J., concurs.

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where the common knowledge or experience of laymen is capable of inferring lack of proper care and also the required causal link."); *but see State v. Jones*, 423 S.C. 631, 638, 817 S.E.2d 268, 271 (2018) (noting in a delayed disclosure case involving criminal sexual conduct, whether the subject matter requires expert testimony is best left to the trial court's "sense of what knowledge is commonly held by the average juror").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Barry Clarke, Petitioner,

v.

Fine Housing, Inc. and RRJR, L.L.C., Defendants,

of which Fine Housing, Inc. is the Respondent.

Appellate Case No. 2020-001371

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J.C. Nicholson Jr., Circuit Court Judge

Opinion No. 28126
Heard April 5, 2022 – Filed January 4, 2023

AFFIRMED

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, P.A., of North Charleston, and Ashley G. Andrews, of LaFond Law Group, P.A., of Charleston, for Petitioner.

W. Cliff Moore III and Kirby D. Shealy III, both of Adams and Reese, LLP, of Columbia, for Respondent.

JUSTICE JAMES: Barry Clarke brought this action for specific performance of a right of first refusal. The trial court ruled for Clarke and ordered Fine Housing, Inc. to convey certain real property to Clarke. The court of appeals reversed, holding the right of first refusal is unenforceable. *Clarke v. Fine Housing, Inc.*, Op. No. 2020-UP-238 (S.C. Ct. App. filed Aug. 12, 2020). We affirm.

I.

Clarke owned a strip club at 2015 Pittsburgh Avenue in Charleston. Group Investment Company, Inc., whose shareholders were John Robinson and Robin Robinson, owned a strip club across the street at 2028 Pittsburgh Avenue (the Subject Property). The Subject Property includes buildings, a parking lot, and other land. In 1999, Clarke and Group Investment entered into a recorded lease (the Lease) that allowed Clarke to use half of the parking spaces located on the Subject Property.

Pertinent Lease provisions include Section 1.1, which states, "Lessee hereby leases from Lessor the property generally described in Exhibit 'A' attached hereto." Section 2.1 provides, "The premises is unimproved property to be used as a parking lot by both the Lessor and the Lessee." The parties agree the "unimproved property" is the parking spaces. Section 7.1 provides, "The Lessee and Lessor shall be entitled to use of one half (1/2) of the spaces contained in the parking lot [which encumbrances all of the property described in Exhibit A]." Clarke agrees he was not entitled to use any portion of the Subject Property other than the parking spaces during the term of the Lease. Clarke argues Section 5.2 of the Lease provides him a right of first refusal (the Right) to buy the entire Subject Property; however, the entirety of Section 5.2 states, "Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell." Section 5.2 does not state what property—the leased parking spaces or all of the Subject Property—is encumbered by the Right. Also, there are no provisions in Section 5.2 or elsewhere in the Lease stating either how the purchase price would be set when the time came for Clarke to exercise the Right or what procedures would govern Clarke's exercise of the Right.

In 2007, Group Investment conveyed the Subject Property to RRJR, LLC for the stated consideration of $5.00. John Robinson and Robin Robinson were members of RRJR. Clarke testified he "probably" knew Group Investment transferred the Subject Property to RRJR, but Clarke claimed he did not seek to

exercise the Right at that time because Group Investment and RRJR were "the same people."

In 2013, RRJR conveyed the Subject Property to Fine Housing for $150,000.00.[1] Fine Housing's closing attorney did not take note of the Lease or the Right prior to the closing, but Fine Housing concedes it had record notice of both the Lease and the Right. Neither Fine Housing nor RRJR notified Clarke of the sale of the Subject Property.

Clarke learned of the sale to Fine Housing in March 2014, and in May 2015, Clarke initiated this action for specific performance against Fine Housing and RRJR. RRJR did not answer and is in default. After a bench trial, the trial court ruled the Right is enforceable as to the entire Subject Property and ordered Fine Housing to convey title to the Subject Property to Clarke upon his payment of $350,000.00. The court of appeals reversed, holding the Right is an unreasonable restraint on alienation and is therefore unenforceable.

II.

South Carolina law prohibits the enforcement of unreasonable restraints on alienation of real property. *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984) ("Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect."). In general, a right of first refusal requires the property owner, when and if he decides to sell, to first offer the property to the holder of the right of first refusal. *See Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997). Accordingly, a right of first refusal restrains an owner's power of alienation to a degree by requiring the owner to offer the property first to the holder of the right. *See Cnty. of Jackson v. Nichols*, 623 S.E.2d 277, 280 (N.C. Ct. App. 2005).

The question of whether a right of first refusal is enforceable turns upon whether the right unreasonably restrains alienation. *See Wise*, 281 S.C. at 579, 316 S.E.2d at 415. The Restatement (Third) of Property provides, "A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the

[1] Clarke discusses the lead-up to the sale of the Subject Property to Fine Housing at length in his brief. Clarke argues Fine Housing employed "predatory" tactics to exploit RRJR and obtain title to the Subject Property. Because resolution of this appeal turns solely on the validity of the Right, Fine Housing's conduct is irrelevant.

restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." Restatement (Third) of Property: Servitudes § 3.4 (Am. L. Inst. 2000). Comment *f* to section 3.4 of the Restatement addresses rights of first refusal: "Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right."

Many state courts apply the Restatement factors to determine—in a case-by-case fashion—whether a right of first refusal unreasonably restrains alienation. *See, e.g.*, *SKI, Ltd. v. Mountainside Props., Inc.*, 114 A.3d 1169, 1178 (Vt. 2015) (analyzing the purpose of the right, the price, and the clarity of the procedures for exercising the right to determine its impact on alienability); *MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr.*, 864 N.W.2d 83, 91-93 (Wis. 2015) (same); *Low v. Spellman*, 629 A.2d 57, 59 (Me. 1993) (same); *Wildenstein & Co., Inc. v. Wallis*, 595 N.E.2d 828, 832 (N.Y. 1992) (same); *Hartnett v. Jones*, 629 P.2d 1357, 1363 (Wyo. 1981) (same). We agree with the Restatement approach and hold the factors to be considered in assessing whether a right of first refusal unreasonably restrains alienation include (1) the legitimacy of the purpose of the right, (2) the price at which the right may be exercised, and (3) the procedures for exercising the right. These factors are not exclusive, and in this case, we will address another point raised by Fine Housing—the lack of clarity as to what real property the Right encumbers.[2]

III.

Clarke argues the court of appeals erred in holding the Right is an unreasonable restraint on alienation and contends the Right contains clear provisions respecting the property encumbered by the Right and the price he would pay to acquire the Subject Property. He argues it was not necessary for the Right to spell out the procedures governing his exercise of the Right. Specifically, Clarke claims (1) the Lease provides the Right applies to all of the Subject Property, (2) the Right leaves the price to be determined by the seller, and (3) South Carolina law requires the Right to be exercised within a reasonable time.[3] Because Clarke's action for

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[2] Fine Housing does not challenge the legitimacy of the purpose of the Right.

[3] Clarke also argues the court of appeals "erred in drawing inferences from John and Robin Robinson's absence from trial." This argument was not in Clarke's petition for rehearing to the court of appeals or his petition for a writ of certiorari; therefore, it is unpreserved. Rule 242(d)(2), SCACR; *Sloan v. Dep't of Transp.*, 365 S.C. 299,

specific performance is one in equity, we apply a de novo standard of review to the question whether the Right is an unreasonable restraint on alienation. *See Campbell v. Carr*, 361 S.C. 258, 262-63, 603 S.E.2d 625, 627 (Ct. App. 2004).

A. What real property is encumbered by the Right?

Typically, the identity of the property encumbered by a right of first refusal is obvious from a plain reading of the instrument. Here, however, the Right is buried in a lease of parking spaces, and the Lease contains Exhibit A—the description of the Subject Property, which includes the buildings, the leased parking spaces, other parking spaces, and other land. The Restatement does not address whether a lack of clarity as to the real property encumbered by a right of first refusal is a factor to consider in determining whether a right of first refusal is an unreasonable restraint on alienation. We hold it is a valid consideration in this case.

Clarke relies on Section 1.1 of the Lease to support his argument that the Right unambiguously applies to all of the Subject Property. Section 1.1 states, "Lessee hereby leases from Lessor the property generally described in Exhibit 'A' attached hereto." Fine Housing argues Exhibit A "merely identified the location of the leased parking spaces" and "[t]he remaining language of the Lease does not provide the clarity needed to identify the property intended to be encumbered by the Right." Fine Housing argues the uncertainty about the property the Right encumbers supports the conclusion that the Right is an unreasonable restraint on alienation.

We agree with Fine Housing. The Lease is unclear as to whether the Right encumbers all of the Subject Property or only the leased parking spaces. Section 5.2 states in its entirety, "Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell." This begs the obvious question, Sell what? Section 1.1 and Exhibit A do not support the conclusion that the Right applies to all of the Subject Property. Other provisions in the Lease strongly indicate the Right encumbers only the leased parking spaces. Section 2.1 provides, "The premises is unimproved property to be used as a parking lot by both the Lessor and the Lessee." Section 7.1 provides, "The Lessee and Lessor shall be entitled to use of one half (1/2) of the spaces contained in the parking lot [which encumbrances all of the

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307-08, 618 S.E.2d 876, 880 (2005) (noting an issue not raised in a petition for rehearing and petition for writ of certiorari is unpreserved for review).

property described in Exhibit A]." Section 7.1 establishes Exhibit A serves solely to identify the location of the parking lot and the parking spaces leased by Clarke.

As noted above, the Restatement does not address the effect on alienation when a right of first refusal is not clear as to the property it encumbers, and we have found no published decisions discussing this precise issue.[4] Nevertheless, it is readily apparent that a right of first refusal that does not identify the property it encumbers can substantially restrain alienation of real property. We hold, under the facts of this case, the uncertainty as to what property is encumbered by the Right supports the conclusion that the Right is an unreasonable restraint on alienation.

B. Price

In general, provisions governing the price at which a right of first refusal may be exercised are important in assessing the impact on alienation. For example, a right of first refusal that may be exercised at a fixed price can substantially restrain alienation. *See Selig v. State Highway Admin.*, 861 A.2d 710, 719 (Md. 2004) (explaining that a right of first refusal allowing the holder to purchase the property at a fixed price inhibits alienability because with the passage of time, the fixed price may bear no relationship to market value). However, where the holder of the right may match the offer of a third party, the restraint on alienation may be lessened. *See Shiver v. Benton*, 304 S.E.2d 903, 905 (Ga. 1983) ("If the holder of the preemption right is merely entitled to meet the offer of an open market purchaser, there is little clog on alienability.").

Clarke emphasizes that the Right does not provide a fixed price at which he could purchase the Subject Property. Clarke first contends the Right left the sales price to be determined entirely by RRJR and simply required him to "match whatever offer [RRJR] received" from a third party. Clarke alternatively contends the exercise of the Right would have, to the benefit of RRJR, "touched off a bidding competition for the property." Fine Housing argues the Right's failure to provide

[4] The Iowa Court of Appeals issued an unpublished decision in which the court partially based its holding that a right was unenforceable on the lack of clarity regarding the property subject to the right. *See Franklin v. Johnston*, 899 N.W.2d 741, at *8 (Iowa Ct. App. 2017) (unpublished table decision).

any method for determining the price at which Clarke could exercise the Right creates an unreasonable restraint on alienation.

We agree with Fine Housing. The Right contains no price provisions at all. Although a right of first refusal that is silent as to price might not restrain alienation to the same degree as a right of first refusal containing a fixed price, a right of first refusal should contain some method for determining the price at which it may be exercised. If the Right provided that Clarke could acquire the Subject Property by matching the terms of a third-party offer, the restraint on RRJR's power of alienation would perhaps have been minimal. *See Bortolotti v. Hayden*, 866 N.E.2d 882, 890 (Mass. 2007) (explaining a right of first refusal that allows the holder to match any bona fide offer made by a third party "works a de minimis restraint on the alienation of property"). Of course, in this case, the Right does not include such a provision.

Where a right of first refusal provides no price terms, a dispute may arise as to whether the holder of the right may purchase the property by matching a third-party offer or only after participating in a bidding war with other prospective buyers. That prospect hardly weighs in Clarke's favor. Under the facts of this case, the complete absence of any method for determining price weighs in favor of a finding that the Right is an unreasonable restraint on alienation.

C. Procedures governing the exercise of the Right

Clarke contends the Right provides satisfactory procedures governing the exercise of the Right. We disagree because the Right contains no such procedures whatsoever. Comment *f* to section 3.4 of the Restatement states:

> The provisions governing exercise of the right of first refusal are important in determining its impact on alienability. Lack of clarity may cause substantial harm by making it difficult to obtain financing and exposing potential buyers to threats of litigation. Lengthy periods for exercise of rights of first refusal will also substantially affect alienability of the property.

When applying this factor, courts often examine the time period within which the right can be exercised after the owner decides to sell. *See Hare v. McClellan*, 662 A.2d 1242, 1249 (Conn. 1995). Alienation can be substantially restrained when the holder of the right has an extended time to decide whether he will purchase the

property. *MS Real Est. Holdings*, 864 N.W.2d at 91. However, when the time allowed for the exercise of the right is reasonable, the right will generally be enforced. *Lorentzen v. Smith*, 5 P.3d 1082, 1086 (N.M. Ct. App. 2000).

Clarke contends, contrary to the Restatement, that "a right of first refusal does not require detailed instructions on how to exercise it to be valid." Clarke argues the seller must only notify the holder of the right of his intent to sell to trigger the right of first refusal. As for the time period in which the holder must exercise the right, Clarke cites *Hobgood v. Pennington* for the proposition that "[w]hen the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time[.]" 300 S.C. 309, 314, 387 S.E.2d 690, 693 (Ct. App. 1989).

Clarke does not dispute that the Right prescribes no limitation on the time within which he could exercise the Right after being notified of RRJR's desire to sell. Again, there are no provisions at all delineating the procedural requirements Clarke must follow to exercise the Right. This deficiency supports the conclusion that the Right is an unreasonable restraint on alienation. *See Girard v. Myers*, 694 P.2d 678, 683 (Wash. Ct. App. 1985) ("The preemptive right in this case states no time limit within which the holder must act and sets forth no procedural requirements that the holder must follow to exercise the right. Such a preemptive right permits the holder to frustrate a sale to a third party simply by stalling and then threatening litigation when a controversy develops."); *MS Real Est. Holdings*, 864 N.W.2d at 91-92 ("[W]here the . . . procedure for exercising the right is clear, and the time for exercising the right when it arises is reasonably short, its practical effect on alienation is de minimis.").

Clarke's reliance on *Hobgood* and his suggestion that the law implies a "reasonable time" within which he could exercise the Right are without merit. In *Hobgood*, the court of appeals addressed the issue of whether a real estate purchase and sale agreement expired after the closing date contained in the agreement. 300 S.C. at 313-14, 387 S.E.2d at 692-93. The *Hobgood* court held that because the contract did not include a provision stating time was of the essence, the contract had not expired: "When the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time; and the failure to incorporate in the memorandum such a statement does not render it insufficient." *Id.* at 314, 387 S.E.2d at 693.

Hobgood lends Clarke no support for two reasons. First, *Hobgood* is factually distinguishable because it had nothing to do with a right of first refusal. Second, Clarke misses the point of the Restatement approach by arguing a court can simply imply a reasonable time requirement in which a right of first refusal must be exercised. The whole point of the Restatement is to predetermine a limited time within which a right of first refusal must be exercised to protect the owner's power of alienation. A judicially implied "reasonable time" requirement would do little to protect the owner's power of alienation. Lengthy litigation over what is or is not a reasonable time under the facts of any given case will necessarily restrain alienation.

Conclusion

The Right does not identify the property it encumbers, contain price provisions, or contain procedures governing the exercise of the Right. We conclude the Right is an unreasonable restraint on alienation. We therefore affirm the court of appeals' holding that the Right is unenforceable.

AFFIRMED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in result only in a separate opinion.

JUSTICE FEW: I concur in result. In my opinion, the instrument Clarke contends grants him a right to purchase the property does not grant him any rights at all. The phrase "first right of refusal" is a descriptive term used to summarize an instrument that sets forth in detail the right of one person to purchase property the seller may otherwise choose to sell to a third person. In this case, the instrument simply recites the descriptive term as though the term means anything independent of the detailed rights set forth in a legitimate first right of refusal. An instrument that simply recites the descriptive term without the underlying detailed explanation of the rights conveyed is meaningless. This instrument is meaningless; it is not, therefore, a "first right of refusal." I do not disagree with the Restatement section the majority adopts. However, I would not reach the question whether the instrument is an unreasonable restraint on alienation because I would find the instrument at issue in this case is not a restraint on alienation. The instrument says nothing, does nothing, restrains nothing. I concur in result.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

Kristian Scott and Brian Frank, Defendants,

Of whom Brian Frank is the Appellant.

In the interest of minors under the age of eighteen.

Appellate Case No. 2019-001084

Appeal From Kershaw County
Michelle M. Hurley, Family Court Judge
Rosalyn Frierson-Smith, Family Court Judge

Opinion No. 5957
Heard May 25, 2022 – Filed January 4, 2023

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Katherine Carruth Goode and Foster Manly Mathews, both of Columbia, for Appellant.

Megan Jeanine Katherine Meekins, of the South Carolina Department of Social Services, of Columbia; and Scarlet Bell Moore, of Greenville, both for Respondent.

LOCKEMY, A.J.: Brian Frank (Father) appeals two family court orders denying his motion to dismiss on subject matter jurisdiction grounds, finding he sexually abused his minor daughter (Child), and ordering his entry onto the Central Registry of Child Abuse and Neglect (Central Registry). On appeal, Father argues the family court erred by (1) finding it had subject matter jurisdiction when the alleged abuse occurred in North Carolina; (2) qualifying a witness as an expert, limiting evidence, and admitting Child's hearsay statements; and (3) limiting evidence relevant to the parents' history and ultimately finding Father should be entered on the Central Registry. We affirm in part, reverse in part, and remand for a new trial.

FACTS/PROCEDURAL HISTORY

Child was born to Father and Kristian Scott (Mother) in 2012. On November 14, 2017, the South Carolina Department of Social Services (DSS) filed a complaint for removal, alleging Mother and Mother's boyfriend, Robert Connell, abused or neglected Child and that Father also sexually abused Child while she was visiting him at his home in North Carolina. By temporary order, Child was placed in the temporary custody of her paternal grandparents on August 24, 2018.

On September 5, 2018, the parties appeared before Judge Michelle Hurley, and Father asserted the action should be dismissed because the court lacked subject matter jurisdiction when the alleged abuse occurred in North Carolina. Judge Hurley denied Father's motion to dismiss and determined South Carolina had exclusive and continuing jurisdiction because (1) South Carolina was Child's home state; (2) Mother and Child continued to reside in South Carolina; (3) Child had significant connections to South Carolina; (4) a custody order had been issued in South Carolina; and (5) a private action was pending in South Carolina.

On the merits, the parties appeared before Judge Rosalyn Frierson-Smith[1] in October 2018. At trial, Father renewed his motion to dismiss for lack of subject matter jurisdiction, but the family court declined to change Judge Hurley's ruling. DSS then moved pursuant to section 19-1-180 of the South Carolina Code (2014) to present Child's out-of-court hearsay statements. DSS asserted that because Child recently turned six years old, her out-of-court statements should be admitted

[1] We refer to Judge Frierson-Smith as "the family court."

to protect her from having to testify about the alleged abuse in front of her claimed abuser.

In support of their section 19-1-180 motion, DSS presented pre-trial testimony from Elizabeth Creed. Creed testified she was employed by Firm Foundations Counseling and Wellness as a licensed professional counselor associate. She indicated her undergraduate degree was in experimental psychology and her graduate degree was as an education specialist in counselor education with a concentration in marriage, family, and couples counseling. According to Creed, in order to become a licensed professional counselor associate, she underwent 750 hours of supervision and direct counseling. She also stated she received specialized training in trauma stemming from sexual abuse of children. Creed acknowledged she personally had not undergone peer review but was under the direct supervision of a licensed professional counselor who had been peer reviewed. She also indicated she was required to work under the supervision of a licensed professional counselor for two years, and she was less than a year into her supervision. Creed further acknowledged she had never testified in court, been qualified as an expert, or published any papers. DSS moved to qualify Creed as an expert in child counseling and trauma, and Father objected. The family court overruled the objection and qualified Creed as an expert in child trauma.

According to Creed, she began counseling Child on January 5, 2018. She explained that, in her opinion, she could not say for certain whether testifying in court would cause Child severe emotional trauma. However, she indicated "it is possible that she would experience severe emotional trauma from testifying." Creed clarified she believed "possible" meant "more likely than not." She stated appearing in a courtroom in front of strangers, family, people she did not know, and the potential perpetrator could be traumatizing for a child. Creed explained that based on Child's age, she believed having to relive the trauma in the courtroom would cause anxiety, excessive worrying, panic attacks, nightmares, and restlessness. She indicated she believed the same symptoms would arise if Child were to testify by video because she would be subject to cross-examination and forced to retell her story to people with whom she does not have a rapport. The following exchange then occurred:

> [DSS]: Okay. All right. So looking at the things that you said a six year old is likely to experience, do you believe that [Child] is likely to experience those same type of distress symptoms, as you put it?

[Creed]: I think so.

[DSS]: Do you think she is substantially likely to experience those?

[Creed]: I do.

She further indicated that because Child had not seen Father in over a year, facing him in the courtroom could possibly add to her distress.

On cross-examination, Creed testified she was not aware of the family's background situation prior to these allegations. Father asked whether Creed was aware of the divorce proceeding between the parties, and DSS objected on the basis of relevancy and that the question was outside the scope of her expertise. Father responded that section 19-1-180(D)(4) includes any motive for Child to possibly falsify or distort the event. The family court sustained the objection, finding the questioning should be related to Creed's counseling expertise. The court further found that Creed already testified the family's background was outside the scope of her knowledge.

In response to Creed's testimony, Father called Michelle Gworski as a witness. Gworski testified she was the guardian ad litem appointed to the 2016 divorce action between Father and Mother. She indicated she sent a letter to the parties in June 2017 regarding the "deplorable" conditions she observed in Mother's home and stated Father subsequently filed a motion requesting primary custody of Child. Gworski explained that the day before the hearing on the motion, Mother told her Child reported abuse to Mother's sister, and they contacted the police. Gworski testified she did not talk to Child about the allegations until May of 2018, and she did not receive the results of the forensic report until a month later. She indicated Child's statements to her were consistent with the forensic report.

Prior to the family court's ruling on the motion, Father offered to waive his presence in the courtroom if Child would be allowed to testify. The family court rejected the offer and granted DSS's motion to admit Child's statements. The court relied on Child's age, the testimony presented about the substantial likelihood she would experience emotional trauma, and the testimony regarding the consistency of Child's statements. The family court further found there was not enough evidence to show a motive for Child to falsify or distort the event. As to trustworthiness of the statement, the court indicated the record showed the

statement was based on Child's personal knowledge, more than one person heard the statement, Child provided a detailed account to Creed and used appropriate language for her age, and Child consistently recounted the statement to Gworski months later.

At trial, DSS requested the family court find Father sexually abused Child and enter him on the Central Registry; however, DSS requested the custody and visitation orders remain as they were in the private custody action. Mother expressly stated the "private case is ongoing, and—and active, and would control the custody and visitation issue, so that would not be before [the family court] today."

Creed testified Child's foster parent brought her to therapy when she was five years old. She indicated the foster parent reported Child had issues adjusting to a new environment and exhibited sexualized behavior in the form of masturbating. According to Creed, she treated Child by using a trauma narrative to help her make sense of her adverse experience. Over Father's objection, Creed testified Child stated, "Brian [Father] licked my butt and my no-no" and appropriately identified the parts of her body.

Gworski next testified she conducted a home visit of Mother's house in June of 2017, where she found "deplorable" living conditions and observed Mother exhibit slurred speech. As a result, she wrote a letter expressing her concerns to Mother and Father's attorneys.

After Gworski learned of Child's abuse allegations, she visited Child at school. Child told Gworksi that Mother did not want the two speaking to each other, but Child said, "I'm going to anyway." Over Father's objection, Gworski indicated Child said "Brian [Father] had licked her no-no" and that she was told by him not to tell Mother. She testified Child recalled that the abuse occurred in Father's truck near a shed. Gworski explained Child subsequently asked her, "When can I see him again?" She stated she replied to Child that if Father hurt her, she could not see him, and Child said, "Oh, okay."

Mary Beth Camp, a caseworker for DSS, testified that after DSS received allegations of sexual abuse in this case, she contacted the family and referred Child for a forensic interview. She explained she did not believe Mother coached Child. Camp stated that DSS concluded the case by finding an indication of sexual abuse

and substantial risk of sexual abuse against Father based on the disclosure made by Child during the forensic interview.

On cross-examination, Father asked Camp if, during her review of the case, she found any previous unfounded allegations of sexual abuse Mother made against Father. DSS objected, arguing the ability to use unfounded cases should be limited. Father responded the question went to Mother's motive to coach Child to make the allegations. However, Father then indicated he was happy to move on.

Melissa Klahre then testified she was a forensic interviewer and therapist at the CARE House of the Pee Dee. She explained she conducted a forensic interview with Child in this case, and Child disclosed "oral vaginal and oral anal penetration by Brian [Father]." She testified Child made appropriate identifications using anatomical drawings, and Child remained consistent throughout the course of the interview.

On cross-examination, Klahre admitted Child's disclosure was not in response to a direct question, but instead after she asked Child, "Do you have any questions for me?" She testified she believed the statements were made almost immediately; however, the immediate disclosure did not necessarily raise a red flag for her. Klahre testified Child made the disclosure after she talked to Child about the room they were in and discussed introductory matters. She stated it did not strike her as odd that Child started talking spontaneously because "every child discloses differently."

Mother testified that prior to the sexual abuse allegations, there was an ongoing action in family court between her and Father. Father attempted to ask Mother about interactions between her and Gworski, but Mother's attorney objected to their relevancy. Father responded that the question was relevant because it went to Mother's motive to potentially coach Child and the timing of the allegations. The family court asked Father to repeat the question, and Father responded he would "move on."

Mother testified she took Child to the police to report the abuse before she received the papers from Father's attorney about the June custody hearing. She indicated she previously made allegations against Father for abusing Child when Child was two years old because "she started acting different[ly]." According to Mother, she called Child's grandparents to express her concerns about Child's behavior, but the grandparents responded "it was from her car seat." Father then asked Mother if,

prior to making those allegations, he paid for her car. DSS and Mother objected to the question on the basis of relevancy. The family court allowed Father "a little leeway" to continue his questioning. Mother responded she could not remember how long after Father stopped making the car payments she made the allegations of abuse.

Father then asked Mother if she had ever accused Douglas Frank, Child's paternal grandfather, of sexual abuse. DSS objected, and Father again responded the testimony was relevant to Mother's attempts to use allegations as leverage. The court stated the question did not have "[a] very strong connection" but allowed Father to ask one question and instructed him to move on.

Mother testified her children call her boyfriend "Dad" because "he raise[d] them," and they call Father, "Brian." Father asked whether he exercised visitation regularly when it was court ordered. In response to an objection on the basis of relevancy, the family court stated the question appeared to get into the private custody action, and custody was not an issue before the court. Father argued everything was tied together because "if there's a finding against him there's no way he gets custody." The court sustained the objection. Mother then testified she recorded a video of Child making the statement and sent it to police in North Carolina but never heard from an investigator.

Mother testified that prior to Child alleging the abuse, she observed Child's behavior was different: she did not talk, stared out the window, and experienced anger. She indicated Child begged her not to force her to visit Father, and during one visitation exchange, she observed Child hit Father and try to run into the highway.

Father testified he was thirty-one years old and lived in North Carolina with his girlfriend and her two children, ages three and one. Father stated he delivered furniture for work and was in the military for nine years. He further explained he was medically retired and received an honorable discharge in 2013. According to Father, he learned of the abuse allegations from Gworksi the day before the hearing for him to obtain custody. He testified he did not sexually assault Child.

Father testified Mother previously made sexual abuse allegations against him, but the allegations were unfounded because he did not have contact with children at the time of the alleged abuse. Father was asked about the timing of the last allegation, and over DSS objection, Father indicated he stopped making payments

on Mother's vehicle because she was not allowing visitation. He indicated the allegations in the current case did not arise until two or three days before the custody hearing, but Mother was served with the hearing documents ten days prior to the hearing. Father stated that due to the allegations and the outstanding DSS case, the court did not award him custody at that June 2017 hearing.

Father testified he had not seen Child since June 2017. He explained that after the allegations, the police contacted him, and he told them the allegations were the result of "a jealous mother that ha[d] a vendetta" against him. Father testified he told the police Mother used allegations of sexual assault in the past like "a playing card." He explained he fully cooperated with police and was not arrested.

At the conclusion of the hearing, DSS requested a finding of sexual abuse against Father and sought to have him placed on the Central Registry. In response, Father argued DSS failed to meet its burden of proving the allegations against him. He asserted that Child was only consistent because she repeated the phrase, "Brian licked my no-no and my butt," and he questioned Child's immediate disclosure during the forensic interview. Father also asserted that law enforcement did not think he was guilty because they never arrested him. Finally, he argued the statement of a young child did not meet the preponderance of the evidence standard, and he was limited in presenting his case because he was unable to cross-examine Child to determine if Mother coached her.

The family court found Father sexually abused Child and should be entered onto the Central Registry. It further found Child should remain in therapy, and custody should be resolved by the private custody action. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err in denying the motion to dismiss on jurisdictional grounds?

2. Did the family court err in qualifying a witness as an expert, in limiting the evidence, and in granting DSS's motion to admit hearsay statements of the complaining witness, in lieu of Child testifying in court or by other means?

3. Did the family court err in limiting the evidence relevant to the parents' history and Mother's motive to influence Child to make false allegations of sexual abuse, and in ultimately finding that Father sexually abused Child and should be entered on the Central Registry?

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). The appellate court generally defers to the findings of the family court regarding credibility because the family court is in a better position to observe the witness and his or her demeanor. *Id.* at 385, 391, 709 S.E.2d at 651-52, 655. The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence. *Id.* at 388-89, 709 S.E.2d at 653-54; *see also Stoney v. Stoney*, 422 S.C. 593, 595, 813 S.E.2d 486, 487 (2018) ("We observed [in *Lewis*] that de novo review allows an appellate court to make its own findings of fact; however, this standard does not abrogate two long-standing principles still recognized by our courts during the de novo review process: (1) a trial judge is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial judge.").

LAW/ANALYSIS

A. Subject Matter Jurisdiction

Father argues the family court erred by denying his motion to dismiss for lack of jurisdiction because custody was not at issue and the alleged abuse occurred in North Carolina. He asserts the family court incorrectly applied the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[2] in determining the court had jurisdiction because it analyzed the issue as if the trial was a custody determination; however, the only issue was whether Father had sexually abused Child and should be entered on the Central Registry. Father contends the situation here is analogous to *South Carolina Department of Social Services v. Tran*, 418 S.C. 308, 792 S.E.2d 254 (Ct. App. 2016), when this court found the family court properly exercised temporary emergency jurisdiction but was without subject matter jurisdiction to enter the removal and termination of parental rights orders. He also argues DSS's own policies and procedures provide a mechanism for resolving the situation when the alleged abuse occurred outside of South Carolina. We disagree.

[2] S.C. Code Ann. §§ 63-15-300 to -394 (2010).

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)). "A court without subject matter jurisdiction does not have authority to act." *Tran*, 418 S.C. at 314, 792 S.E.2d at 257.

"The family court is a statutory court created by the legislature and, therefore, is of limited jurisdiction. Its jurisdiction is limited to that expressly or by necessary implication conferred by statute." *State v. Graham*, 340 S.C. 352, 354, 532 S.E.2d 262, 263 (2000). "The family court has exclusive jurisdiction to hear matters concerning the abuse and neglect of children." *S.C. Dep't of Soc. Servs. v. Meek*, 352 S.C. 523, 528, 575 S.E.2d 846, 848 (Ct. App. 2002). Moreover, the family court has exclusive original jurisdiction over abuse and removal proceedings. S.C. Code Ann. § 63-7-1610(A) (2010).

> 'Child abuse or neglect' or 'harm' occurs when: (a) the parent, guardian, or other person responsible for the child's welfare: (i) inflicts or allows to be inflicted upon the child physical or mental injury . . . . [or] (ii) commits or allows to be committed against the child a sexual offense as defined by the laws of this State or engages in acts or omissions that present a substantial risk that a sexual offense as defined in the laws of this State would be committed against the child.

S.C. Code Ann. § 63-7-20(6) (2010 & Supp. 2022).

The UCCJEA defines a child custody proceeding as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear." S.C. Code Ann. § 63-15-302(4) (2010).

> [A] court of this State which has made a child custody determination . . . has exclusive, continuing jurisdiction over the determination until:

> (1) a court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

S.C. Code Ann. § 63-15-332 (2010).

We hold the family court properly determined it had jurisdiction over this abuse and neglect case. *See Lewis*, 392 S.C. at 386, 709 S.E.2d at 652 (explaining the appellate court reviews decisions of the family court de novo). First, the legislature has conferred jurisdiction over abuse and neglect cases in South Carolina to family courts. *See Graham*, 340 S.C. at 354, 532 S.E.2d at 263 ("The family court is a statutory court created by the legislature and, therefore, is of limited jurisdiction. Its jurisdiction is limited to that expressly or by necessary implication conferred by statute."); § 63-7-1610(A) ("The family court has exclusive jurisdiction over all proceedings held pursuant to this article."); § 63-7-20(6) ("'Child abuse or neglect' or 'harm' occurs when: (a) the parent, guardian, or other person responsible for the child's welfare . . . (ii) commits or allows to be committed against the child a sexual offense as defined by the laws of this State or engages in acts or omissions that present a substantial risk that a sexual offense as defined in the laws of this State would be committed against the child.").

Second, we are not persuaded by Father's argument that the UCCJEA does not apply because "custody and visitation were not an issue." Although the family court may not have decided custody and visitation at trial, Father's entry on the Central Registry will affect Child's future custody and visitation determinations.[3] Moreover, there was a previous custody order over Child in the state of South Carolina. Thus, we hold the family court properly applied the UCCJEA in this

[3] Father acknowledged this at trial when he argued, "[I]t's all tied together. And if this—this is left open to divert to the private action and if there's a finding against him there's no way he gets custody."

case and found it had jurisdiction. *See* § 63-15-302(4) (explaining the UCCJEA defines a child custody proceeding as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, *neglect, abuse*, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear") (emphasis added).

Additionally, this case is distinguishable from *Tran* because this court held South Carolina did not have jurisdiction to make an initial child custody determination or modify a child custody decree from another state when the child's home state was Georgia, there was a custody order in Georgia, and the record contained no evidence to show Georgia declined jurisdiction. 418 S.C. at 317, 792 S.E.2d at 259. Here, Child's home state was South Carolina, there was a custody order in place in South Carolina, and there is no indication in the record that the state of South Carolina had declined jurisdiction over Child. *See* § 63-15-332 (explaining a South Carolina court which has made a custody determination retains exclusive and continuing jurisdiction until "(1) a court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State"); *Anthony H. v. Matthew G.*, 397 S.C. 447, 451, 725 S.E.2d 132, 134 (Ct. App. 2012) ("The UCCJEA's primary purpose is to provide uniformity of the law with respect to child custody decrees between courts in different states."). Moreover, this court is always mindful of a child's best interest, and the forensic interview, victim statements, and therapy all occurred in South Carolina. Therefore, the family court properly found it retained continuing and exclusive jurisdiction over Child and this abuse and neglect action.

B. Evidentiary Arguments

i. Qualifying the Expert Witness

Father argues the family court erred by qualifying Creed as an expert in child counseling and trauma because she lacked experience. He contends (1) she was only a licensed professional counselor associate; (2) she had not yet undergone peer review; (3) she worked under the supervision of a licensed professional counselor; (4) she had been a licensed professional counselor associate for only

one year; (5) she had not published any papers; and (6) she had never testified in court or been qualified as an expert. We disagree.

"Generally, the family court has the discretion to determine whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue." *Edwards v. Edwards*, 384 S.C. 179, 186, 682 S.E.2d 37, 41 (Ct. App. 2009). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

We find the family court did not err by qualifying Creed as an expert in child trauma. Creed testified she had an undergraduate degree in experimental psychology and a graduate degree in counselor education. She also testified that she underwent 750 hours of supervision and direct counseling. Moreover, she counseled Child. Therefore, Creed possessed the specialized knowledge to assist the family court in determining a fact in issue. *See* Rule 702, SCRE. Although we acknowledge Creed had not completed her supervised training, testified in court, or published a paper, these assertions go towards the weight of her testimony and not the admissibility. *See Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) ("Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony.").

ii. Limiting the Evidence

Father argues the family court improperly limited the evidence during the hearing on the section 19-1-180 motion. He contends that on cross-examination, he attempted to ask Creed whether she knew about the divorce proceedings, and the court sustained DSS's objection on the grounds of relevancy and scope. Father argues the previous question he asked—whether Creed was aware of the family's situation going on with the Child—was different from whether the witness had knowledge of the divorce proceedings. Therefore, he asserts the family court erred in excluding this line of questioning because it was relevant to the statutory factors to be considered before ruling on the motion. We agree.

A child's out-of-court hearsay statement may be admitted if the child is found to be unavailable to testify due to a "substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television." § 19-1-180(B)(2)(a)(v). The

child's statement also must be "shown to possess particularized guarantees of trustworthiness." § 19-1-180(B)(2)(b). "In determining whether a statement possesses particularized guarantees of trustworthiness under subsection (B)(2)(b), the court may consider . . . (4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion . . . ." § 19-1-180(D).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE.

We find the family court abused its discretion by limiting Father's cross-examination of Creed because evidence regarding Mother and Father's divorce was relevant to the trustworthiness of Child's statements. *See Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2 (explaining "a family court's evidentiary or procedural rulings" are reviewed "using an abuse of discretion standard"); *Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004) ("An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support.").

Father's primary defense at the pre-trial hearing was that Mother coached Child to make the abuse allegations in order to succeed in the custody action. Father initially asked Creed whether she was aware of the background and the family's situation with Child prior to the allegations, and she said she was not. He then asked whether she was aware of the divorce proceedings, and the other parties objected. The second question was sufficiently different from the first and was relevant because one of the factors the family court may consider regarding trustworthiness is "any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion . . . ." § 19-1-180(D)(4). Therefore, we hold the family court abused its discretion by limiting Father's cross-examination of Creed regarding the divorce proceedings.

iii. Admitting Child's Hearsay Statements

First, Father argues the family court erred by admitting Child's hearsay statements because there was insufficient evidence to establish a substantial likelihood Child

would suffer severe emotional trauma from testifying because Creed only testified that it was "more likely than not" Child would experience severe emotional trauma. Second, Father asserts he needed to cross-examine Child about who may have influenced or coached her to make the allegations, and his counsel offered to have Father out of the room during questioning to allow Child to testify. Third, Father contends the family court failed to make a specific finding as to the presence or lack of any apparent motive Child may have had to falsify or distort the event. We agree.

We hold the family court abused its discretion by admitting Child's hearsay statements because the testimony elicited at trial was not sufficient to support the court's finding that Child was unavailable. *See Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2 (explaining "a family court's evidentiary or procedural rulings" are reviewed "using an abuse of discretion standard"). In order to admit an out-of-court hearsay statement, the family court must find a child was unavailable to testify due to a "substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television." § 19-1-180(B)(2)(a)(v).

At the pre-trial hearing, Creed initially testified, "[I]t is possible that [Child] would experience severe emotional trauma from testifying." When pressed by counsel, she further explained that possible meant "more likely than not." Creed then described the different types of distress symptoms a six-year-old might experience from testifying and opined she thought Child was likely to experience the same sort of symptoms. Creed was then asked, "Do you think she is substantially likely to experience those?" and she replied, "I do." We hold this testimony did not provide evidentiary support for the family court to find there was a substantial likelihood that Child would suffer severe emotional trauma from testifying. Therefore, we hold the trial court abused its discretion by finding Child was unavailable to testify and admitting her hearsay statements based on the testimony presented at trial.

We are also concerned by the lack of credence given to Father's suggestion to waive Father's presence in the courtroom to allow Child to testify. We acknowledge Creed testified the courtroom experience could bring a child anxiety and it could be traumatizing for Child to appear in a courtroom in front of strangers, family, people she did not know, and the alleged perpetrator. However, in requesting the hearsay statements be admitted, DSS expressly argued Father could question the people he thought Child may have been coached by as a

remedy. To the contrary, Father's situation was not remedied because the family court limited Father's scope of cross-examination in error.

C. Limiting Evidence Regarding Mother's Motive and Entering Father on Central Registry

Father argues the family court improperly limited his defense by preventing him from presenting evidence of Mother's motives and efforts to manipulate the outcome of the litigation. We agree.

We hold the family court abused its discretion by limiting Father's cross-examination of Mother because evidence regarding Mother's motive to coach Child was relevant to facts in issue. *See Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2 (explaining "a family court's evidentiary or procedural rulings" are reviewed "using an abuse of discretion standard"). Here, the evidence against Father was Child's repeated statements to Gworski, Khlare, and Creed. Father's primary defense at trial was Mother allegedly coached Child to make the allegations and that Mother wielded abuse allegations in the past to accomplish her goals. Father's questions were relevant because the answers could make Father's defense more or less probable; thus, the family court erred by not allowing him to question Mother on the relevant evidence. Moreover, this limitation of questioning was particularly prejudicial because Father was not allowed to cross-examine Child regarding the allegations.

Father further argues the family court erred by finding he abused Child and entering him on the Central Registry because (1) the evidence showed Mother's propensity to make false allegations; (2) the timing of Child's allegation prior to the custody hearing was suspicious; (3) Child's disclosure of the abuse as soon as the forensic interview started was also suspicious; (4) Child's consistency in her statements was indicative of coaching; (5) Mother told Child not to speak with the GAL; and (6) Child asked the GAL when she could see Father again shortly after disclosing the abuse.

"If the family court finds there is a preponderance of evidence the defendant physically or sexually abused or willfully or recklessly neglected the child, it must order the person be entered in the Central Registry of Child Abuse and Neglect." *S.C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 451-52, 574 S.E.2d 730, 733 (2002). "'Preponderance of evidence' means evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition."

S.C. Code Ann. § 63-7-20(22) (2010). The statutory proceeding is "a civil action aimed at protection of a child, not a criminal action geared toward punishing the defendant." *Beaufort Cnty. Dep't of Social Serv. v. Strahan*, 310 S.C. 553, 554, 426 S.E.2d 331, 332 (Ct. App. 1992).

As explained above, because we hold the family court erred by limiting the testimony on relevant evidence, we reverse the finding that Father sexually abused Child and his entry on the Central Registry and remand this case for a new trial.[4]

CONCLUSION

To summarize the foregoing, we affirm the finding that the South Carolina family court retained jurisdiction over this action and hold the family court did not err by qualifying Creed as an expert witness. However, we hold the family court abused its discretion by limiting testimony on relevant evidence and finding Child was unavailable to testify. Accordingly, we reverse Father's entry onto the Central Registry and remand for a new trial in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and HILL, JJ., concur.

[4] We acknowledge Child consistently described the alleged abuse and exhibited issues adjusting to a new environment and sexualized behavior; however, we decline to address the merits of the issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nancy Miramonti, Respondent,

v.

Richland County School District One, a body politic and corporate; and the Board of Commissioners of Richland County School District One, Appellants.

Appellate Case No. 2019-001624

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5958
Heard October 4, 2022 – Filed January 4, 2023

AFFIRMED IN PART AND VACATED IN PART

Eugene Hamilton Matthews, of Richardson Plowden & Robinson, PA; and Kenneth Allen Davis, and Charles J. Boykin, both of Boykin Davis, LLC; and Sedeirdra Lynn Smith, all of Columbia, for Appellants.

L. Cody Smith and Jessica Clancy Crowson, both of Rogers Lewis Jackson Mann & Quinn, LLC, of Columbia, for Respondent.

HILL, J: In 2019, Richland County School District One (RCSD One) changed its policy regarding English for Speakers of Other Languages (ESOL) students to

provide that ESOL students would no longer receive ESOL instruction at specific magnet schools but only at the schools for which they were zoned. The policy was adopted after the deadline for transfer requests had expired. A parent of one ESOL student wrote a letter to the RCSD One Board (the Board) requesting the Board reopen the transfer request window to allow ESOL students currently attending magnet schools outside their assigned zones to request to stay at the magnet school for the following year.

At their next meeting, the Board went into executive session. The record is silent as to the stated purpose of the executive session. In the ensuing open meeting, Chairman Jamie Devine announced he had received the parent's complaint. According to the Board minutes, Chairman Devine stated, "The Board has responded" to the parent's complaint, and the parent "will get something in writing from the Board tomorrow." Commissioner Beatrice King then asked the Board counsel about the Board Policy requiring the Board to "consider" complaints about Board policies at the next meeting "and dispose of the matter according to its best judgment." Commissioner King asked the Board counsel whether the Board could dispose of a complaint without a vote. Counsel stated the parent's complaint was discussed during executive session, but counsel would not agree with Commissioner King that a vote was required to dispose of a complaint. Chairman Devine then interjected that "the best judgment of the Board is to send a letter to respond to this complaint," and a letter would be sent out tomorrow "based off the discussion we had in executive session." Commissioner King voiced her disagreement, noting "we can't vote in executive session." Chairman Devine responded no vote or motion was necessary.

The next day, Chairman Devine sent a letter to the parent on Board letterhead. The letter explained the parent had met with Chairman Devine and other district personnel about his question regarding the transfer policy. The letter declared "the answer to your question has remained and continues to be the same," without explaining what the answer was.

Nancy Miramonti (Respondent) then brought this lawsuit against the Board, seeking a declaratory judgment that the Board's actions regarding the parent's complaint violated the Freedom of Information Act (FOIA),[1] requesting attorney's fees pursuant to FOIA, and an order enjoining the Board from further FOIA violations

[1] S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2022).

and requiring the Board to reconsider the parent's complaint at its next meeting. The circuit court granted Respondent's requested relief. The Board now appeals. We affirm.

I. STANDARD OF REVIEW

"A declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165 (Ct. App. 2003). "As to questions of law, this court's standard of review is de novo." *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n*, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019). Our standard of review extends to correct errors of law, but we will not disturb the trial court's factual findings as long as they have reasonable support in the record. *Seago v. Horry Cnty.*, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008).

II. DISCUSSION

A. Executive Session

The Board contends it did not abridge FOIA by discussing the parent's complaint letter in executive session because the discussion occurred while the Board was receiving legal advice. This argument stumbles at the starting block: a public body is forbidden from entering executive session without complying with section 30-4-70(b) of the South Carolina Code (2007), which states: "Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session." Because there is no evidence the Board complied with this section, its executive session was improper. *See Donohue v. City of North Augusta*, 412 S.C. 526, 531–33, 773 S.E.2d 140, 142–43 (2015) (announcement that "contractual matter" would be discussed in executive session insufficient to satisfy "specific purpose" requirement of section 30-4-70(b)).

Even if the Board had complied with the FOIA's specific purpose requirement when it retreated into executive session, it could not have taken any vote except to adjourn or resume its public session. § 30-4-70(b). Importantly, the "members of a public body may not commit the public body to a course of action by a polling of members in executive session." *Id*.

The Board argues it took no action on the parent's complaint during executive session. However, Chairman Devine's statements during the public meeting undercut this argument. Chairman Devine declared the decision to respond by letter to the parent's complaint was "based off the discussion" in executive session.

Nevertheless, the Board insists that because no vote on how to respond to the parent's complaint was taken, the Board did not take any action in executive session. This argument chases itself and then collides with Chairman Devine's statements and the letter he sent in response to the parent's complaint. These immovable facts support the circuit court's finding that the Board decided how to respond to the parent's complaint during executive session.

We further note Chairman Devine had no authority to send the letter without a majority vote permitting him to do so. Absent constitutional or legislative authority, an individual member of a public body has no authority to act. In general, a public body may act only after the action has been approved by a majority vote of a quorum of its members. *See Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998).

Our supreme court confronted a similar situation in *Business License Opposition Committee v. Sumter County*, 311 S.C. 24, 426 S.E.2d 745 (1992). There, the Sumter County Council passed an amended ordinance after discussing the ordinance in secret meetings that had not been publicly noticed. *Id*. at 26, 426 S.E.2d at 746-47. The clerk of the Council testified the Council had "reached a consensus" about amending the ordinance in the closed meetings, but "no formal action was taken." *Id*. at 26, 426 S.E.2d at 747. The County contended no vote was taken at the closed meeting, but the record showed that even though no motion was made to amend the ordinance, the amended version was read and passed during a subsequent public meeting. *Id*. at 28, 426 S.E.2d at 747. Seeing through the ruse, our supreme court held the ordinance had been amended during the closed meetings in violation of section 30-4-70(a)(g) and affirmed the circuit court order invalidating the ordinance. We see little daylight between *Sumter County* and this case.

Nor do we see any factual dispute that would have precluded the circuit court from ruling as a matter of law that the Board violated FOIA, a ruling we hereby affirm. *Cf. S.C. Lottery Comm'n v. Glassmeyer*, 433 S.C. 244, 251–52, 857 S.E.2d 889, 893

(2021) (remanding FOIA declaratory judgment action for trial because factual issues were in dispute).

B. Injunctive Relief

The Board asserts the circuit court erred in issuing an injunction requiring it to consider and dispose of the parent's complaint at its next public meeting. The Board claims the injunction was, in effect, an improper grant of mandamus against a legislative body.

The FOIA, by its terms, empowers a circuit court to order injunctive relief it deems appropriate to rectify FOIA violations, and FOIA violations "must be considered to be an irreparable injury for which no adequate remedy at law exists." § 30-4-100(A) (2007 and Supp. 2022). It has been held proper, for instance, for a trial court to enjoin a public body from future FOIA violations. *See Sumter County*, 311 S.C. at 27, 426 S.E.2d at 747 (affirming trial court order enjoining County from any further informal meetings violating the FOIA); *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 354–56, 594 S.E.2d 888, 896–97 (Ct. App. 2004) (affirming order enjoining sheriff from future FOIA violations).

Notably, the Board has not appealed the circuit court's rulings enjoining it from improperly entering into executive session or taking any action in executive session in violation of FOIA. But the circuit court order requiring the Board to take up the complaint anew at its next public meeting stands on a different footing. We can understand the circuit court's frustration with the Board. The Board's cavalier disregard of FOIA reflects a clear abuse of power. *Cf. Singleton v. Horry Cnty. Sch. Dist.*, 289 S.C. 223, 227–28, 345 S.E.2d 751, 753 (Ct. App. 1986) ("Courts will not interfere with the exercise of discretion by school boards in matters committed by law to their judgment unless there is clear evidence that the board has acted corruptly, in bad faith, or in clear abuse of its powers.").

The portion of the injunction requiring the Board to reconsider the parent's complaint at its next meeting is not merely an equitable remedy for a FOIA violation; nor is it an instance of a court reviewing a completed legislative act. Rather, it is a judicial decree requiring the Board to take specific legislative action. *See Patton v. Richland Cnty. Council*, 303 S.C. 47, 49, 398 S.E.2d 497, 498 (1990) (noting the general rule that court will not restrain by injunction the exercise of legislative power). We agree with the Board that such an order should only ensue, if at all, by way of mandamus,

a cause of action that was not pled or raised by Respondent. We therefore vacate this portion of the injunction.

AFFIRMED IN PART AND VACATED IN PART.

GEATHERS and McDONALD, JJ., concur.