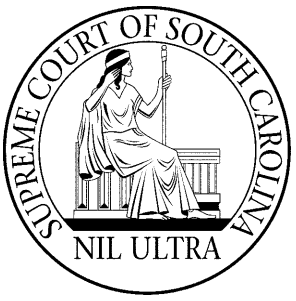

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
April 2, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITION FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2014-UP-148-Cellular Sales of South Carolina, LLC, v. SCDEW

2014-UP-149-SCDSS v. Henry W.

2014-UP-150-SCDSS v. Sarah E. and Michael B.

2014-UP-151-State v. Antonio L. Dodd

2014-UP-152-State v. Andre Green

2014-UP-153-Christopher Kinloch v. Chelita Pinkney

2014-UP-154-State v. Verntirell Dukes

2014-UP-155-State v. Brian T. Jenkins

2014-UP-156-State v. Andrew James Harrelson

2014-UP-157-State v. Darrell Florez

2014-UP-158-Mell Woods v. John D. Hinson (2)

2014-UP-159-City of Columbia v. William K. Wilson

2014-UP-160-State v. Charles M. Harris

2014-UP-161-Horry County v. Aquasino Partners of South Carolina, LLC, et al.

2014-UP-162-State v. Jimmy Lee Wilson, Jr.

2014-UP-163-Rawley Schofield v. Fairfield Cty. and Mary R. Medlin v. Fairfield Cty.

2014-UP-164-SCDSS v. Shanetta P.

PETITIONS FOR REHEARING

5185-Hector G. Fragosa v. Kade Construction	Pending
5191-Jacqueline Carter v. Verizon Wireless Southeast	Pending
5193-Israel Wilds v. State	Pending
5197-Gladys Sims v. Amisub	Pending

5198-State v. Robert Palmer and Julia Gorman	Pending (2)
5199-State v. Antonio Scott	Pending
5200-Tynaysha Horton v. City of Columbia	Pending
5201-Phillip D. Grimsley, Sr. v. SLED & State of SC	Pending
5203-James Arthur Teeter, III, v. Debra M. Teeter	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-036-State v. Noel Gray	Pending
2014-UP-047-State v. Sam Harold Smith	Denied 03/25/14
2014-UP-062-Stoneledge at Lake Keowee v. IMK Development	Pending
2014-UP-064-Antonio Lazaro v. Burris Electrical	Pending
2014-UP-074-Tim Wilkes v. Horry County	Pending
2014-UP-076-Mell Woods v. Robert H. Breakfield	Pending
2014-UP-082-W. Peter Buyck, Jr. v. William Jackson	Pending
2014-UP-084-Douglas E. Stiltner v. USAA Casualty Ins. Co.	Pending
2014-UP-087-Moshtaba Vedad v. S. C. Dep't of Transportation	Pending
2014-UP-088-State v. Derringer Young	Pending
2014-UP-091-State v. Eric Wright	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-095-Patricia Johnson v. Staffmark	Pending
2014-UP-110-State v. Raymond Franklin	Pending
2014-UP-111-In the matter of the care and treatment of Dusty Cyr	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4750-Cullen v. McNeal	Pending
4764-Walterboro Hospital v. Meacher	Pending
4832-Crystal Pines v. Phillips	Pending
4888-Pope v. Heritage Communities	Pending
4895-King v. International Knife	Pending
4909-North American Rescue v. Richardson	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5008-Willie H. Stephens v. CSX Transportation	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending
5017-State v. Christopher Manning	Pending

5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5041-Carolina First Bank v. BADD	Pending
5052-State v. Michael Donahue	Pending
5053-State v. Thomas E. Gilliland	Pending
5055-Hazel Rivera v. Warren Newton	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending
5060-State v. Larry Bradley Brayboy	Pending
5061-William Walde v. Association Ins. Co.	Pending
5062-Duke Energy v. SCDHEC	Pending
5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending
5072-Michael Cunningham v. Anderson County	Pending
5074-Kevin Baugh v. Columbia Heart Clinic	Pending
5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5078-Estate of Livingston v. Clyde Livingston	Pending
5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending

5082-Thomas Brown v. Peoplease Corp.	Pending
5084-State v. Kendrick Taylor	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5090-Independence National v. Buncombe Professional	Pending
5092-Mark Edward Vail v. State	Pending
5093-Diane Bass v. SCDSS	Pending
5095-Town of Arcadia Lakes v. SCDHEC	Pending
5097-State v. Francis Larmand	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5101-James Judy v. Ronnie Judy	Pending
5110-State v. Roger Bruce	Pending
5111-State v. Alonza Dennis	Pending
5112-Roger Walker v. Catherine Brooks	Pending
5113-Regions Bank v. Williams Owens	Pending
5116-Charles A. Hawkins v. Angela D. Hawkins	Pending
5117-Loida Colonna v. Marlboro Park (2)	Pending
5118-Gregory Smith v. D.R. Horton	Pending
5119-State v. Brian Spears	Pending
5121-State v. Jo Pradubsri	Pending
5125-State v. Anthony Marquese Martin	Pending
5126-A. Chakrabarti v. City of Orangeburg	Pending

5127-Jenean Gibson v. Christopher C. Wright, M.D.	Pending
5130-Brian Pulliam v. Travelers Indemnity	Pending
5131-Lauren Proctor v. Whitlark & Whitlark	Pending
5135-Microclean Tec. Inc. v. Envirofix, Inc.	Pending
5137-Ritter and Associates v. Buchanan Volkswagen	Pending
5139-H&H Johnson, LLC v. Old Republic National Title	Pending
5140-Bank of America v. Todd Draper	Pending
5144-Emma Hamilton v.Martin Color Fi	Pending
5148-State v. Henry Jermaine Dukes	Pending
5151-Daisy Simpson v. William Simpson	Pending
5152-Effie Turpin v. E. Lowther	Pending
5154-Edward Trimmier v. SCDLLR	Pending
5156-State v. Manuel Marin	Pending
5157-State v. Lexie Dial	Pending
5159-State v. Gregg Henkel	Pending
5160-State v. Ashley Eugene Moore	Pending
5161-State v. Lance Williams	Pending
5164-State v. Darren Scott	Pending
5165-Bonnie L. McKinney v. Frank J. Pedery	Pending
5166-Scott F. Lawing v. Univar USA Inc.	Pending
5171-Carolyn M. Nicholson v. SCDSS and State Accident Fund	Pending

5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5177-State v. Leo Lemire	Pending
5178-State v. Michael J. Hilton	Pending
5181-Henry Frampton v. SCDOT	Pending
5188-Mark Teseniar v. Professional Plastering	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-293-Clegg v. Lambrecht	Pending

2012-UP-295-Larry Edward Hendricks v. SCDC	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-563-State v. Marion Bonds	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-580-State v. Kendrick Dennis	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending

2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety	Pending
2012-UP-647-State v. Danny Ryant	Pending
2012-UP-654-State v. Marion Stewart	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending
2013-UP-014-Keller v. ING Financial Partners	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-034-Cark D. Thomas v. Bolus & Bolus	Pending
2013-UP-056-Lippincott v. SCDEW	Pending
2013-UP-058-State v. Bobby J. Barton	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-063-State v. Jimmy Lee Sessions	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending
2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending

2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending
2013-UP-085-Brenda Peterson v. Hughie Peterson	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending
2013-UP-110-State v. Demetrius Goodwin	Pending
2013-UP-120-Jerome Wagner v. Robin Wagner	Pending
2013-UP-125-Caroline LeGrande v. SCE&G	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-133-James Dator v. State	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail, et al.	Pending
2013-UP-183-R. Russell v. DHEC and State Accident Fund	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-189-Thomas J. Torrence v. SCDC	Pending
2013-UP-199-Wheeler Tillman v. Samuel Tillman	Pending
2013-UP-232-Theresa Brown v. Janet Butcher	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Pending

2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-267-State v. William Sosebee	Pending
2013-UP-272-James Bowers v. State	Pending
2013-UP-279-MRR Sandhills v, Marlboro County	Pending
2013-UP-286-State v. David Tyre	Pending
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-294-State v. Jason Thomas Husted	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-304-State v. Johnnie Walker Gaskins	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-317-State v. Antwan McMillan	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-323-In the interest of Brandon M.	Pending
2013-UP-326-State v. Gregory Wright	Pending
2013-UP-327-Roper LLC v. Harris Teeter	Pending
2013-UP-340-Randy Griswold v. Kathryn Griswold	Pending
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-360-State v. David Jakes	Pending
2013-UP-380-Regina Taylor v. William Taylor	Pending
2013-UP-381-L. G. Elrod v. Berkeley County	Pending

2013-UP-389-Harold Mosley v. SCDC	Pending
2013-UP-393-State v. Robert Mondriques Jones	Pending
2013-UP-403-State v. Kerwin Parker	Pending
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending
2013-UP-428-State v. Oran Smith	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending
2013-UP-444-Jane RM Doe v. Omar Jaraki	Pending
2013-UP-459-Shelby King v. Amy Bennett	Pending
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending
2013-UP-485-Dr. Robert W. Denton v. Denmark Technical College	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending
2013-UP-495-Lashanda Ravenel v. Equivest Financial, LLC	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services,
Respondent,

v.

Michelle G. and Robert L.,

of whom Michelle G. is the Appellant.

Appellate Case No. 2013-001383

Appeal From Anderson County
The Honorable Karen F. Ballenger, Family Court Judge

Opinion No. 27371
Heard March 19, 2014 – Filed March 27, 2014

AFFIRMED

Charles R. Griffin, Jr., of Anderson, for Appellant.

Kathleen J. Hodges, of Anderson, for Respondent.

JUSTICE BEATTY: This is an expedited appeal by a mother in a termination of parental rights (TPR) case.[1] The family court terminated Appellant's parental rights to her two minor sons and denied Appellant's motion to dismiss, in which she challenged the constitutionality of section 63-7-2570(1) of

[1] Robert L. is not a party to this appeal.

the South Carolina Code. On appeal, Appellant contends the TPR statute violates the Fourteenth Amendment and is void for vagueness. We affirm.

I. FACTS

Appellant is the biological mother of four children: a daughter and a son who are now adults, and two minor sons who are the subject of this TPR action. Appellant and Robert L. (Biological Father) were previously married and lived in North Carolina. After the divorce, their two oldest children, then minors, alleged Biological Father had sexually abused them. Appellant reported the allegations to authorities. A finding of abuse was made against Biological Father in North Carolina, and Appellant obtained custody of the children.

During this time, while Appellant was still living in North Carolina with her children, she met Kenneth G. (Stepfather) online. Stepfather lived in South Carolina. According to Appellant, Stepfather initially lied to her about his identity, and he was physically and sexually abusive to her when she went to visit him in South Carolina. For example, Stepfather demanded that Appellant perform sex acts for him via a webcam and that she include her daughter, and that Appellant have sex with other men. However, Appellant continued to visit Stepfather, reportedly due to his threat to help Biological Father regain custody of the children.

Despite these incidents, Appellant married Stepfather. On their wedding night, Stepfather raped Appellant's daughter in Appellant's presence. Appellant's daughter thereafter had two children with Stepfather as a result of ongoing sexual abuse. Appellant has admitted that she was aware of the rape incident and the fact that Stepfather is the biological father of her daughter's two children. In addition, Appellant has admitted that, on repeated occasions, she engaged in oral sex with her daughter and had sexual intercourse with her oldest son. Appellant has maintained these acts occurred due to threats or coercion by Stepfather. However, the incidents occurred over an extended period of time, and some of the incidents occurred via webcam when Stepfather was in another town. Appellant never reported any of this abuse to the police.

Appellant's three sons entered foster care on June 11, 2012 after the oldest son revealed to law enforcement that there had been sexual abuse in the home.[2]

[2] Stepfather was thereafter convicted of multiple charges of incest.

The South Carolina Department of Social Services (DSS) filed a summons and complaint dated August 29, 2012 seeking the termination of Appellant's parental rights to her three sons. Appellant filed a motion to dismiss, arguing section 63-7-2570(1), the TPR provision pled in this case, was impermissibly vague in violation of the Fourteenth Amendment.

Appellant's oldest son was removed as a party because he turned eighteen prior to the hearing in this matter and was no longer subject to TPR. The matter proceeded as to Appellant's younger sons at a hearing held on April 4 and 5, 2013. By order dated May 9, 2013, the family court terminated Appellant's parental rights to her two minor sons. The court found there was clear and convincing evidence they had been harmed as defined in section 63-7-20(4) of the South Carolina Code and, because of the severity or repetition of the abuse or neglect, as provided by section 63-7-2570(1), it was not reasonably likely that the home could be made safe within twelve (12) months, and termination was in the children's best interests. The family court denied Appellant's motion to dismiss the action based on her allegation that section 63-7-2570(1) is unconstitutionally vague.

II. STANDARD OF REVIEW

A state must prove a case for termination of parental rights by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Richberg v. Dawson*, 278 S.C. 356, 296 S.E.2d 338 (1982). Upon review, this Court is entitled to make its own determination whether the grounds for termination are supported by clear and convincing evidence. *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 614 S.E.2d 642 (2005). However, this scope of review does not require this Court to disregard the findings of the family court, which was in a better position to evaluate the credibility of the witnesses and assign weight to their testimony. *Charleston Cnty. Dep't of Soc. Servs. v. Jackson*, 368 S.C. 87, 627 S.E.2d 765 (Ct. App. 2006).

III. LAW/ANALYSIS

On appeal, Appellant argues the family court erred in denying her motion to dismiss this TPR action because section 63-7-2570(1) violates the Fourteenth Amendment to the United States Constitution. Appellant asserts section 63-7-2570(1) is unconstitutionally vague and violates her procedural due process rights because it fails (1) to give sufficiently fair notice to one who would avoid its sanctions, and (2) to provide ascertainable standards to the trier of fact, here, the

family court, in determining whether to terminate parental rights. In particular, Appellant points to the use of the undefined term "severity" in the statute and argues section 63-7-2570(1) "permits [TPR] to be wantonly and freakishly meted out to a parent whose conduct is subjectively, arbitrarily and capriciously determined to be 'Severe[.]'"

The United States Supreme Court has historically recognized "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky*, 455 U.S. at 753. Accordingly, parents have a fundamental liberty interest in the care, custody, and management of their children. *Id.*; *see also S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 335, 741 S.E.2d 739, 745 (2013) (citing *Santosky*).

Statutes terminating parental rights must, therefore, comport with basic due process requirements guaranteed by the Fourteenth Amendment. *In re Maricopa Cnty. Juvenile Action Nos. JS-5209 & JS-4963*, 692 P.2d 1027, 1032 (Ariz. Ct. App. 1984). "A statute whose terms are vague and conclusory does not satisfy due process requirements." *Id.*

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *In re Anonymous Member of S.C. Bar*, 392 S.C. 328, 335, 709 S.E.2d 633, 637 (2011) (citation omitted); *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (citation omitted). Consequently, a statute may be unconstitutionally vague where "(1) it does not provide fair notice of the conduct proscribed," or "(2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed[.]" *In re Gentry*, 369 N.W.2d 889, 893 (Mich. Ct. App. 1985).[3] In the current appeal, Appellant makes both of these contentions as to section 63-7-2570(1).

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[3] A statute may also be challenged on a third basis not at issue here—that "its coverage is overbroad and impinges on First Amendment freedoms." *In re Gentry*, 369 N.W.2d at 893; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (stating vague laws infringe upon several important values, including (1) the need for notice, (2) the need for explicit standards, and (3) First Amendment considerations). The traditional rule of standing is relaxed for overbreadth claims involving First Amendment rights, where a party "simply must demonstrate that the statute could cause someone else—anyone else—to refrain

This Court begins with a presumption of constitutionality. *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) ("This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid."). "[A] legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id.* at 570, 549 S.E.2d at 597.

"A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *In re Anonymous Member of S.C. Bar*, 392 S.C. at 335, 709 S.E.2d at 637 (citing *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598). "[A]ll the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *Curtis*, 345 S.C. at 572, 549 S.E.2d at 599; *cf. Maricopa*, 692 P.2d at 1034 ("The requirement that statutory language must be reasonably certain is satisfied 'by the use of ordinary terms which find adequate interpretation in common usage and understanding,' or if the term can be given meaning by reference to other definable sources." (internal citation omitted)).

"The constitutionality of a statute must be considered in light of the standing of the party who seeks to raise the question and of its particular application . . . ." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 535 n.7, 737 S.E.2d 830, 839 n.7 (2012) (citation omitted). "Standing is not a separate issue when the constitutionality of a statute is challenged under the due process clause, but is instead the foundation of the inquiry." *Id.*

"One whose conduct clearly falls within the statutory proscription does not have standing to raise a void-for-vagueness challenge." *Id.* at 535, 737 S.E.2d at 839; *accord Curtis*, 345 S.C. at 572, 549 S.E.2d at 598; *see also In re Amir X.S.*, 371 S.C. 380, 385 n.2, 639 S.E.2d 144, 146 n.2 (2006) (stating the traditional rule of standing for constitutional attacks is that one to whom application of a statute *is* constitutional may not attack the statute on the ground that it *might* be

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from constitutionally protected expression." *In re Amir X.S.*, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006).

unconstitutional when applied to *other* people or situations (citing *United States v. Raines*, 362 U.S. 17, 21 (1971))). "A statute's constitutionality is judged on an objective, not subjective, basis." *Chimento*, 401 S.C. at 535 n.6, 737 S.E.2d at 838 n.6.

Thus, when raising a claim of unconstitutional vagueness, the litigant must demonstrate that the challenged statute is vague *as applied to his own conduct*, regardless of its potentially vague application to others. *In re Hanks*, 553 A.2d 1171, 1176 (Del. 1989) (citing *Aiello v. City of Wilmington, Del.*, 623 F.2d 845, 850 (3d Cir. 1980)).

In the current appeal, Appellant points to section 63-7-2570(1)'s use of the word "severity" throughout her brief and contends the term is undefined and that the statute provides no ascertainable standard for the trier of fact to make a TPR determination.[4] Section 63-7-2570 of the South Carolina Code currently sets forth eleven enumerated grounds for terminating a parent's rights and provides in relevant part as follows:

> The family court may order the termination of parental rights upon a finding of one or more of the following grounds *and a finding that termination is in the best interest of the child*:
>
> (1) The child or another child while residing in the parent's domicile has been *harmed* as defined in Section 63-7-20, and because of the *severity or repetition of the abuse or neglect*, it is not reasonably likely that the home can be made safe within twelve months. In

[4] At the TPR hearing, Appellant argued the use of the terms "severity" *and* "repetition" made the statute unconstitutionally vague. However, on appeal to this Court, her brief appears to have abandoned any reliance on the term "repetition" and she instead focuses on the term "severity." In any event, the use of "repetition" in this context does not make the statute impermissibly vague as the undisputed testimony, including Appellant's own admissions, demonstrates that Appellant committed repeated sexual acts with her daughter and her oldest son. "Repetition" is a word that should be given its ordinary dictionary meaning. *See Webster's Third New International Dictionary of the English Language, Unabridged* 1924 (2002) (defining "repetition" as "the act or an instance of repeating something that one has already said or done").

> determining the likelihood that the home can be made safe, the parent's previous abuse or neglect of the child or another child may be considered.

S.C. Code Ann. § 63-7-2570(1) (Supp. 2013) (emphasis added).

Section 63-7-20(4) of the Code defines the terms "child abuse or neglect" and "harm" as used in the provision challenged here. It states in relevant part:

> (4) "Child abuse or neglect" or "harm" occurs when the parent, guardian, or other person responsible for the child's welfare:
>
> > (a) inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child, ...
> >
> > (b) 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(4) (2010).

In its order, the family court specifically found there was clear and convincing evidence that Appellant "had [engaged in] repeated acts of sexual relations with her [oldest] son . . . and [her] daughter . . . and that abuse was severe." In addition, Appellant "was present while her husband raped her daughter . . . and that abuse is severe." The court stated Appellant's oldest son and daughter were subject to abuse in both North Carolina and South Carolina, and that "[t]he children knew about the sexual abuse going on and that in itself is abuse and mental injury." The court found there was a substantial risk of harm for Appellant's two minor sons, and that it was "not reasonably likely that the home can be made safe within twelve (12) months." The court expressed concern that, "[d]uring the testimony of [Appellant], at no time did she accept responsibility for the abuse," and that Appellant had failed to adequately protect her children, who had been abused by Appellant, Biological Father, and Stepfather. In these circumstances, the court found the termination of Appellant's parental rights was in the best interests of her minor sons. At the hearing in the matter, the family court further explained its reasoning as to the meaning of the terms used in the statute:

> And severity, [] having sexual intercourse with your son, I mean, I can't even believe I'm having to say this, . . . that is definitely severe and I . . . don't see how anybody could interpret that any differently. And having sexual intercourse with your daughter[;] being present while your husband is raping your child. All of that would definitely fall within the definition of severity and repetition.

We agree with the family court's observations and find Appellant has no standing to pursue this constitutional challenge because Appellant's conduct clearly falls within the parameters of the acts proscribed by section 63-7-2570(1). A statute's words generally should be given their plain and ordinary meaning, and the only appropriate description of the abuse in this case is that it was "severe" under any common understanding of the term. *See Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011) ("Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application."); *Webster's Third New International Dictionary of the English Language, Unabridged* 2081 (2002) (defining "severity" as the "quality or state of being severe," and defining "severe" to mean "of a great degree or an undesirable or harmful extent," or "inflicting physical discomfort or hardship," or "inflicting pain or distress"); *see also People v. Weninger*, 611 N.E.2d 77, 83 (Ill. App. Ct. 1993) ("A court will assume [] that the words used in a statute have their ordinary and popularly understood meanings, absent a contrary legislative intent. Also, in addition to the language used, consideration must be given to the legislative objective and the evil the statute is designed to remedy." (internal citations omitted)). Moreover, since it is undisputed that the abuse occurred multiple times, and the statute refers alternatively to the "severity" *or* the "repetition" of the abuse or neglect, Appellant's conduct falls within the realm of the TPR statute due to the repetition of the abuse, regardless of its "severity."

IV. CONCLUSION

We conclude the family court properly denied Appellant's motion to dismiss this TPR action based on her challenge to the constitutionality of section 63-7-2570(1). Because her conduct clearly falls within the parameters of the statute, she lacks standing to challenge the statute as being void for vagueness. Appellant does not otherwise challenge the findings of the family court and its TPR decision, and we hold those findings are supported by clear and convincing evidence and that TPR is in the best interests of the children. As a result, we affirm the order of the family court.

AFFIRMED.

TOAL, C.J., HEARN, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

George M. Lee, III, and Elizabeth Sims, Plaintiffs,

Of whom George M. Lee, III is the Appellant,

v.

The University of South Carolina and The University of South Carolina Gamecock Club, Respondents.

Appellate Case No. 2012-212567

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

Opinion No. 27372
Heard November 7, 2013 – Filed April 2, 2014

REVERSED AND REMANDED

Mark W. Hardee, of The Hardee Law Firm, of Columbia, for Appellant.

Andrew F. Lindemann, William H. Davidson, II, and Joel S. Hughes, all of Davidson & Lindemann, P.A., of Columbia, for Respondents.

JUSTICE KITTREDGE: This case involves an agreement between Respondents, the University of South Carolina (University) and the University Gamecock Club (Gamecock Club), and Appellant George M. Lee, III. In exchange for Appellant

purchasing a $100,000 life insurance policy and naming the University the sole, irrevocable beneficiary of the policy, Appellant was given the "opportunity to purchase tickets" for his lifetime to University football and basketball games. Years later, the University instituted a program that required all Gamecock Club members, which included Appellant, to pay a seat license fee as a prerequisite for purchasing season tickets. Believing that the University could not require him to pay additional consideration for the opportunity to purchase tickets without violating the agreement, Appellant brought a declaratory judgment action. The trial court entered judgment for the University and the Gamecock Club, finding that Appellant was not deprived of the opportunity to purchase season tickets when the University instituted the seat license fees. We reverse.

I.

George M. Lee, III, has been a member of the Gamecock Club for many years. Prior to 1990, Lee was a member at the Full Scholarship level, affording him the opportunity to purchase tickets to University home athletic events. In 1990, Lee took advantage of an opportunity offered by the Gamecock Club in order to elevate his membership to the Lifetime Full Scholarship level, which would ensure preferred seating assignments at basketball and football games were protected.[1] The Gamecock Club presented Lee with two options: Lee could make a one-time donation of $100,000 to the Gamecock Club or he could take out a life insurance policy in the amount of $100,000 with the University as the sole, irrevocable beneficiary. Lee chose the latter option.

On March 9, 1990, Lee entered into a Memorandum of Agreement (Agreement) with the Gamecock Club. The Agreement provided that Lee would "irrevocably assign and contribute to the Gamecock Club the face amount of a whole life insurance policy valued at a minimum $100,000 with an A+ top 25 company as rated by the 'Best Rating System.'" The Agreement further provided that Lee would pay the annual premiums on the policy "of a sum not less than $1,000 . . . for a period of eight (8) years until the policy is paid up[,] at which time the Gamecock Club will own the paid up policy." In exchange, Lee was "designated as a Lifetime Scholarship Donor for the eight (8) years [he paid] on the policy."

[1] Although it was under no obligation to do so, the Gamecock Club accommodated Lee's request to take over his father's seats after his father's death in 1990.

The Agreement contained an attachment that listed the benefits Lee would receive.[2] The Agreement further stated that: "In accordance with said attachment, George M. Lee, III[,] will have the *opportunity to purchase tickets* entitled to the Gamecock Level or membership presently held." (emphasis added).

At the end of the eight-year period, the Gamecock Club notified Lee that, due to "optimistic interest rate projections" in 1990 that never materialized, the Gamecock Club had not "realize[d] the needed cash value to insure the intended $100,000 face value" of the policy. Thus, the Gamecock Club offered Lee a new agreement with three options: (1) make no further payments to the Gamecock Club and revert back to Full Scholarship level; (2) contribute $500 or more to the Gamecock Club in order to remain a Lifetime Full Scholarship member; or (3) "[c]ontinue [paying] the current premium until such time as the intended face value of the policy is realized." Lee chose the second option and began paying $500 a year to maintain his Lifetime Full Scholarship status and the accompanying benefits.

In 2008, the University considered several revenue-enhancing alternatives, including raising ticket prices. Following the lead of other universities, the University rejected the idea of raising ticket prices and decided to institute what it called the Yearly Equitable Seating (YES) program. The YES program required all Gamecock Club members, regardless of membership level, to pay a seat license fee each year for the opportunity to purchase tickets and maintain their current seats.[3] To that end, Lee was required to pay $325 per year for each of his eight

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[2] Lee testified that one of the most attractive benefits of the Agreement was that, while a Lifetime Full Scholarship member, he had the right to designate an heir for his tickets—an option not available to most Gamecock Club members. Lee was also entitled to the following benefits under the Agreement: (1) four season football tickets in the "best available" location; (2) four additional season football tickets; (3) assigned reserved parking for football games; (4) second priority on away and bowl games; (5) four season basketball tickets in the "best available" location; (6) assigned parking at the Carolina Coliseum; and (7) second priority on away and tournament basketball tickets.

[3] The University presented the YES program as an advantage, for it asserted requiring a seat license fee (as opposed to raising ticket prices) provided a tax benefit to Gamecock Club members.

seats in order to maintain his seating at football games. Lee has paid this license fee under protest since the institution of the YES program.

II.

Lee and Elizabeth Sims[4] filed a declaratory judgment action to determine whether they were entitled to purchase season tickets without paying the seat license fees. The trial court, sitting non-jury, found that the Agreement was "unambiguous on its face" and further found that, even when required to pay the seat license fees, Lee retained the "opportunity to purchase tickets." As a result, the trial court held that the University complied with the terms of the Agreement and that Lee was required to pay the seat license fees in order to retain the opportunity to purchase season tickets to athletic events. Lee appealed, which we certified for review pursuant to Rule 204(b), SCACR.

III.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "An action for breach of contract is an action at law." *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) (citing *Auto Owners Ins. Co. v. Langford*, 330 S.C. 578, 581, 500 S.E.2d 496, 497 (Ct. App. 1998)). Because the construction of a clear and unambiguous contract is a matter of law for the court, we review the trial court's findings of law *de novo*. *Watts v. Monarch Builders, Inc.*, 272 S.C. 517, 520, 252 S.E.2d 889, 891 (1979).

IV.

"'The law in this state regarding the construction and interpretation of contracts is well settled.'" *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) (quoting *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011)). "'In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties.'" *Id.* at 46, 747 S.E.2d at 184 (quoting *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984)).

[4] Only Lee has appealed the trial court's judgment.

"'Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.'" *Id*. (quoting *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976)).

"'If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.'" *Id*. (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)). Courts "are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *S.C. Dep't. of Transp. v. M & T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (citations omitted).

Applying these settled principles of contract interpretation, we agree with the trial court that the Agreement is unambiguous. However, we find legal error in the trial court's interpretation and conclude that the University breached the Agreement by requiring Lee to pay the additional seat license fee to retain the opportunity to purchase tickets. The Agreement reflects the agreed upon bargain between Lee and the University.

The language of the Agreement is clear. As long as Lee performs his contractual obligations, the University must provide him with the "opportunity to purchase" season tickets to University athletic events as described in the Agreement. The Agreement contains no limitations or conditions on this contractual right. Thus, by requiring Lee to pay the seat license fee before purchasing season tickets, the University has attempted to impose an additional term that the parties did not agree upon. This unilateral attempt to modify the Agreement is impermissible. *See* 17A Am. Jur. 2d *Contracts* § 507 ("[O]ne party to a contract may not unilaterally alter its terms."). Indeed, "[o]nce [a] bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration." *Layman v. State*, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006). We hold that the University and the Gamecock Club are required by the terms of the Agreement to permit Lee the opportunity to purchase tickets without being subject to any other conditions, including the payment of seat license fees.

We recognize the need for the University to increase its revenue streams, and we appreciate that the YES program (as opposed to increasing ticket prices) is an

effort to provide ticketholders with certain tax benefits. Indeed, the University would be permitted under the Agreement to increase ticket prices. However, the clear and unambiguous language of the Agreement prohibits the University from imposing additional fees that Lee must pay before being allowed the opportunity to purchase tickets. Were we to accept the University's view of the Agreement, it would mean Lee received little or nothing in the bargain, for the University would always have the ability to demand additional consideration for the opportunity to purchase tickets. That is the very thing foreclosed by the Agreement.

V.

We conclude that the Agreement unambiguously prohibits the University from requiring Lee to pay the seat license fee as a prerequisite for the opportunity to purchase tickets pursuant to the Agreement. We reverse the decision of the trial court and remand for entry of judgment for Lee.

REVERSED AND REMANDED.

TOAL, C.J., BEATTY and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm the circuit court's ruling that Respondents did not breach the contract.

I find that the trial court was correct in its construction of this contract. I agree with the circuit court, and the majority, that this contract is unambiguous on its face. Looking to the plain language, it provides that Lee would be a "Lifetime Full Scholarship Member" with "the opportunity to purchase tickets." Lee has received exactly what he bargained for. He is both a Lifetime Full Scholarship member and that he has the opportunity to purchase tickets just as any other person with this status. Accordingly, I agree with the circuit court that the University did not breach the contract.

As the majority states, "we are without the authority to alter an unambiguous contract by construction." *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant,* 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). Despite acknowledging this principle, the majority states that the language of this contract "prohibits the University from imposing additional fees." I am unable to find any language prohibiting additional fees. Further, the majority acknowledges that a court must enforce an unambiguous contract regardless of its wisdom, folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. *Id.* Despite acknowledging this principle, the majority finds that under the circuit court's reading of the contract, Lee receives "little or nothing in the bargain." I disagree with the notion that Lee received nothing. As he concedes, he is a Lifetime Scholarship Member, with all its attendant benefits, and he has opportunity to purchase tickets in the same manner as everyone else at that level.

Accordingly, I dissent and would affirm the circuit court's order finding that the University did not breach this unambiguous contract.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dorris W. Green, Jr. as Guardian ad Litem for Inman G., a minor, Appellant,

v.

United States Automobile Association Auto and Property Insurance Company, Respondent.

Appellate Case No. 2011-197648

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27373
Heard April 17, 2013 – Filed April 2, 2014

AFFIRMED

Bernard McIntyre, of Beaufort, for Appellant.

Charles R. Norris, of Nelson Mullins Riley & Scarborough, LLP, of Charleston, and C. Mitchell Brown, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from a circuit court order granting the automobile insurance carrier (USAA) summary judgment in this action to determine coverage under a policy issued in Florida. Appellant Green, representing his child who was injured while a passenger in his mother's

automobile, contends that as a matter of public policy the courts of South Carolina should refuse to recognize the validity of a family member exclusion in the Florida policy.[1] Further, he contends that the circuit court erred in finding there was no uninsured motorist coverage for his minor child under his Florida policy. Reluctantly, we agree with the circuit court that enforcement of this exclusion, which is admittedly valid under Florida law, does not offend our public policy, and that there is no underinsured coverage for father's minor child under the father's policy. We therefore affirm the grant of summary judgment to USAA.

FACTS

Appellant owned two cars: a Blazer driven primarily by him, and a Honda driven by his wife (mother). Both cars were insured under a policy issued to appellant in Florida. The Honda was registered in that state, but the Blazer was registered in South Carolina. Appellant maintains a Florida driver's license because "He goes to Florida on a regular basis . . . [t]o see his parents." Notwithstanding the Florida license, Florida registration, and Florida insurance policy, mother testified she and appellant had lived continuously in Beaufort since they married in 2004.[2] The accident occurred in South Carolina when mother was making a left turn at an intersection and an oncoming car hit her Honda on the passenger's side, severely injuring her minor child, Inman Green. Mother is the at-fault driver.

ISSUES

1) Did the policy's family member exclusion violate South Carolina's public policy?

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[1] The validity of these types of exclusions is discussed in an A.L.R. annotation. Martin J. McMahon, Annotation, *Validity, under Insurance Statutes, of coverage exclusion for injury to or death of insured's family or household members*, 52 A.L.R. 4th 18 (1987 and Supp. 2012).

[2] No issue regarding appellant's compliance with the South Carolina Motor Vehicle Responsibility Act is before us.

2) Did the circuit court err in finding the injured child could not recover under the Florida policy's underinsured (UIM)[3] coverage?

ANALYSIS

1. **Public Policy**

USAA declined coverage citing this exclusion:

> There is no coverage for [Bodily Injury] for which a **covered person** becomes legally responsible to pay to a member of that **covered person's** family residing in that **covered person's** household.

It is uncontroverted that mother was a covered person under the policy, and that the injured child resides in mother's household. Further, it is undisputed that this family member exclusion is valid under Florida statutory law, and that the exclusion does not violate Florida's public policy. *E.g., Mitchell v. State Farm Mut. Auto. Ins.*, 678 So.2d 418 (Fla. Dist. Ct. App. 1996).

The circuit court cited the general rule, followed in South Carolina, that the validity of a contract is determined by the law of the state in which the contract was made. *E.g., Unison Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 436 S.E.2d 182 (Ct. App. 1993). As noted above, it is uncontested that the exclusion is valid under Florida law. *Mitchell, supra*.

Appellant first argues that, because South Carolina has abolished parental immunity, enforcement of the family member exclusion violates public policy. Appellant has conflated two separate ideas in making this argument. It is true, as he argues, that South Carolina has abolished parental tort immunity. *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980). At issue here, however, is not the question of a common law immunity from suit but rather the enforceability of a contract provision. Appellant's injured child may sue his mother in South Carolina for his injuries, but the insurance policy does not provide coverage for her. The abolition

[3] Under the policy here, underinsured coverage is a type of uninsured motorist coverage.

of parental immunity in this State does not create a public policy bar to enforcement of the valid family member exclusion in USAA's Florida automobile insurance policy.

Appellant next contends that this action, arising out of mother's negligence, is governed by the doctrine of *lex loci delecti*, and thus the substantive law of South Carolina applies. As the circuit court held, the fact that the accident occurred in South Carolina does not convert the validity of the Florida contract from one of *lex loci contractu* into one of *lex loci delecti*. *Unison*, *supra*. The substantive law of Florida governs the validity of the insurance contract's terms.

Finally, Green relies on South Carolina cases refusing to apply out-of-state intrafamily immunities as a matter of public policy. *See Algie v. Algie*, 261 S.C. 103, 198 S.E.2d 529 (1973) (refusing to dismiss suit based upon Florida interspousal immunity doctrine); *Boone v. Boone*, 345 S.C. 8, 546 S.E.2d 191 (2001) (refusing to apply Georgia interspousal immunity doctrine). Green has again conflated South Carolina's public policy refusing to enforce other jurisdictions' common law tort immunities in our courts with our construction of an out-of-state automobile insurance contract exclusion. Florida's District Court of Appeals made an eloquent argument for a change in Florida's policy regarding the validity of the family member exclusion in *Mitchell*, *supra*.[4] Nevertheless, the Florida court concluded as do we, that such a change is the prerogative of the Florida legislature.

We agree with the circuit court that the family member exclusion contained in the Florida automobile policy at issue here, being valid under both Florida statutory

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[4] Who else but a spouse or family member is most likely to be riding as a passenger in a Florida resident's car? Yet, injury to that family member is excluded from liability coverage by most, if not all, insurance policies issued in Florida. As counsel for State Farm candidly admitted to us at oral argument, they knew of no insurance policy offered in Florida without a family member exclusion. Not only is the driver left without liability protection, but the very persons whom the insureds most likely would want to have covered, may also have no protection under the uninsured motorist coverage section if there is only one policy involved.

Mitchell, 678 So.2d at 420 (footnote omitted).

authority and Florida public policy considerations, is not void as against our public policy when applied in this South Carolina litigation.

2. **UIM Coverage**

Appellant also sought to recover UIM benefits under the USAA policy, contending that because the child's injuries exceeded the amount available under the liability provision of the contract, UIM coverage was activated. The circuit court granted USAA summary judgment on this UIM claim, holding that the policy's definition of an uninsured motor vehicle barred coverage. The policy's definition of "uninsured" explicitly excludes an automobile owned by or furnished to or available for the regular use of the named insured or a family member. The evidence in the record was that the Honda involved in the accident was owned by mother and appellant, and that mother, a family member, regularly drove that vehicle.

On appeal, Green argues that because the UIM coverage provision is both vague and void, he is entitled to coverage. These arguments are not properly before the Court since neither was raised to or ruled upon by the circuit court. *E.g.*, *Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 737 S.E.2d 601 fn. 11 (2013). Moreover, under Florida law, it would appear that the UIM provisions of this contract are neither void nor vague. *See Small v. New Hampshire Indem.*, 915 So.2d 714 (Fla. Dist. Ct. App. 2005) (rejecting arguments and construing similar policy language). The circuit court did not err in granting USAA summary judgment on appellant's UIM coverage claim.

CONCLUSION

The circuit court order granting USAA summary judgment is

AFFIRMED.

BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Catawba Indian Nation, a/k/a The Catawba Indian Nation of South Carolina, a/k/a The Catawba Indian Tribe of South Carolina, Appellant,

v.

State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division, Respondents.

Appellate Case No. 2012-212118

Appeal From Richland County
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27374
Heard January 22, 2014 – Filed April 2, 2014

AFFIRMED IN PART, REVERSED IN PART

William W. Wilkins, of Nexsen Pruet, of Greenville; Gregory Poole Harris, of Harris & Gasser, LLC, of Columbia; James Walter Fayssoux, Jr. and Paul S. Landis, both of Fayssoux Law Firm, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Deputy Attorney General Clyde H. Jones, Jr., and Solicitor General Robert D. Cook, all of Columbia, for Respondents.

JUSTICE BEATTY: The Catawba Indian Nation (the "Tribe") brought this declaratory judgment action against the State of South Carolina and Mark Keel (collectively, the "State") to determine the effect of the Gambling Cruise Act, S.C. Code Ann. §§ 3-11-100 to -500 (Supp. 2013), on its gambling rights. The circuit court granted summary judgment to the State, finding: (1) the Tribe's action was precluded by collateral estoppel and/or res judicata, and (2) the Gambling Cruise Act does not confer upon the Tribe the right to offer video poker and similar electronic play devices on its Reservation as the Act does not alter the statewide ban on video poker. The Tribe appealed, and this Court certified the case for review pursuant to Rule 204(b), SCACR. We affirm in part and reverse in part.

I. FACTS

Because the Tribe's litigation has a long and complex history, we begin with (1) a brief historical background, (2) a review of events leading to a 1993 Settlement Agreement, (3) a discussion of the Tribe's 2005 declaratory judgment action and this Court's opinion thereon in 2007, (4) an outline of the events culminating in the enactment of the Gambling Cruise Act of 2005, and (5) an examination of the 2012 declaratory judgment action that is now before this Court.

(1) Historical Background

In the 1760 Treaty of Pine Hill, as confirmed by the 1763 Treaty of Augusta, the King of England and the Catawba Head Men and Warriors entered into an agreement in which the Catawba surrendered certain aboriginal territory in North Carolina and South Carolina to Great Britain in return for the right to settle on land located in South Carolina described as a "Tract of Land of Fifteen Miles square," comprised of 144,000 acres or 225 square miles. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 499-500 (1986); *see also* 25 U.S.C.A. § 941a(1) (2013) (describing treaties).

By 1840, the Catawba had leased most of this land to others. *South Carolina*, 476 U.S. at 501. In 1840, the Catawba entered into the Treaty of Nation Ford, in which the Catawba conveyed its interest in this tract of land to the State in exchange for the establishment of a new reservation and scheduled monetary payments. *Id.* In 1842, the State purchased a 630-acre tract as a new reservation

for the Tribe, which then had a membership of about 450 persons, and the State held the land in trust for the Tribe. *Id.*

The Catawba subsequently maintained that the State did not perform all of its obligations under the agreement and, further, that the State did not have the authority to enter into the 1840 treaty based on federal provisions that prohibited the conveyance of tribal land without the consent of the United States. *Id.*

State officials and the Federal Government became involved in the situation, and in 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding, by which the State purchased 3,434 acres of land and conveyed it to the United States to be held in trust for the Tribe; the State and the Federal Government agreed to make certain contributions to the Tribe; and the Tribe agreed to conduct its affairs based on the Federal Government's recommendations, but was not required to release its claims against the State. *Id.* at 501-02.

During the ensuing years, Congress maintained some oversight of Indian affairs, but by 1953, it decided to make a change in its basic policy and to terminate its supervisory responsibilities for Indian tribes, marking the beginning of a "termination era" that lasted until the 1960s.[1] *Id.* at 503. During this time, after consultation with the Catawba, it was decided that an end to federal control was desired by all parties. *Id.* at 503-04.

In 1959 Congress enacted the Catawba Indian Tribe Division of Assets Act ("CITDA Act"), 25 U.S.C.A. §§ 931–938, which distributed to the enrolled members of the Tribe the 3,434-acre reservation acquired in 1943. *Id.* at 504. Among other things, the CITDA Act provided "that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians." *Id.* (citing § 935 of the CITDA Act).

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[1] Between 1954 and 1962, Congress actually passed twelve separate "Termination Acts," the eleventh of which is the "Catawba Act." *Id.* at 504 n.11. Section 5 of the Catawba Act provides that "the laws of the several States shall apply to [the Catawba] in the same manner they apply to other persons or citizens within their jurisdiction." *Id.* at 505.

(2) Events Resulting in 1993 Settlement Agreement

In 1980, the Catawba brought an action seeking possession of the 225-square-mile tract of land in South Carolina and trespass damages for the period of its dispossession. *Id.* at 505. By that time, some 27,000 persons claimed title to different parcels within the tract. *Id.* at 499. The United States Supreme Court issued an opinion in 1986 finding the statute of limitations applied to the Tribe's claim, but it did not reach the question whether it barred the claim. *Id.* at 499-500.

In 1993, after many years of litigation and extensive negotiations, the Catawba, the State, and the United States entered into a settlement that ended the dispute over the right to possession of the 144,000 acres of land located in York, Lancaster, and Chester counties. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 522, 642 S.E.2d 751, 752 (2007). This 1993 Settlement Agreement has been codified in both federal legislation[2] and state legislation (the "State Act")[3] that implements the agreement. *Id.* at 522-23, 642 S.E.2d at 752-53. The federal legislation requires the Settlement Agreement and the State Act to be complied with as if they had been implemented by federal law. *Id.* at 523, 642 S.E.2d at 753 (citing 25 U.S.C.A. § 941b(a)(2) (2001)).

Under the terms of the settlement, the Catawba waived its right to be governed by the Indian Gaming Regulatory Act ("IGRA").[4] *Id.*; *see* 25 U.S.C.A. § 941*l*(a) (2013) ("The [IGRA] shall not apply to the Tribe."). Instead, the Catawba agreed to be governed by the terms of the Settlement Agreement and the State Act as pertains to games of chance. *Catawba Indian Tribe*, 372 S.C. at 523, 642 S.E.2d at 753.

As is relevant here, the State Act and the Settlement Agreement both provide: "The Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law." S.C. Code Ann. § 27-16-110(G) (2007); Settlement Agreement § 16.8. At

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[2] 25 U.S.C.A. §§ 941 to 941n (2013) (federal codification of settlement).

[3] S.C. Code Ann. §§ 27-16-10 to -140 (2007) (State Act).

[4] 25 U.S.C.A. §§ 2701–2721 (2013) (IGRA).

the time the Settlement Agreement was executed in 1993, video poker was legal in South Carolina. Thereafter, in 1999, the South Carolina General Assembly passed a statewide ban on the possession and operation of video poker devices. S.C. Code Ann. § 12-21-2710 (2000); Act No. 125, 1999 S.C. Acts 1319 (effective July 1, 2000).

(3) First Declaratory Judgment Action in 2005

In 2005, the Tribe brought a declaratory judgment action against the State and the Attorney General seeking, *inter alia*, a declaration that, despite the enactment of the statewide ban in section 12-21-2710, it had a present and continuing right to utilize video poker or similar electronic play devices on its Reservation. *Catawba Indian Tribe*, 372 S.C. at 523, 642 S.E.2d at 753. The Tribe contended the terms of the Settlement Agreement (§ 16.8) and the State Act (S.C. Code Ann. § 27-16-110(G)) authorized video poker to the same extent allowed by state law, and video poker was legal at the time the parties executed the Settlement Agreement. *Id.*

In 2007, this Court issued its opinion holding the Tribe's right to video poker under the Settlement Agreement is subject to future changes in state law, as contemplated in the language of the cited provisions. *Id.* at 529 n.8, 642 S.E.2d at 592 n.8. Using the plain and ordinary meaning of the terms, the Court determined the legislative intent was for the Tribe to be allowed to have video poker on its Reservation "to the same extent state law authorizes the devices," and we specifically found "[t]he language of § 27-16-110(G) is unambiguous." *Id.* at 525-26, 642 S.E.2d at 754-55. The Court concluded the Tribe could no longer permit video poker on its Reservation because the possession and operation of video poker devices was presently banned by section 12-21-2710. *Id.* at 527 n.7 & 530, 642 S.E.2d at 755 n.7 & 757.

(4) Events Culminating in S.C.'s Gambling Cruise Act of 2005

The Tribe has now brought a second declaratory judgment action that involves interpretation of the Gambling Cruise Act. This legislation was enacted approximately two months before the Tribe's first declaratory action was initiated in 2005, but no question was raised regarding the Gambling Cruise Act in that first action. An overview of the events culminating in the passage of this legislation will be helpful before considering the Tribe's current declaratory judgment action.

In 1951, Congress enacted what has become known as the Johnson Act, now found at 15 U.S.C.A. §§ 1171 to 1178, to prohibit the use and possession of gambling devices in interstate and foreign commerce, as well as in specified jurisdictions. *Brizill v. Dist. of Columbia Bd. of Elections & Ethics*, 911 A.2d 1212, 1214 (D.C. 2006). Until 1992, federal law prohibited gambling on any ship operating under the United States flag. *Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 380, 556 S.E.2d 357, 358 (2001) (citing the Gambling Ship Act, 18 U.S.C.A. §§ 1081–1084, and the Johnson Act, 15 U.S.C.A. §§ 1171–1178).

United States flag ships were placed at a competitive disadvantage because vessels under foreign flags were not prevented from offering gambling once the ship was beyond state territorial waters. *Id.* In response to this situation, in 1992 Congress amended § 1175 of the Johnson Act. *Id.* The Johnson Act still generally prohibits the use or possession of gambling devices on United States flag ships in § 1175(a), but under an exception in § 1175(b), the possession or transport of a gambling device within state territorial waters is not a violation of this prohibition *if* the device remains on board the vessel and is used only *outside* those territorial waters. *Palmetto Princess, L.L.C. v. Georgetown County*, 369 S.C. 34, 37, 631 S.E.2d 68, 70 (2006). The exception does not apply, however, if a state in which the voyage begins and ends has enacted a statute prohibiting gambling day cruises. *Id.* at 37-38, 631 S.E.2d at 70 (citing 15 U.S.C.A. § 1175(b)(2)(A)). "Thus, 'day cruises' . . . may be subject to **federal** criminal prosecution under § 1175(a) if they begin and end in a state that 'has enacted a statute the terms of which prohibit that use . . . .'" *Stardancer*, 347 S.C. at 380, 556 S.E.2d at 358-59 (citing § 1175(b)(2)(A)).

When the General Assembly amended section 12-21-2710 in 1999 to ban the possession and operation of video poker devices, it included an intent clause that states in part: "The General Assembly by enactment of this act has no intent to enact any provision allowed by 15 U.S.C. § 1175, commonly referred to as the Johnson Act, or to create any state enactment authorized by the Johnson Act." *Id.* at 385 & n.12, 556 S.E.2d at 361 & n.12 (citing § 22(B) of 1999 Act No. 125).

Since the State did not "opt out" of the Johnson Act, gambling day cruises, i.e., "cruises to nowhere" that went outside the state's territorial waters for gambling, were legal under federal law. Because of this, coastal counties and municipalities began adopting local ordinances banning gambling day cruises that left from within their boundaries. However, this Court held in a series of decisions that local governments did not possess the authority to ban such cruises because

the plain language of the Johnson Act indicated that only *a state*, not a political subdivision of a state, could prohibit those cruises, and our General Assembly had elected not to enact a statute prohibiting the "cruises to nowhere." *See, e.g., Palmetto Princess, L.L.C. v. Town of Edisto Beach*, 369 S.C. 50, 631 S.E.2d 76 (2006); *Palmetto Princess, L.L.C. v. Georgetown County*, 369 S.C. 34, 631 S.E.2d 68 (2006).

To resolve this impasse, in 2005 the General Assembly enacted the Gambling Cruise Act. S.C. Code Ann. §§ 3-11-100 to -500 (Supp. 2013). With certain exceptions, the General Assembly delegated to municipalities and counties "the authority conferred to this State by the United States Congress pursuant to the Johnson Act, as amended, 15 U.S.C. Sections 1171 through 1177[,] . . . to regulate or prohibit gambling aboard gambling vessels while such vessels are outside the territorial waters of the State, when such vessels embark or disembark passengers within their respective jurisdictions for voyages that depart from the territorial waters of the State, sail into United States or international waters, and return to the territorial waters of the State without an intervening stop." *Id.* § 3-11-200(A); *see also id.* § 3-11-300(B).

The Gambling Cruise Act explicitly states in pertinent part that it "must not be construed to . . . repeal or modify any other provision of law relating to gambling" or to "allow or permit gambling aboard any vessel, gambling vessel, or passenger cruise liner *within the territorial waters of the State*[.]" *Id.* § 3-11-400(B)(1), (3) (emphasis added).

(5) Current Declaratory Judgment Action Filed in 2012

On January 24, 2012, the Tribe filed the current declaratory judgment action in Richland County against the State seeking a declaration as to its rights under the Settlement Agreement and the State Act based on the enactment of the Gambling Cruise Act. Specifically, the Tribe contended the Gambling Cruise Act constituted an "authorization" of video poker, and if video poker is permitted anywhere in the state, the Tribe should be allowed to exercise the same right upon its Reservation. The State argued this Court's 2007 *Catawba* opinion was dispositive because it determined the Tribe did not have the right to offer video poker on its Reservation as the use or possession of video poker devices was banned statewide. The State contended the Tribe's action was precluded by collateral estoppel and res judicata, and that its assertions regarding the Gambling Cruise Act failed as a matter of law.

The parties filed cross-motions for summary judgment. The circuit court granted summary judgment to the State. The circuit court found the Tribe's action was precluded by the doctrine of collateral estoppel and/or the doctrine of res judicata. In addition, the circuit court found the Gambling Cruise Act was not an authorization of video poker and it did not alter the statewide ban on video poker, which remained in force. Thus, section 16.8 of the Settlement Agreement and the State Act did not require the State to allow the Tribe to offer video poker on its Reservation. The Tribe appealed to the Court of Appeals. This Court certified the case for its review pursuant to Rule 204(b), SCACR.

II. STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure states a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Id.* at 379, 534 S.E.2d at 692.

Each side in this dispute asserts the case involves a legal question, i.e., an analysis of the Gambling Cruise Act and a determination of its impact on the Tribe's Settlement Agreement. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

III. LAW/ANALYSIS

A. Preclusion of Declaratory Judgment Action

The Tribe first contends the circuit court erred in finding its declaratory judgment action is precluded by collateral estoppel and/or res judicata. We agree.

"Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action." *S.C. Prop. & Cas. Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403

S.E.2d 625, 627 (1991). In *Wal-Mart Stores, Inc.*, this Court adopted the general rule set forth in the Restatement (Second) of Judgments § 27 (1982). *Id.* "Section 27 provides that *when an issue of fact or law* is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id.* (emphasis added).

Stated another way, "[t]he party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

The doctrine of collateral estoppel is also known as "issue preclusion." *In re Crews*, 389 S.C. 322, 698 S.E.2d 785 (2010); *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008); *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 481 S.E.2d 706 (1997). Issue preclusion bars the relitigation of only the particular issues that were actually litigated and decided in the prior suit. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997). As a result, the doctrine of collateral estoppel is inapplicable when the argument turns on an assertion that the other party *should* have litigated a particular issue in the prior action. *See id.* at 216, 493 S.E.2d at 835.

The doctrine of res judicata is a distinguishable concept. *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984). Res judicata encompasses both issue preclusion and claim preclusion. *Crestwood Golf Club, Inc.*, 328 S.C. at 216, 493 S.E.2d at 834. However, res judicata is more commonly referred to simply as claim preclusion. *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). Claim preclusion bars plaintiffs from pursuing a later suit where the claim (1) was litigated or (2) could have been litigated. *Crestwood Golf Club, Inc.*, 328 S.C. at 216, 493 S.E.2d at 835.

Our Court has recently reaffirmed the following statement of the doctrine:

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were

> adjudicated in the former suit and any issues which might have been raised in the former suit."

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (alteration in original) (citations omitted), *cited with approval in Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011).

Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). The doctrine of res judicata is not an "ironclad bar," however, to a later lawsuit. *Judy*, 393 S.C. at 167, 712 S.E.2d at 412; *Garris*, 333 S.C. at 449, 511 S.E.2d at 57; *Clark v. Aiken Cnty. Gov't*, 366 S.C. 102, 109, 620 S.E.2d 99, 102 (Ct. App. 2005).

The circuit court noted that the Tribe's first declaratory judgment action was brought on July 28, 2005, almost two months after the Gambling Cruise Act took effect on June 1, 2005. The court found the Tribe relied upon section 27-16-110(G) in that action and had asked for a determination of its rights, under the Settlement Agreement and the State Act, to operate video poker or similar electronic play devices on its Reservation. The court acknowledged that the Tribe "made a somewhat different legal argument in the first action than now, contending that the Settlement Agreement and § 27-16-110(G) could not be 'amended' by the General Assembly based upon any future ban placed upon video poker." However, the circuit court stated that in the first declaratory judgment action in 2005, "the Tribe *also had the opportunity* to make the same legal arguments it is now presenting. In such circumstances, *res judicata* or collateral estoppel bars the second suit."

As an initial matter, we note the circuit court's full ruling discusses the law pertaining to res judicata, but it does not appear to delineate or distinguish the elements of collateral estoppel. Moreover, the doctrine of collateral estoppel is inapplicable when the argument turns on an assertion that the other party *should* have litigated a particular issue in the prior action. *Crestwood Golf Club, Inc.*, 328 S.C. at 216, 493 S.E.2d at 835.

We find collateral estoppel is not applicable because the issue decided in the 2005 declaratory judgment action is not the same as the issue asserted in the

current action. In the prior case, the Tribe sought a declaration that any changes in state law did not affect its vested right to offer video poker on its Reservation based on the terms of the Settlement Agreement (section 16.8) and the State Act (section 27-16-110(G)). In particular, the Tribe maintained the ban on video poker in section 12-21-2710 did not apply to it because the ban was enacted after the Settlement Agreement. In the 2007 *Catawba* opinion, this Court found that the language of the Settlement Agreement and the associated statute that authorized the Tribe to offer video poker "to the same extent" it is allowed by South Carolina law was intended to make the Tribe subject to the same law as all South Carolina citizens, and this necessarily contemplated any changes in the law would apply to the Tribe. Thus, the ban in section 12-21-2710 was equally applicable to the Tribe.

In contrast, in the current action the Tribe does not dispute that changes in state law are applicable to the Tribe's agreement. The Tribe now contends that enactment of the Gambling Cruise Act amounts to an "authorization" of video poker in South Carolina; therefore, under the terms of its Settlement Agreement and the State Act, it should be allowed to offer video poker "to the same extent" on its Reservation. The Tribe is seeking a declaratory judgment as to the interpretation and import specifically of the Gambling Cruise Act on its gaming rights. This is a distinguishable issue. The Gambling Cruise Act was never raised by the parties or addressed by any court in the first action and, contrary to the State's argument in brief, a review of the Act was not necessary to a determination of the question there. Since the current issue was not actually litigated in the prior action, the State has not met its burden of demonstrating that collateral estoppel should be applied.

As to res judicata, we also find it is not preclusive here. Although res judicata normally applies to issues that were previously raised or that could have been raised in the prior action, declaratory judgments are distinguishable. As one legal treatise has observed, res judicata does apply to declaratory judgments, but only as to issues *actually decided* by the court:

> Suits for declaratory judgments do not fall within the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby but, in addition, also of all matters which could have been presented for adjudication. *A declaratory judgment is not res judicata as to matters not at issue and not passed upon. Unlike other judgments, a declaratory judgment determines only what it*

> *actually decides and does not preclude, under res judicata principles, other claims that might have been advanced*.

22A Am. Jur. 2d *Declaratory Judgments* § 244 (2013) (emphasis added) (footnotes omitted); *see also* 50 C.J.S. *Judgments* § 944 (2009) ("[A] declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced."); Restatement (Second) of Judgments § 33 (1982) ("A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them *as to the matters declared*, and, in accordance with the rules of issue preclusion, *as to any issues actually litigated by them and determined in the action*." (emphasis added)).

Citing *Robison v. Asbill*, 328 S.C. 450, 492 S.E.2d 400 (Ct. App. 1997), the circuit court appears to have found this concept applies only when a party is seeking additional, coercive relief following a successful ruling in a declaratory judgment action. However, this reading imposes an additional restriction that is not articulated in the case law or the legal treatises. The success or failure of the Tribe's prior action is not determinative as to whether res judicata is appropriate. The Restatement makes clear that a declaratory judgment decides only what it actually decides, and the fact that the plaintiff lost a prior action does not vitiate this principle. *See* Restatement (Second) of Judgments § 33 cmt. c (1982) ("A plaintiff who has lost a declaratory judgment action may also bring a subsequent action for other relief, subject to the constraint of the determinations made in the declaratory action. The theory is the same: a declaratory [judgment] action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced.").

In this case, the ruling that is entitled to res judicata effect is the determination made in the first action that the Tribe's video poker rights are affected by future changes in state law, including the statewide ban enacted in section 12-21-2710. The question raised in the current declaratory judgment is, accepting that principle, what is the effect of the 2005 Gambling Cruise Act on the Tribe's rights? This issue was not actually decided in the prior action. Consequently, we agree with the Tribe's contention that its current declaratory judgment action is not precluded by the doctrine of res judicata.

B. Effect of Gambling Cruise Act on Tribe's Rights

The Tribe next contends the circuit court erred in granting summary judgment to the State after finding the Gambling Cruise Act did not amount to an "authorization" of video poker and similar electronic play devices in South Carolina. The Tribe asserts "[t]he State's enactment of the Gambling Cruise Act is an authorization that triggers the Catawba Nation's right to offer video poker and similar electronic devices on its Reservation pursuant to § 16.8." We disagree.

The clear terms of the Gambling Cruise Act itself support a finding that it does not alter the statewide ban on video poker, as the General Assembly explicitly provided that the Gambling Cruise Act "must not be construed to . . . repeal or modify any other provision of law relating to gambling" or to "allow or permit gambling aboard any vessel, gambling vessel, or passenger cruise liner within the territorial waters of the State[.]" S.C. Code Ann. § 3-11-400(B)(1), (3) (Supp. 2013). The State correctly asserts, "Video gaming is currently banned in South Carolina and the Tribe's reliance upon legislation regulating 'cruises to nowhere' does not lift, alter, or modify that ban. If it did, [then] everyone in South Carolina could take advantage of the Gambling Cruise Act and could ignore the prohibition upon video gaming in the State."

Section 12-21-2710 is currently the law in South Carolina, and it imposes a statewide ban on such video gambling devices:

> It is unlawful for any person *to keep on his premises or operate* or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps . . . .

S.C. Code Ann. § 21-21-2710 (2014) (emphasis added). In enacting the Gambling Cruise Act, the General Assembly specifically stated that it shall not be construed to repeal or modify existing law. S.C. Code Ann. § 3-11-400(B)(1), (3). This Court has confirmed the continued viability of this statutory scheme in the recent case of *Union County Sheriff's Office v. Henderson*, 395 S.C. 516, 519-20, 719

S.E.2d 665, 666 (2011) ("Section 12-21-2710 makes it unlawful to possess illegal gambling machines, even if they are not fully operational. The mere possession of gambling devices, or even their component parts, is unlawful.").

The Tribe avers that it is allowed to offer gambling "to the same extent" allowed by state law, and "extent" should be given "its literal and ordinary meaning." The Tribe maintains the circuit court improperly added a "geographical restriction to § 16.8 of the [Settlement] Agreement" as "[t]he issue is 'what' activity the State has authorized, not 'where' the authorized activity may take place." The Tribe argues it should not be required "to have an ocean" to be able to exercise the same rights to video poker as found elsewhere in the state, and there is "no geographical component" in the Settlement Agreement.

We find the Tribe's assertion that it "does not need to have an ocean" to exercise the same rights unavailing because its interpretation of the Gambling Cruise Act, the Settlement Agreement, and the State Act contravenes the unambiguous terms of the provisions at play here. Contrary to the Tribe's assertions, the prohibition on video poker is being applied to the Tribe "to the same extent" provided by state law. The ban on video poker devices remains in force throughout the territorial limits of South Carolina, including the State's territorial waters. Nothing has changed in that regard.

Gambling outside the State's territorial waters aboard cruises to nowhere was legal in South Carolina pursuant to federal law in the Johnson Act years before the Gambling Cruise Act was enacted. Thus, the Gambling Cruise Act did not "authorize" video poker. Nor can it be deemed an "authorization" of video poker inside the jurisdictional boundaries of South Carolina. For purposes of analogy only, the State points to an unreported decision from the United States District Court for the Southern District of Florida, *Seminole Tribe of Florida v. Florida*, 1993 WL 475999 (S.D. Fla. 1993). That case involved the Indian Gaming Regulatory Act, or IGRA, which the State acknowledges does not apply to the Tribe since the Tribe opted out of the IGRA in its Settlement Agreement.[5]

[5] Congress passed the IGRA in 1988, and it expressly permits gambling on Indian reservations under certain prescribed circumstances. *Brizill v. Dist. of Columbia Bd. of Elections & Ethics*, 911 A.2d 1212, 1216 n.7 (D.C. 2006). Because of this, gambling casinos are legal on many Indian reservations despite the prohibitions of § 1175 of the Johnson Act. *Id.*; *see also* Deborah F. Buckman, *Interplay Between Indian Gaming Regulatory Act and Johnson Act*, 2 A.L.R. Fed. 2d 241, 241 (2005)

However, the State cites it for the federal court's finding that Florida's authorization of "cruises to nowhere" did not undermine that state's existing prohibition against gaming and it did not serve to authorize casino gambling "within the State."

In our view, the Gambling Cruise Act merely delegates the State's authority to opt out of the federal Johnson Act to political subdivisions, such as cities and counties. Under any interpretation, the Gambling Cruise Act does not authorize the utilization of video poker devices anywhere in the State's territorial limits, be it on land or within the State's territorial waters.

The Tribe states its gaming rights are unique and that it is "*not* 'like everyone else' in South Carolina with regard to gaming rights, and [it] should not be treated 'like everyone else.' " In this regard, the Tribe notes: "For example, members of the Catawba Nation are the beneficiaries of a Tribal Trust Fund, are exempt from certain federal and state income taxes, and are exempt from state and county taxes on personal property, including automobiles. In addition, the Catawba Nation's real property is exempt from county and state property taxes, sales on the Reservation are exempt from sales taxes, and it has the right to operate for-profit high-stakes bingo games."

We agree the Tribe is not treated the same as everyone else in certain respects of the law. However, none of the examples pointed out by the Tribe involve video poker. Moreover, in regards to "video poker or similar electronic play devices," the Tribe has specifically agreed to be treated like everyone else. We hold the circuit court correctly determined the Gambling Cruise Act does not authorize the Tribe to offer video poker on its Reservation.

IV. CONCLUSION

We conclude the Tribe's action is not precluded by collateral estoppel or res judicata and reverse this finding by the circuit court. We affirm, however, the circuit court's determination that the Gambling Cruise Act does not authorize the Tribe to offer video poker on its Reservation in contravention of the existing statewide ban on video gambling devices.

("The [IGRA] . . . was enacted in 1988 in order to provide a statutory basis for the operation of gaming by Indian tribes and to balance tribal interests with those of the states in which they were located.").

AFFIRMED IN PART, REVERSED IN PART.

PLEICONES, Acting Chief Justice, KITTREDGE, HEARN, JJ., and Acting Justice Ralph Keith Kelly, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Alton Wesley Gore, Jr., Appellant.

Appellate Case No. 2012-206368

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5214
Heard December 10, 2013 – Filed April 2, 2014

AFFIRMED

Nicole Nicolette Mace, of the Mace Law Firm, and Amy Kristan Raffaldt, both of Myrtle Beach, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Christina J. Catoe, of Columbia, for Respondent.

WILLIAMS, J.: In this criminal appeal, Alton Gore appeals his conviction for trafficking cocaine, arguing the circuit court erred when it (1) denied Gore's motion to challenge the veracity of the search warrant affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); (2) improperly admitted certain photographs into evidence; and (3) failed to charge the jury on the lesser-included offense of simple possession. We affirm.

FACTS/PROCEDURAL HISTORY

On February 28, 2010, Detective Jesse Ard of the Horry County Police Department drafted a search warrant affidavit based on suspected criminal activity at 309 Junco Circle in Longs, South Carolina. Detective Ard supported the affidavit with the following probable cause allegations:

> A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area. Also within the last seventy-two hours agents followed [Gore] from the residence to another location and were able to monitor and record another buy for a quantity of cocaine.

The magistrate issued a search warrant, and evidence suggesting drug activity was retrieved from the residence at Junco Circle. Gore was subsequently indicted for trafficking cocaine in an amount between two hundred and four hundred grams.[1]

Prior to trial, Gore moved for an evidentiary hearing pursuant to *Franks v. Delaware*,[2] arguing the probable cause allegations used to support the search warrant were deliberately false or misleading. As a result, Gore contended the search warrant affidavit was insufficient to support probable cause. Gore claimed law enforcement improperly drafted the affidavit. He argued the affidavit suggested a controlled drug purchase had been executed at Gore's residence within seventy-two hours of seeking a search warrant when the purchase occurred seven months prior to the execution of the search warrant. He also contended the omission of the date and time of the alleged criminal activity was in violation of *State v. Winborne*.[3]

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[1] S.C. Code Ann. § 44-53-370(e)(2)(d) (2002) (outlining the offense of trafficking in cocaine in an amount between two hundred and four hundred grams).

[2] 438 U.S. 154 (1978).

[3] In *State v. Winborne*, the supreme court held that for a search warrant affidavit to show probable cause, it must state facts so closely related to the time of the issuance of the warrant that a probable cause finding can be justified. 273 S.C. 62,

In response, the State claimed the officers told the magistrate the dates and times of the alleged drug transactions. The State also argued because it was a lengthy investigation, the second drug transaction was a "refresher buy" that would allow the officers to meet the close time and proximity requirements for the search warrant. Detective Ard testified at the hearing and corroborated the State's argument. In response to being asked about the omission of the date and time, Detective Ard stated it was common to omit this information to protect informants' identities and testified repeatedly that the magistrate was informed of all the facts, circumstances, and dates surrounding the procurement of the search warrant.

The circuit court denied Gore's motion for an evidentiary hearing pursuant to *Franks*, finding the affidavit was not false or misleading and was supported by probable cause. Based on the information in the affidavit and the officer's testimony, the circuit court held there was "a fair probability that evidence of a crime would be found on the particular place to be searched." Because Gore failed to make the requisite preliminary showing, the court determined the first prong of the *Franks* test was not met and there was no need to evaluate the sufficiency of the remaining portions of the affidavit.

A jury trial was held on January 5, 2012. At trial, the State sought to introduce two photographs of Gore found in the master bedroom. One of the investigating officers, Detective Mark Cooper, identified the photos and stated, "There was [sic] two photos of the defendant, I believe he had some money in his hand or something like that, he squatted down or something." Defense counsel immediately objected.

Outside the jury's presence, Gore argued the photos were irrelevant and highly prejudicial. In response, the State contended the photographs were relevant to prove Gore was a resident of the house. The circuit court agreed with the State and instructed the jury that the pictures were introduced "only for the purposes of the testimony alleging that they were found on the premises and for no other purposes." The pictures were introduced into evidence. Detective Cooper testified the pictures were found on the dresser in the master bedroom and the male in the photographs was Gore.

64, 254 S.E.2d 297, 298 (1979). The supreme court concluded an affidavit that fails to state when the alleged facts transpired is insufficient. *Id.*

Detective Ard also testified at trial. On the day of Gore's arrest, Detective Ard observed Gore and his girlfriend leave in two separate vehicles from 309 Junco Circle. Detective Ard stated Gore and his girlfriend were unaccompanied when they left the residence and Gore was alone when he was subsequently arrested for an unrelated traffic incident. He stated they maintained visual contact with Gore from the time he departed the residence until he was stopped by police. Detective Ard confirmed that two handguns and a large quantity of cocaine were seized from the residence later that day.

After hearing from other witnesses for the State and Gore, the circuit court charged the jury on trafficking in cocaine in the amount of two hundred to four hundred grams. The jury found Gore guilty as charged. The circuit court sentenced Gore to twenty-five years imprisonment and fined him $100,000. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in denying Gore's motion to challenge the veracity of the search warrant affidavit pursuant to *Franks v. Delaware*?

2. Did the circuit court err in admitting two photographs of Gore holding large sums of United States currency?

3. Did the circuit court err in failing to charge the jury on the lesser-included offense of simple possession?

LAW/ANALYSIS

1. Search Warrant Affidavit

Gore first contends the circuit court erred in denying his motion to challenge the veracity of the search warrant pursuant to *Franks v. Delaware*. Alternatively, even if the circuit court properly denied his motion, Gore contends the search warrant was insufficient to establish probable cause. We disagree.

In *Franks v. Delaware*, the United States Supreme Court held that the Fourth and Fourteenth Amendments give an accused the right in certain circumstances to challenge the veracity of a search warrant affidavit after the warrant has been issued and executed. *State v. Missouri*, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). This challenge may be based on false information being included in the

search warrant affidavit or exculpatory material being omitted from the affidavit. *Id.* at 554, 524 S.E.2d at 397.

Franks outlined a two-prong test for challenging the veracity of a search warrant affidavit. *Franks*, 438 U.S. at 155-56. First, to mandate an evidentiary hearing, there must be "allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof." *Id.* at 171. At the hearing, the accused has the burden of proving the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. *Id.* at 156; *see State v. Jones*, 342 S.C. 121, 127, 536 S.E.2d 675, 678 (2000) (holding a defendant is entitled to challenge misstatements in a warrant affidavit if the following criteria are met: "(1) the defendant's attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement").

Second, if a deliberate falsehood or a reckless disregard for the truth has been established, the court must exclude the false material and consider the remainder of the affidavit to determine if it is sufficient to establish probable cause. *State v. Davis*, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003). If the court determines no probable cause exists after the false material is omitted from the analysis, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* (citing *Franks*, 438 U.S. at 155-56); *see Missouri*, 337 S.C. at 553-54, 524 S.E.2d at 396-97 (adopting the two-prong Franks test).

In the instant case, Gore challenges the sufficiency of the search warrant affidavit based on: (1) Detective Ard's failure to include a date and time for the first purchase of cocaine at the residence; and (2) Detective Ard's misrepresentation that the first purchase of cocaine occurred within seventy-two hours of the date of the search warrant affidavit.

We agree with Gore's argument that the first allegation in the affidavit improperly omitted the date and time of the drug transaction. The statement reads: "A confidential and reliable informant made a buy for cocaine out of the residence while being recorded and monitored by agents in the area." This phrase indicates only that a controlled buy was made at the residence on at least one occasion in the past. It gives no indication of how long ago the transaction occurred, which the

supreme court in *Winborne* held is necessary to establish probable cause for a search warrant. *See Winborne*, 273 S.C. at 64, 254 S.E.2d at 298 ("An affidavit which fails altogether to state the time of the occurrence of the facts alleged is insufficient.").

This omission, however, does not *per se* invalidate the search warrant. Rather, Gore must make a preliminary showing that Detective Ard included a deliberate falsehood or recklessly disregarded the truth in an effort to make the affidavit misleading to the magistrate. *See Missouri*, 337 S.C. at 554, 524 S.E.2d at 398 ("To be entitled to a *Franks* hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge."). Although Gore claims this omission is evidence of a reckless disregard for the truth, we find Detective Ard's sworn testimony is evidence to the contrary. *See Jones*, 342 S.C. at 129, 536 S.E.2d at 679 (holding oral information may be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant).

Detective Ard testified under oath that he supplemented the affidavit with oral testimony and specifically stated the dates of the controlled buys when seeking the search warrant. *See id.* at 128, 536 S.E.2d at 678-79 ("Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause."). When asked why he omitted this information, Detective Ard stated it was "common practice" to omit the specific date, time of the buy, or the amount of the drugs in the written affidavit portion of the warrant to protect the confidential informant's identity. Because of this omission, Detective Ard testified, "We made [the magistrate] painfully aware of the fact that there was a length of time from one buy from the house to our most recent buy . . . that we were unable to get inside the house, actually make a buy from inside the house, but we were able to observe [Gore] leave his residence, kept him under constant surveillance the entire trip to the empty . . . lot where the buy was made . . . ." We find Detective Ard's statements to the magistrate properly supplemented this portion of the affidavit.

We also address Gore's claim that the second probable cause allegation was intentionally misleading because the use of "also" indicated the first buy occurred within seventy-two hours of the affidavit's execution. This allegation states, "Also within the last seventy-two hours agents followed [Gore] from the residence to

another location and were able to monitor and record another buy for a quantity of cocaine." While we agree that this sentence could have been more artfully drafted, we disagree with Gore's argument that it was deliberately misleading. It is uncontested that officers followed and observed Gore selling drugs within seventy-two hours of the affidavit's execution. Further, any confusion over the timing of these drug transactions was clarified by Detective Ard when he sought the search warrant. Because neither of these probable cause allegations were false, we find Gore failed to satisfy the first prong of the *Franks* test. As such, we affirm the circuit court's decision to deny Gore's motion pursuant to *Franks v. Delaware.*

Next, Gore contends that even if the allegations in the search warrant were credible, the magistrate did not have a substantial basis to conclude probable cause existed. We disagree.

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. *State v. King*, 349 S.C. 142, 149, 561 S.E.2d 640, 643 (Ct. App. 2002). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. *Jones*, 342 S.C. at 126, 536 S.E.2d at 678. The appellate court should give great deference to a magistrate's determination of probable cause. *Id.*

We are mindful on review that affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in "'a common sense and realistic fashion.'" *State v. Sullivan*, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). Our task is to decide whether the magistrate had a substantial basis for concluding probable cause existed. *State v. Adolphe*, 314 S.C. 89, 92, 441 S.E.2d 832, 833 (Ct. App. 1994).

"The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." *State v. Philpot*, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). The magistrate should make a probable cause determination based on all of the information available to the magistrate when the warrant was issued. *State v. Driggers*, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996). In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. *State v. Gentile*, 373 S.C. 506, 513-14, 646 S.E.2d 171, 174 (Ct. App. 2007).

We find the search warrant affidavit contains sufficient facts to support the magistrate's probable cause determination. We acknowledge the second drug transaction did not occur inside the residence. However, we believe the circumstances surrounding the second drug transaction provided a sufficient nexus to the residence to justify a search warrant. Specifically, Detective Ard testified the officers observed only Gore and his girlfriend at the residence the morning of Gore's arrest. Further, he stated that Gore drove alone from the residence and went directly to the location where the drug transaction occurred. *See State v. Scott*, 303 S.C. 360, 362-63, 400 S.E.2d 784, 785-86 (Ct. App. 1991) (upholding subsequent search warrant of defendant's home when affidavit stated officers had visual contact with defendant from time he left his residence until the time of the traffic stop and drugs were uncovered on defendant at stop). In addition, the magistrate was aware Gore had participated in a drug transaction inside the residence within the last seven months. *See id.* at 363, 400 S.E.2d 786 ("In the case of drug dealers, evidence is likely to be found where the dealers live." (citing *U.S. v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986))). We find the earlier drug transaction at the residence coupled with this drug transaction demonstrate a pattern of ongoing illegal activity. *See King*, 349 S.C. at 151, 561 S.E.2d at 644 (finding confidential informant's previous reliability with law enforcement and first-hand knowledge of prior drug transactions at residence were sufficient to establish probable cause for search warrant). Accordingly, we hold the totality of circumstances provided a sufficient nexus to the residence to establish probable cause for the search warrant. *See State v. Dupree*, 354 S.C. 676, 685, 583 S.E.2d 437, 442 (Ct. App. 2003) ("The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched." (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983))). Given the affidavit and the supporting oral testimony, we conclude there was a substantial basis for concluding probable cause existed to issue a search warrant.

2. Admission of Photographs

Next, Gore contends the circuit court erred in admitting two photographs, which depicted him holding large sums of United States currency. We agree with Gore but find this error to be harmless.

"The relevance, materiality and admissibility of photographs are matters within the sound discretion of the [circuit] court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Rosemond*, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). Even if evidence is improperly admitted, the admission must be prejudicial to warrant reversal. *See State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding the improper admission of evidence is reversible error only when the admission causes prejudice).

At trial, the State sought to introduce two photographs of Gore, which were found in the master bedroom when the officers searched the residence. In the photographs, Gore was squatting down and displaying large sums of United States currency in his hands and on the ground in front of him. Gore objected at trial and argued these photographs were irrelevant and unduly prejudicial.[4] In support of that argument, Gore claims these photographs were not taken inside the residence, there were other seized photographs of Gore in the residence that were not prejudicial, and the photographs invited the jury to infer criminal disposition. We agree and find these photos were unnecessary to link Gore to the residence, particularly when other photographs in evidence accomplished this purpose and several other witnesses testified Gore lived at the residence. *See State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) ("Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.").

However, we find the admission of these photographs to be harmless error in light of the overwhelming evidence of Gore's guilt. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding an insubstantial error not affecting the result of the trial is harmless when "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached"). Several police officers testified that based on their observations during the investigation, Gore lived at 309 Junco Circle. His former girlfriend testified he lived at 309 Junco Circle and only Gore possessed a key to the residence. An employee from the Horry County Clerk of Court's office stated Gore's address on his bond documents was listed as 309 Junco Circle. Further, the State established that the white-powder substance seized from 309 Junco Circle was cocaine. We find this evidence overwhelmingly established Gore's guilt. As a result, Gore's conviction

[4] The State argues Gore failed to object when Detective Cooper described the two photographs. We disagree and find defense counsel timely objected.

should not be set aside based on the admission of these photographs. *See State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (stating that appellate courts will not generally set aside convictions due to insubstantial errors not affecting the result).

3. Jury Charge on Simple Possession

Last, Gore claims the circuit court erred in denying his request to charge the jury on the lesser-included offense of simple possession. We disagree.

The circuit court must charge a jury on a lesser-included offense if evidence exists from which it could be inferred that a defendant committed the lesser offense rather than the greater offense. *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Nevertheless, due process requires that a lesser-included offense instruction be given only when the evidence warrants the instruction. *Hopper v. Evans*, 456 U.S. 605, 611 (1982). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense." *State v. Geiger*, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

Gore argues the circuit court erred in denying his request to charge the jury on simple possession because cocaine residue was found underneath a mattress in the guest bedroom of the residence. Because the larger amount of cocaine was discovered in the master bedroom, and Gore contended the residence belonged to his girlfriend, a jury could have determined Gore only had constructive possession over the items, including the cocaine residue, in the guest bedroom. As a result, Gore claims the jury could have concluded he did not possess the requisite amount of cocaine required for the trafficking charge.

We find the circuit court properly charged the jury. Although Gore claims the jury could have concluded he was not a resident of the house and only slept in the guest bedroom as a visitor, the overwhelming and undisputed evidence indicates otherwise. As noted above, several witnesses testified Gore lived at the residence. Although Gore argued his girlfriend lived there, evidence was submitted that she maintained her own residence in North Carolina at all pertinent times. Furthermore, no evidence placed Gore in the guest bedroom of the residence. Gore's girlfriend testified the guest bedroom was actually his daughter's bedroom, and one of the officers stated it appeared to be a "child's bedroom or a spare

bedroom of some kind." Significantly, the master bedroom, where the larger amount of cocaine was hidden, contained all men's clothing as well as several framed pictures of Gore. Therefore, we find the evidence did not support a charge of simple possession and affirm the circuit court on this issue. *See State v. Grandy*, 306 S.C. 224, 226, 411 S.E.2d 207, 208 (1991) (finding the circuit court properly denied defendant's request to charge the lesser-included offense of possession with intent to distribute when the undisputed evidence showed the amount of cocaine in defendant's possession exceeded the quantity required to invoke the trafficking statute).

CONCLUSION

Based on the foregoing, Gore's conviction is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sherri Simcox-Adams, Appellant,

v.

Michael E. Adams, Respondent,

and

Jimmy Simcox and Barbara Simcox, Third-Party Defendants.

Appellate Case No. 2011-196406

Appeal From Lancaster County
W. Thomas Sprott, Jr., Family Court Judge

Opinion No. 5215
Heard November 12, 2013 – Filed April 2, 2014

AFFIRMED

Stephen D. Schusterman, of Schusterman Law Firm, of Rock Hill, for Appellant.

George W. Speedy, of Speedy, Tanner, Atkinson & Cook, LLC, of Camden, for Respondent.

WILLIAMS, J.: Sherri Simcox-Adams (Wife) claims the family court erred in granting primary custody of the parties' daughter (Child) to Michael Adams

(Husband) because it improperly relied on the investigation and report of the guardian ad litem (GAL). Wife also argues her due process rights were violated by the GAL's failure to comply with the requirements of section 63-3-830(A)(6) of the South Carolina Code (2010). Additionally, Wife contends the family court erred when it found Wife's inheritance was transmuted into marital property. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in 1994 and have one daughter (Child). On October 2, 2008, Wife filed for divorce on the grounds of adultery and sought child custody, child support, alimony, equitable distribution, and attorney's fees. Husband timely answered and counterclaimed. After a temporary hearing in August 2009, the family court ordered joint custody of Child to Husband and Wife, with Wife as Child's primary custodian. The family court appointed Leland Summers to serve as the GAL and to assist the court on the issue of child custody.

The family court held a final hearing on May 2 and 3, 2011. At the commencement of the hearing, the parties agreed to waive alimony and any interest in the other party's retirement or 401(k) accounts. The GAL also submitted his report to the family court. Wife, however, did not object to the timeliness of its submission. Wife, Husband, the parties' treating psychologist, Dr. J. Patrick Goldsmith, and the GAL all testified at the final hearing.

Wife first testified in support of her claim that she should be Child's primary caretaker. She highlighted several incidents she believed Husband put Child in danger. She testified Husband did not tell her when he accidentally squirted sunscreen in Child's eye, which eventually resulted in an eye infection. She also claimed Husband drove his jet ski recklessly while Child was riding with him. According to Wife, the jet ski flipped over and Child was thrown into the water. Wife stated Husband permitted Child to drive a golf cart without supervision and Child almost ran the golf cart off the road.

During her testimony, Wife was questioned about her mental state and a prior "episode" of catatonic symptoms she experienced in August 2008. In response, Wife stated it was brought on by a urinary tract infection, and contrary to Husband's claims, she was never instructed to undergo a psychological evaluation. She stated there were no other episodes and it did not affect her ability to parent Child. Wife claimed Husband had concocted that story in an attempt to get

custody of Child. In regards to her contact with the GAL, she stated she only met with the GAL one time, and he had never contacted her outside that meeting.

Next, Dr. Goldsmith testified regarding his evaluation of Wife, Husband, and Child. Dr. Goldsmith diagnosed Child with an adjustment disorder and depressed moods; Husband with an adjustment disorder and anxiety; and Wife with an adjustment disorder "with mixed disturbance of emotions and conduct, to include paranoid traits." According to Dr. Goldsmith, Child said Wife would make untruthful statements about Husband. Child also told Dr. Goldsmith that Wife instructed Child to say she wanted to live with Wife, whereas Father instructed Child to simply tell the truth. Dr. Goldsmith also recalled Wife's statement during their interview that she would not be opposed to having Husband's parental rights terminated because of their disagreements and Husband's anger issues. Dr. Goldsmith testified Wife had been extremely difficult to communicate with in the past, but she was cooperative throughout her interview for this evaluation.

The GAL also presented his observations and concerns at the final hearing. He testified he had two major concerns: (1) the differences in the parents' discipline styles; and (2) Wife's prior mental "episode" and its potential effect on Child's wellbeing if Wife relapsed. When questioned, the GAL acknowledged he was unaware of any other mental incidents in the three years since that single episode. The GAL specifically expressed concern over Wife's behavioral issues and her lack of willingness to cooperate with Husband when conflicts arose. The GAL also stated Child expressed a preference to live with Husband.

On cross-examination, Wife's counsel asked the GAL about his investigation into Wife's concerns over Child's safety while in Husband's care. In response, the GAL stated Child denied being thrown off a jet ski into the water. The GAL admitted he never discussed with Child whether Husband permitted her to drive a golf cart by herself. Wife's counsel also questioned the GAL as to why he failed to interview Wife prior to the final hearing. The GAL stated he attempted to contact Wife "several times" at the phone number she provided to him, but she never answered, and he was unable to leave a message because her voicemail was always full. As a result, he met with her when trial started. The GAL explained that in contested cases, he prefers to do his final interviews close to the final hearing because his observations would be more accurate and it would be less costly to not have to reinterview the parties if there was a continuance.

The GAL also submitted his report to the family court, in which he found the following: (1) Child had a close relationship with both her parents; (2) both parents demonstrated appropriate child-rearing skills and a genuine concern for Child's best interests; (3) Child indicated Wife spoke negatively about Husband in the presence of Wife's family, whereas Husband did not; and (4) Wife and her parents followed Husband "almost to the point of stalking." As required by statute, the GAL made no recommendation in his report or at the final hearing as to custody.

In addition to the issue of custody, the parties contested the marital nature of the parties' inheritance. Husband and Wife testified they each received an inheritance worth approximately $70,000 to $80,000. Husband's inheritance was invested into the parties' home, which was titled in both parties' names. Wife's inheritance was placed into a joint account, which was titled in both of their names. Wife, however, withdrew these funds from the joint account and created a new account in her and her parents' names after the parties filed for divorce.

Wife stated Husband never contributed any funds to the joint account. Wife admitted that Husband's name was on the account, but she claimed it was only on the account "in case of emergency" and it was more of "an attachment for convenience." Husband testified the account was used as a "nest egg" and the parties only used the account when Wife was out of work and they needed the additional money to pay bills. Husband stated,

> My [inheritance] money was for the house. When she inherited her money, we just used her account like our nest egg kind of account. If something comes (sic) up like when she went out of work, we would have that to help pay for bills, things like that. We never tried to touch the money because that was our nest egg and we used my accounts to pay all the household bills . . . . I would sometime[s] move [money] around . . . whenever I'd pay bills with my account on the internet, I would go to [the joint] account sometimes if we needed to move money to certain accounts.

After considering the testimony and evidence presented at the hearing, the family court granted the parties a divorce based on one year's continuous separation. In its final order, the family court awarded joint custody of Child to Husband and Wife, with Husband as Child's primary custodian. In changing the custodial

arrangement, the court noted several incidents when Wife improperly interfered with Husband's visitation with Child. Specifically, the court found there were instances when Wife's parents and Husband would both arrive to pick up Child from school. Husband would acquiesce and allow Wife's parents to take Child from school to avoid conflict. The family court found Wife exhibited poor judgment in dealing with the needs of Child as they related to Husband. In addition, the family court was concerned that Wife created a stressful atmosphere for Child and would be less likely to foster a positive relationship with Husband than if Husband was Child's primary caretaker.

The family court also ruled on whether each party's inheritance was marital property. Despite Wife's claim that her inheritance was her separate property, the family court found additional marital funds were deposited into the joint account. The family court found Wife's testimony that Husband's name was only on the account for convenience was not credible and concluded these funds were intended to be a "rainy day" fund for the parties. As a result, the family court found both Husband's and Wife's inheritances were transmuted into marital property.

Wife appeals.

ISSUES ON APPEAL

1. Did the family court err in relying on the GAL's investigation and report in making its custody determination?

2. Did the family court deprive Wife of her due process rights by considering the GAL's report when the GAL failed to timely submit his report as required by section 63-3-830(A)(6)?

3. Did the family court err in finding Wife's inheritance was transmuted into marital property?

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011)

(footnote omitted). The burden is upon the appellant to convince the appellate court that the preponderance of the evidence is against the family court's findings. *Id.* "Stated differently, de novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." *Id.* at 388-89, 709 S.E.2d at 654 (italics omitted).

APPLICABLE LAW

1. Custody Determination

Wife raises several grounds as to how the family court erred when it made its custody decision. We address each argument in turn.

In determining a child's best interest in a custody dispute, the family court should consider several factors, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties, including the guardian ad litem, expert witnesses, and the children; and the age, health, and gender of the children. *Patel v. Patel*, 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001). A guardian ad litem must

> conduct an *independent, balanced, and impartial* investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case[.]

Id. at 288, 555 S.E.2d at 390 (emphasis in original); *see also* S.C. Code Ann. § 63-3-830 (A) (2010). "Rather than merely adopting the recommendation of the guardian, the court, by its own review of all the evidence, should consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child as well as all psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life." *Pirayesh v. Pirayesh*, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004). When determining custody, the family court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration. *Id.*

Wife first takes issue with the GAL's concern about the parties' differing discipline styles and the potential for Wife to experience another "episode," which the GAL improperly concluded could place Child in danger.

Regarding the discipline issue, we find no improper recommendation by the GAL or ensuing improper reliance by the family court. The GAL couched his concern over how Child was disciplined as it related to both parents' discipline styles. Specifically, the GAL testified one of his main concerns when parents divorced was

> the rules that the child is required to follow be the same in both homes in that the discipline administered for not following the rules or improper behavior be the same in both homes. And the only way that happens is that both parents have to agree to communicate with each other and set those boundaries . . . .

We find the GAL properly expressed his concerns to the family court based on his observations. Further, Wife fails to highlight—and we fail to find—any reference to or criticism of either party's discipline style in the family court's final order. As a result, we find this argument without merit.

Regarding the GAL's concern over Wife's prior mental "episode" in 2008, we find the GAL did not overly emphasize this incident to the family court. We believe it was incumbent upon the GAL to bring this situation to the family court's attention as any relapse could affect Child's wellbeing. Further, the GAL did not testify that Wife was *likely* to experience another episode or that Wife *was* a threat to Child. Rather, the GAL stated his only concern was *if* another episode happened, it could *possibly* put Child in danger. Moreover, the GAL accurately stated in the report that it was only a "single episode" and included Wife's statement that there were no other episodes and it did not affect her ability to parent Child. As such, we find no basis for Wife's allegation that the GAL was biased or attempted to improperly influence the family court in his report.

Additionally, Wife claims the GAL failed to properly investigate certain incidents that occurred while Child was in Husband's care.

The GAL specifically testified at the final hearing that he was aware of certain concerns raised by Wife, including a report that Child was thrown off the back of a

jet ski while with Husband. The GAL questioned Child in response to Wife's concern and stated Child told him that she never fell off a jet ski when she was with Husband. The GAL admitted he did not inquire into whether Husband permitted Child to drive a golf cart. However, Wife never introduced any witnesses at the final hearing to substantiate her claim that Husband permitted Child to drive a golf cart or that Husband put Child in danger. As such, we are not persuaded that this alleged occurrence would have affected the GAL's report.

Last, Wife claims the GAL did not conduct a balanced investigation because he only met with Wife one time, the evening after the trial started.

The GAL's report, which was submitted to the family court, reflected that the GAL only conducted telephone interviews with Husband. When asked why the GAL did not speak to Wife prior to the final hearing, the GAL stated that he called the number Wife provided to him several times, but she never answered, and he was unable to leave a message because her voicemail was always full. In addition to the telephone interviews, the GAL conducted a home visit and had private conversations with Husband and Child in Husband's home prior to the final hearing. *See Patel*, 347 S.C. at 288, 555 S.E.2d at 390 (finding GAL should meet with and observe child in the home setting, consider the child's wishes, if appropriate, and interview the parents and others with relevant knowledge of the case). The GAL also met with Wife and Child in Wife's home, but he did not conduct this interview until the evening after the first day of trial. When questioned as to why the GAL did not meet with Wife until the first day of trial, the GAL testified that aside from Wife's failure to return his phone calls, he believed his observations would be more accurate closer to the final hearing. Further, the GAL believed it would be less costly for the parties if he did not have to reinterview them should the family court grant a continuance. We find that despite the GAL's well-intended approach, his investigation with Wife causes concern.

Regardless of these concerns, we find the family court made an independent and well-informed decision, giving appropriate and fair weight to all relevant custody considerations. We first note Wife never objected to the sufficiency of the GAL's investigation at the final hearing. She never attempted to request a continuance or sought to remove the GAL, despite knowing the GAL had not contacted her until the eve of the final hearing. *See Spreeuw v. Barker*, 385 S.C. 45, 70-71, 682 S.E.2d 843, 856 (Ct. App. 2009) (finding the father's argument regarding guardian ad litem's bias was not preserved for appeal when the father never made a motion

to relieve the guardian based on her bias or otherwise objected to her report at the final hearing); *Payne v. Payne*, 382 S.C. 62, 70, 674 S.E.2d 515, 519 (Ct. App. 2009) (finding the mother failed to preserve issue relating to the guardian ad litem's custody recommendation by not objecting when the guardian gave her recommendation to the family court). Other than failing to inquire about the golf cart incident, Wife failed to raise any other specific matters or issues that the GAL failed to investigate. In addition, it appears that the Wife's failure to cooperate with the GAL by not returning phone calls and failing to communicate with the GAL contributed to the tardiness of the GAL's interview as well as his observations of Wife and Child.

Further, the family court was presented with other credible evidence and testimony to support its custody decision, specifically testimony from Dr. Goldsmith, who interviewed both parties and Child, and from other witnesses, who gave Husband "high marks." The family court's final order also lends support for our conclusion. The final order neither referenced the GAL's findings nor stated the family court placed any reliance on the GAL's report or investigation. *Cf. Patel*, 347 S.C. at 286, 555 S.E.2d at 389 (finding family court improperly relied on GAL's biased investigation when the family court explicitly held in its order that "it placed 'a great deal of reliance' on the GAL's report when deciding the custody issue"). Last, although Wife argues otherwise, we cannot conclude the GAL's observations were biased or reflected overwhelmingly favorable treatment towards Husband as the GAL specifically found in his report that both Wife and Husband had close relationships with Child, demonstrated appropriate child rearing skills in their respective homes, and expressed a genuine concern for Child's best interests. *Cf. id.*, 347 S.C. at 286, 555 S.E.2d at 388-89 (finding GAL did not conduct an objective, balanced investigation when GAL's method of evaluating mother created a high likelihood of bias in father's favor). Based on the foregoing, the family court properly considered all the relevant factors and circumstances of this case when it awarded custody of Child to Husband.

2. Due Process

Next, Wife contends her due process rights were violated because the GAL's report did not comply with the notice requirements of section 63-3-830(A)(6). In response, Husband states Wife never raised the timeliness issue to the family court when the GAL submitted his report. We agree with Husband and find this issue unpreserved.

To be preserved, an issue must have been raised to and ruled upon by the family court. *Payne*, 382 S.C. at 70, 674 S.E.2d at 519. "Issues not raised and ruled upon in the [family] court will not be considered on appeal." *Id.* Furthermore, a due process claim cannot be raised for the first time on appeal. *See Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003).

Because Wife did not object when the GAL submitted his report and testified before the family court, we find this issue is unpreserved for our review. *See Payne*, 382 S.C. at 70, 674 S.E.2d at 519 (finding mother failed to preserve issue relating to guardian ad litem's custody recommendation by not objecting when the guardian gave her recommendation to the family court).

3. Transmutation of Wife's Inheritance

Next, Wife claims the family court erred when it found her inheritance was transmuted into marital property. We disagree.

"Identification of marital property is controlled by the provisions of the Equitable Apportionment of Marital Property Act" (the Act). *Johnson v. Johnson*, 296 S.C. 289, 294, 372 S.E.2d 107, 110 (Ct. App. 1988). The Act defines marital property as all real and personal property acquired by the parties during the marriage that is owned as of the date of filing or commencement of marital litigation, regardless of how legal title is held. S.C. Code Ann. § 20-3-630(A) (2014). Under the Act, "property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse" is nonmarital property. § 20-3-630(A)(1).

"The spouse claiming an equitable interest in property upon dissolution of the marriage has the burden of proving the property is part of the marital estate." *Johnson*, 296 S.C. at 294, 372 S.E.2d at 110. If a spouse carries this burden, a prima facie case is established that the property is marital property. *Id.* If the opposing spouse then wishes to claim that the property is not part of the marital estate, that spouse has the burden of presenting evidence to establish its nonmarital character. *Id.* (citing *Miller v. Miller*, 293 S.C. 69, 71 n.2, 358 S.E.2d 710, 711 n.2 (1987)). If the opposing spouse can show that the property was acquired before the marriage or falls within a statutory exception, this rebuts the prima facie case for its inclusion in the marital estate. *Johnson*, 296 S.C. at 295, 372 S.E.2d at 110.

"Property that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer

traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property." *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013). "Transmutation is a matter of intent to be gleaned from the facts of each case." *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2011). Evidence of intent to transmute nonmarital property may include using the property exclusively for marital purposes or using marital funds to build equity in the property. *Johnson*, 296 S.C. at 295, 372 S.E.2d at 111. However, "[t]he mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id.* at 295-96, 372 S.E.2d at 111.

We agree with the family court's conclusion that Wife's inheritance was marital property. Wife testified the inheritance was deposited into her "separate account" and it was titled jointly only for "emergency" purposes. Husband, on the other hand, testified the parties deposited Wife's inheritance into a joint account with the intention that the money would be the parties' nest egg. Because it was their nest egg, Husband stated the parties agreed to only use that account when they needed additional money to pay household bills. Having heard both parties' testimony about the nature of their inheritance, the family court found Wife's testimony was not credible. Aware of our broad scope of review, we find the family court was in the best position to weigh each party's testimony on this issue. *See Lewis*, 392 S.C. at 386, 709 S.E.2d at 652 (acknowledging this court's broad scope of review does not alter the fact that a family court is better able to make credibility determinations because it has the opportunity to observe the witnesses); *see also Kennedy v. Kennedy*, 389 S.C. 494, 503, 699 S.E.2d 184, 188 (Ct. App. 2010) (finding dispute between parties over whether certain debt was marital or nonmarital was best resolved by family court because it was in a better position to observe the witnesses and assess their credibility).

In addition to the family court's credibility determination, we conclude the parties' actions during their marriage demonstrate they intended the inheritance to be marital property. First, the account was titled in both parties' names. *See Myers v. Myers*, 391 S.C. 308, 319, 705 S.E.2d 86, 92 (Ct. App. 2011) ("The nonmarital character of inherited property may be lost if the property . . . is utilized by the parties in support of the marriage[] or is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property.") (internal quotation marks omitted). Second, despite the parties' agreement to only

use the account for "emergencies," Husband testified they would occasionally use the account to pay household bills or to cover family expenses if they did not have sufficient funds in their other bank account. In our opinion, the parties' use of Wife's inheritance to pay household bills and family expenses demonstrates these funds were used in support of the marriage. *See Peterkin v. Peterkin*, 293 S.C. 311, 312-13, 360 S.E.2d 311, 312-13 (1987) (finding husband's life estate in family farm was transmuted into marital property because income generated by property was used to pay family expenses); *Sanders v. Sanders*, 396 S.C. 410, 416, 722 S.E.2d 15, 18 (Ct. App. 2011) (finding inherited funds used for household expenses and other purposes "in support of the marriage" to be transmuted into marital property). Further, it is reasonable to conclude Wife's testimony that these funds would be used for emergency purposes implies these funds would be for the benefit of both parties. Third, despite Wife's contention that it was her separate account, she transferred all of the disputed funds into a new account titled in her and her parents' names after the parties filed for divorce. If Wife already considered the funds in this account to be her separate property, we fail to understand the necessity of transferring these funds to a new account. *See Crossland v. Crossland*, 397 S.C. 406, 415, 725 S.E.2d 509, 514 (Ct. App. 2012) (finding the husband's premarital savings were transmuted into marital property when the husband added the wife's name to the account shortly after marriage and then transferred the funds into an account solely titled in his name after they separated).

Finally, we believe equity dictates this result. *See Simpson v. Simpson*, 404 S.C. 563, 579, 746 S.E.2d 54, 63 (Ct. App. 2013) (citing *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983)) (stating the time honored equitable maxim that all courts have the inherent power to all things reasonably necessary to ensure that just results are reached to the fullest extent possible). Both parties testified they received a similarly-valued inheritance. The parties used the entirety of Husband's inheritance to build their marital home. Wife's inheritance, however, was set aside and used only for emergencies, such as when Wife was unemployed, with the mutual intent that it would be their "nest egg." To deprive Husband of his share in this asset when Wife has benefitted from the use of Husband's inheritance is unjust. Therefore, for all the foregoing reasons, we affirm the family court's finding on this issue.

CONCLUSION

Based on the foregoing, the family court's decision is

AFFIRMED.

FEW, CJ., and THOMAS, J., concur.