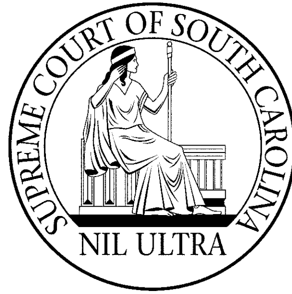

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
April 21, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jennings B. Anderson, Respondent.

Appellate Case No. 2021-000019

Opinion No. 28020
Submitted March 19, 2021 – Filed April 21, 2021

PUBLIC REPRIMAND

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Julie K. Martino, both of Columbia, for the Office of Disciplinary Counsel.

Harvey M. Watson, III, Esquire, of Ballard & Watson, Attorneys at Law, of West Columbia, for Respondent.

PER CURIAM: In this attorney discipline matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules of Lawyer Disciplinary Enforcement found in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent consents to the imposition of a public reprimand and agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (Commission) in investigating and prosecuting this matter. An investigative panel of the Commission (Panel) unanimously recommends a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

I.

Respondent was retained by Client in October 2018 to represent Client in a family court matter after Client's husband abruptly left the marital home. Client was a stay-at-home mother with two young children. She had previously given up her career to provide the stability, consistency, and regularity necessary to care for her son with autism. Through Respondent's efforts, the family court issued a temporary order awarding Client primary custody of the children, child support, spousal support, the use of the marital home, and other provisions. Client spoke to Respondent about hiring a private investigator based on her suspicions that her husband was having an affair. However, Respondent told Client it was unnecessary. In April 2019, a woman in Texas texted Client and stated she was having an affair with Client's husband. Respondent thereafter requested husband's bank records and subsequently amended the complaint to allege Client was entitled to a divorce on the ground of adultery. Husband ultimately admitted he was having an ongoing affair with the woman in Texas.

Sometime in April or May 2019, Respondent and Client began a sexual relationship. Client was extremely vulnerable during this time due to her emotional and financial uncertainty for both herself and her children, as Husband was not paying the required child or spousal support, and the son with autism was regressing. Client and Respondent had discussions about the future of their relationship and potential marriage. Client believed Respondent loved her and would take care of her. Respondent told Client that he could face sanctions for engaging in a sexual relationship with her. Respondent failed to advise Client about the significant potential of harm to her in her divorce action because of the relationship. In addition, Respondent did not advise Client that their relationship was a conflict of interest or that his representation of her could be materially limited by his personal interests.

On August 16, 2019, the family court granted Client a divorce on the ground of adultery. The signed divorce decree was entered the same day. Respondent called Client on August 26, 2019, and ended the affair for what he claimed to be "multiple reasons, both professional and personal." Client was shocked and devastated. Respondent self-reported the misconduct to ODC on September 5, 2019.

II.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.7(a)(2) (significant risk that representation of the client is materially limited by lawyer's personal interests); Rule 1.7(b) (failure to obtain written informed consent to proceed with representation despite a concurrent conflict of interest); Rule 1.8(m) (engaging in sexual relations with a vulnerable client when such relations could have a harmful or prejudicial effect upon the client's interests); Rule 8.4(e) (conduct prejudicial to the administration of justice).

Respondent also admits the allegations contained in the Agreement constitute grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (a violation of the Rules of Professional Conduct); Rule 7(a)(5) (conduct tending to pollute the administration of justice); and Rule 7(a)(6) (violation of the Oath of Office contained in Rule 402(h), SCACR).

III.

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct. Within thirty (30) days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan with the Commission to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Peter D. Korn, Respondent

Appellate Case No. 2021-000025

Opinion No. 28021
Submitted April 1, 2021 – Filed April 21, 2021

PUBLIC REPRIMAND

Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel C. Tex Davis Jr., both of Columbia, for the Office of Disciplinary Counsel.

Harvey M. Watson, III, of Ballard & Watson, Attorneys at Law, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to either a confidential admonition or a public reprimand, agrees to pay costs, and agrees to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School within one year. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

Respondent has practiced in the default services area for approximately four decades and opened his own law firm in 1989, which he incorporated as Korn Law Firm, P.A. (KLF). Respondent and KLF represented lenders in default matters. Demand for foreclosure legal services ballooned in the late 2000s when a recession left many lenders with a glut of defaulted mortgages. Respondent grew KLF to accommodate client demand, and at one time, KLF had approximately 150 firm employees. The growth was neither controlled nor permanent.

Respondent and KLF hired ABC Legal Services (ABC) in 2009 to coordinate service of process for the firm's foreclosure litigation cases. KLF needed to serve a high volume of defendants and ABC's invoices were substantial. KLF and ABC did not enter into a written agreement for services.

Federal and state efforts to stem the tide of the foreclosure crisis with legislation, administrative actions, and a state-wide temporary stay of foreclosures slowed Respondent's business considerably. Respondent reports the national lenders who dominated his client base instructed KLF to resist reducing its size and overhead and insisted a renewed deluge of foreclosures was forthcoming. The second wave never materialized and KLF became crippled by its overhead. Respondent attempted to keep the firm afloat by leveraging his personal and firm assets, but it was not enough.

KLF fell behind on many financial obligations including payments to ABC. Email correspondence between KLF and ABC reflects that KLF was typically significantly behind in paying ABC and often submitted payments without clearly identifying the invoices being paid. Despite the late and incomplete payments, ABC continued to accept work from, and coordinate service for, KLF. In total, KLF paid ABC approximately $1,600,000 from October 2009 through August 2014, but still owed ABC more than half that amount. Although Respondent submits some of KLF's clients failed to pay or were late to pay the firm, he acknowledges the firm's clients generally expected the firm to advance costs and that the firm was compensated for the costs it incurred in the vast majority of

foreclosure actions. The firm simply fell behind in making payments to ABC, and once it did so, never managed to bring its payments current.

On September 15, 2014, Respondent and KLF entered into an agreement with Florida-based law firm Butler and Hosch, P.A. (B&H) in which B&H agreed to assume and complete all of KLF's open files and collect payments due to the firm. The collected funds were to be used to pay KLF's debts, including its debt to Synovus Bank (Synovus), which held a protected security interest in KLF's accounts receivable, other income KLF received in the normal course of business, and some firm assets. Respondent and most of the KLF employees became employees of B&H as part of the agreement Respondent and KLF made with B&H.

On September 19, 2014, Respondent signed a $745,478.08 confession of judgment in favor of ABC on behalf of KLF. At the time, Respondent was KLF's sole officer, director, and shareholder. When contacted by the sheriff in an attempt to collect against the judgment, KLF offered a $10,000 cashier's check as partial payment. ABC rejected the offer and the sheriff returned the execution *nulla bona*.

On December 1, 2014, ABC filed a disciplinary complaint against Respondent. On December 30, 2014, ABC filed a lawsuit against KLF, Respondent, B&H, and others in federal court. On January 14, 2015, ABC commenced supplemental proceedings in state court to enforce the judgment. Respondent responded to the disciplinary complaint on January 20, 2015 alleging that ABC was using the disciplinary process solely for civil advantage.

The federal court relieved ABC's counsel on July 15, 2015, and directed ABC to retain new counsel by July 30, 2015. ABC did not retain new counsel, and the case was dismissed for failure to prosecute by order dated August 17, 2015.

During the supplemental proceedings in state court, Synovus made an appearance and obtained an order directing KLF to remit funds collected on the firm's accounts receivable to Synovus. On February 25, 2016, ABC assigned its interest in its judgment against KLF to Synovus, and Synovus filed notice of the assignment with the circuit court. Thereafter, on June 8, 2016, the Master-in-Equity held Robert Hosch of B&H in contempt for exerting control over proceeds from KLF's accounts receivable and ordered him to return $695,000 in funds or pay the same to Synovus.

Respondent acknowledges he failed to ensure his firm paid ABC for the services it provided that enabled the firm to continue its foreclosure practice, even though the firm had, with limited exception, received payment for those very bills from its clients.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 4.4(a) (respect for rights of third persons); and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Matter B

KLF represented lender Specialized Loan Servicing, Inc. (SLS) in a condominium foreclosure action, as well as the Federal Home Loan Mortgage Corporation (Freddie Mac), to whom SLS had assigned the winning foreclosure bid. The foreclosure action was finalized in early June 2014, but KLF did not send the deed and Master's commission to the Master-in-Equity until October 2014. Respondent does not acknowledge the delay was caused by KLF's cash flow problem, but he does acknowledge the firm was experiencing a cash flow problem and that the commission check payable to the Master-in-Equity was issued from B&H's cost advance account although some KLF accounts were still active at that time.

By this time, Freddie Mac had marketed the condominium and Complainant RB had contracted to purchase the property. Lawyer signed the purchase contract on behalf of Freddie Mac. A closing date was scheduled for late October 2014. The closing was extended, and RB's closing attorney, unaware that the deed had just been forwarded to the Master-in-Equity, questioned whether a perceived defect in the foreclosure process had resulted in a title problem. The closing was extended, but when Freddie Mac still did not have title in late November 2014, Freddie Mac chose to cancel the contract and the parties agreed RB was entitled to the return of the $1,000 in earnest money KLF was holding for the transaction. Despite multiple requests from RB and his realtor, the earnest money was not returned until late January 2015.

RB filed a disciplinary complaint against a different attorney on January 22, 2015. Based on the investigation of that matter, ODC issued a notice of investigation to Respondent on June 22, 2015. Respondent responded to the notice of investigation on August 10, 2015.

Respondent admits his conduct in this matter violated Rule 1.15(d), RPC, Rule 407, SCACR (prompt delivery of trust account funds a third party is entitled to receive).

II.

Respondent acknowledges his conduct in the above matters violated Rule 7(a)(1), RLDE, Rule 413, SCACR (a violation of the Rules of Professional Conduct constitutes grounds for discipline).

Respondent also agrees that within thirty days of the imposition of discipline, he will pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (Commission). As a condition of discipline, Respondent also agrees to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School within one year.

III.

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct. Within thirty (30) days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan with the Commission to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Within one year of the date of this opinion, Respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John A. Jackson, Respondent.

Appellate Case No. 2021-000023

Opinion No. 28022
Submitted April 1, 2021 – Filed April 21, 2021

DISBARRED

Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel C. Tex Davis, Jr., both of Columbia, for the Office of Disciplinary Counsel.

John A. Jackson, of Myrtle Beach, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to a sanction ranging from a two-year definite suspension to disbarment, agrees to pay costs, and requests that any sanction be made retroactive to the date of his interim suspension. We accept the Agreement and disbar Respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

Client A retained Respondent in October 2011 to collect a civil judgment owed to her from injuries she suffered in an automobile accident. Client A paid

Respondent a $1,800 retainer fee. Respondent failed to respond to several messages left by Client A seeking an update on her case. Respondent represents that he was able to domesticate the judgment in Virginia, where the defendant had relocated. However, Respondent was unable to effectuate service on the defendant. Ultimately, Respondent informed Client A that he did not believe he could accomplish the service for which he had already been paid. Respondent advised Client A to seek new counsel. Respondent admits he then stopped responding to Client A's repeated calls.

Client A filed a claim against Respondent with the Resolution of Fee Disputes Board (the Board). On December 4, 2013, the Board issued a Certificate of Non-Compliance against Respondent and a judgment in favor of Client A for $1,800. The Lawyer's Fund for Client Protection issued payment of $1,800 to Client A on October 30, 2014.

On August 23, 2014, Respondent was served with a subpoena to produce documents and to appear for an on-the-record interview with Disciplinary Counsel on September 24, 2014. Respondent failed to appear for the interview or produce the subpoenaed documents. As a result, Respondent was placed on interim suspension on October 2, 2014. *In re Jackson*, 410 S.C. 161, 763 S.E.2d 813 (2014).

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.15 (failure to refund unearned fees); Rule 8.1(b) (failure to respond to ODC inquiry); and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Matter B

Client B was incarcerated with the South Carolina Department of Corrections. Respondent was appointed to represent Client B in a civil action against the Department of Corrections. Respondent was able to obtain a $4,500 settlement for Client B. Respondent represents that Client B did not want to deposit the settlement monies into his prison account. Respondent advised Client B that Client B could execute a Power of Attorney to designate someone to take possession of the settlement monies. Respondent provided Client B with a Power of Attorney form, which Client B returned to Respondent. Respondent failed to respond to

repeated calls from Client B seeking an update on his case. Respondent acknowledges that he failed to maintain Client B's settlement monies in his trust account and that he used Client B's settlement monies for his own benefit.

Client B filed a claim with the Board. On April 22, 2014, the Board issued a Certificate of Non-Compliance against Lawyer and a judgment in favor of Client B in the amount of $4,500. The Lawyer's Fund for Client Protection issued payment of $4,500 to Client B on February 16, 2015.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.15 (failure to safeguard client funds); and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Matter C

Complainant is a medical provider who provided service for five of Respondent's clients. Complainant had valid Letters of Protection for each of these patients. Complainant sent several letters to Respondent seeking an update on each of the cases. Respondent failed to respond to Complainant. After a disciplinary complaint was filed, Respondent provided an update to Complainant. Respondent informed Complainant that four of the cases were still pending or the clients had sought other legal representation. Respondent acknowledged that with the remaining case, Respondent owed Complainant $4,230. Respondent acknowledged that he had used the settlement monies for his own benefit. Respondent offered to repay Complainant via a payment plan over a five month period. Respondent made one payment to Complainant of $1,000. Respondent has made no further payments to Complainant. Respondent acknowledges he still owes Complainant $3,230.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (failure to safeguard funds); 4.4(a) (respect for rights of third persons); and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Matter D

Respondent was found in civil contempt by an order filed June 12, 2013, in a family court matter. The family court found that Respondent owed a child support arrearage of $1,875, that Respondent's failure to make child support payments as willful, and that Respondent had the ability to make the payments when due. The family court ordered Respondent to report to the Charleston County Detention Center in thirty days; however, Respondent could purge himself of contempt if payment in full was made. Respondent acknowledges that, with the financial assistance of his parents, he was able to make full payment for his child support arrearage. Respondent admits his conduct in this matter violated Rule 8.4(e), RPC, Rule 407, SCACR (conduct prejudicial to the administration of justice).

II.

Respondent admits that his conduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement in Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules of Professional Conduct); Rule 7(a)(3) (willful failure to respond and to appear as directed in a disciplinary proceeding); Rule 7(a)(5) (conduct tending to pollute the administration of justice); and Rule 7(a)(10) (willful failure to comply with a final decision of the Resolution of Fee Disputes Board).

Respondent also agrees that within thirty days of the imposition of discipline, he will enter into a payment plan with the Commission on Lawyer Conduct (Commission) to repay the Complainant in Matter C the amount of $3,230, to reimburse the Lawyers' Fund for Client Protection, and to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. As a condition of discipline Respondent also agrees to complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to reinstatement.

III.

We accept the Agreement and disbar Respondent from the practice of law in this state, retroactive to the date of his interim suspension. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and he

shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Within thirty days of the date of this opinion, Respondent shall enter into a payment plan with the Commission to repay the Complainant in Matter C the amount of $3,230, to reimburse the Lawyers' Fund for Client Protection for claims paid, and to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Prior to petitioning for reinstatement, Respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School.

DISBARRED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Lottery Commission, Respondent,

v.

George S. Glassmeyer, Petitioner.

Appellate Case No. 2020-000050

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 28023
Heard March 2, 2021 – Filed April 21, 2021

REVERSED

Andrew Sims Radeker and Taylor Meriwether Smith IV, Harrison, Radeker & Smith, P.A., both of Columbia, for Petitioner.

Vordman Carlisle Traywick III, Robinson Gray Stepp & Laffitte, LLC; Karl Smith Bowers Jr., both of Columbia, for Respondent.

JUSTICE FEW: George Glassmeyer sent Freedom of Information Act (FOIA) requests to the South Carolina Lottery Commission for information relating to million-dollar lottery winners. The Lottery Commission filed this lawsuit asking the circuit court to declare the information exempt from disclosure. The circuit court ruled in favor of the Lottery Commission without a trial. We reverse and remand for trial.

I. Facts and Procedural History

Glassmeyer sent several FOIA requests to the Lottery Commission seeking information related to winners of lottery prizes equal to or greater than one million dollars between March 1, 2013, and March 20, 2014. Glassmeyer requested the "full name, address, and telephone number; the date and gross amount of the claim; and a copy of any and all forms of identification obtained from" each winner. The Lottery Commission responded to each request, stating that pursuant to subsection 30-4-40(a)(2) of the South Carolina Code (Supp. 2020) it was not going to disclose the information. The Lottery Commission claimed the information sought was "personal" and "disclosure . . . would constitute unreasonable invasion of personal privacy." Instead, the Lottery Commission disclosed the hometown and state of each winner, the amount of each prize, the date of each prize, and the game associated with each prize. Glassmeyer responded that the Lottery Commission's disclosure did not satisfy his requests.

The Lottery Commission then filed this lawsuit seeking a declaratory judgment that the release of lottery winners' names, addresses, telephone numbers, and forms of identification would constitute an unreasonable invasion of personal privacy under subsection 30-4-40(a)(2) and may be withheld. The Lottery Commission also sought injunctive relief preventing Glassmeyer from obtaining the information.

At the start of the non-jury trial, the Lottery Commission made an oral motion for judgment on the pleadings. The circuit court granted the Lottery Commission's motion and declared the release of the lottery winners' "personal identifying information would constitute an unreasonable invasion of personal privacy within the meaning of § 30-4-40(a)(2)." The circuit court also entered an injunction permanently restraining Glassmeyer from seeking the lottery winners' full names, addresses, telephone numbers, and forms of identification.

The court of appeals affirmed. *S.C. Lottery Comm'n v. Glassmeyer*, 428 S.C. 423, 835 S.E.2d 524 (Ct. App. 2019).[1] We granted Glassmeyer's petition for a writ of certiorari. We reverse the court of appeals.

II. Analysis

A. Injunction

The circuit court issued an injunction in favor of the Lottery Commission which "PERMANENTLY restrained and enjoined [Glassmeyer] from seeking to obtain the (1) full names; (2) addresses; (3) telephone numbers; and (4) forms of identification of all lottery winners and claimants." The injunction prevented Glassmeyer from seeking the information from any source. This was improper.

As the Lottery Commission conceded during oral argument to this Court, an injunction restricting Glassmeyer from seeking this information from *any* source is overly broad. The only question before the circuit court was the Lottery Commission's obligation to disclose the information. Thus, a proper injunction could restrict Glassmeyer only from seeking this information from the Lottery Commission. The Lottery Commission had no right to request an injunction permanently restraining Glassmeyer from seeking this information from any source, and the circuit court had no authority to prevent Glassmeyer from doing so.

Even if the injunction was proper in scope, an injunction was unnecessary. The parties are in the midst of litigation. Glassmeyer requested the information from the Lottery Commission, and the Lottery Commission refused to disclose the information. The declaratory judgment entered by the circuit court, although improper as a judgment on the pleadings as we will discuss, is an adequate remedy to protect the Lottery Commission's interests. *See Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) ("The court will reserve its equitable powers for situations when there is no adequate remedy at law." (citing *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989))); *see also Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258,

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[1] The court of appeals also held the circuit court erred in not addressing Glassmeyer's counterclaim for willful abuse of process and remanded the claim to the circuit court. 428 S.C. at 439, 835 S.E.2d at 532. This issue was not appealed to this Court.

265 (2013) (noting an injunction was unnecessary because the declaratory judgment entered in the case provided an adequate remedy at law). Even a proper injunction would accomplish nothing in this case because the accompanying declaratory judgment permitted the Lottery Commission to refuse to disclose the information.

B. Declaratory Judgment

Glassmeyer argues the Lottery Commission had no right to bring a declaratory judgment action asking the circuit court to determine its rights and obligations under FOIA. We disagree.

When a party has a question regarding its rights or obligations under the law, the party may bring an action under the Declaratory Judgments Act to have the question resolved by a court. The Declaratory Judgments Act[2] provides, "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20 (2005). It further provides, "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (2005). Despite Glassmeyer's arguments to the contrary, the Lottery Commission had the right to bring a declaratory judgment action asking the circuit court to determine whether the exemption applied.

C. Judgment on the Pleadings

Glassmeyer also argues the circuit court erred in granting judgment on the pleadings in favor of the Lottery Commission on the declaratory judgment action. We agree.

Under FOIA, "A public body may but is not required to exempt from disclosure the following information: . . . Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." S.C. Code Ann. § 30-4-40(a)(2). A public body must make two decisions before invoking this exemption. First, the public body must determine whether the information requested is personal and whether disclosure would constitute an

[2] S.C. Code Ann. § 15-53-10 *et seq.* (2005).

unreasonable invasion of personal privacy. Second, if so, the public body must determine whether to disclose the information. Only the first decision is before us at this time. When the Lottery Commission made the decision, it made a judgment call as to whether disclosure of the information would constitute an unreasonable invasion of personal privacy. The Lottery Commission's determination was necessarily based on evidence. "Whether a record is exempt depends on the particular facts of the case." *Evening Post Publ'g Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (citing *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996)).

When the litigation began, the circuit court was required to "resort to general privacy principles, which [] involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other." *Glassmeyer v. City of Columbia*, 414 S.C. 213, 220, 777 S.E.2d 835, 839 (Ct. App. 2015) (quoting *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004)). This is also a determination necessarily based on evidence. The Lottery Commission had the evidentiary burden of proving the exemption applied. *Evening Post Publ'g Co.*, 363 S.C. at 457, 611 S.E.2d at 499.

The court of appeals nevertheless held, "The question of whether the information Glassmeyer requested was exempt under FOIA is a question of law and does not require looking at any facts other than Glassmeyer's request." 428 S.C. at 438, 835 S.E.2d at 531. We disagree. *See Evening Post Publ'g Co.*, 363 S.C. at 457, 611 S.E.2d at 499 (explaining FOIA exemptions "depend[] . . . on . . . facts").[3] Without a trial on the issues to develop a factual record, there is no evidence on which the circuit court could base its judgment.

Throughout this litigation, the Lottery Commission relied heavily on the threat to the safety of lottery winners to support its argument the invasion of a winner's privacy would be unreasonable. At the circuit court, just prior to asking for judgment on the pleadings, the Lottery Commission argued it is "very concerned in this day and age about invasion of privacy and the safety and security of [its] winners." To support the point, the Lottery Commission stated "there are a litany of examples of situations, not just in South Carolina, but nationwide about lottery winners who have been threatened, who have been harmed physically, who have been cheated. In fact,

[3] The exemption set forth in subsection 30-4-40(a)(4) is uniquely based only on law.

we had a situation here with one of those really high lottery winners where he was scammed." The Lottery Commission presented no evidence to support the statements.

The court of appeals, however, found that evidence to support the Lottery Commission's argument was "not necessary to the circuit court's order." 428 S.C. at 438, 835 S.E.2d at 531. The Lottery Commission was unconvinced. Even during oral argument to this Court, after the court of appeals said it did not matter, the Lottery Commission argued the safety of lottery winners is a consideration the circuit court should make in the balancing the conflicting interests. Specifically, the Lottery Commission told this Court "people are robbed, they are killed, they are extorted; there are . . . a legion of circumstances that take place that put the safety of lottery claimants, particularly those who come upon over a million dollars, in great jeopardy." We agree with the Lottery Commission that the extent to which these risks are real is important in the circuit court's determination of whether the exemption applies.

Similarly, Glassmeyer's reason for requesting the information is important for the circuit court to consider in its determination of whether the exemption applies. Ordinarily, a citizen requesting information under FOIA should not have to disclose the reason for the request. However, when a public entity invokes the unreasonable invasion of personal privacy exemption in subsection 30-4-40(a)(2), the circuit court must balance the conflicting interests of the individual's privacy against the public's need to know. *Glassmeyer*, 414 S.C. at 220, 777 S.E.2d at 839 (quoting *Burton*, 358 S.C. at 352, 594 S.E.2d at 895). In such an instance, the court must understand and address the reason for seeking the information because the reason goes directly to the public's interest and whether the invasion of personal privacy would be unreasonable. In this case, Glassmeyer's reason for seeking the information from the Lottery Commission should be developed at trial.

III. Conclusion

We vacate the injunction in favor of the Lottery Commission. We reverse the declaratory judgment—without addressing the merits—and remand the action to the circuit court for trial.

BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Watson Smiley, IV, Respondent.

Appellate Case No. 2020-001315

Opinion No. 28024
Submitted March 26, 2021 – Filed April 21, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Julie K. Martino, both of Columbia, for the Office of Disciplinary Counsel.

James Watson Smiley, IV, of Charleston, Pro Se.

PER CURIAM: In this attorney disciplinary matter, formal charges were filed against Respondent on September 5, 2019, alleging he committed misconduct in failing to timely perfect an appeal, failing to correct various deficiencies the South Carolina Court of Appeals ordered him to correct, and failing to respond to inquiries by the Office of Disciplinary Counsel (ODC). Based on this misconduct and Respondent's prior history of failing to respond to ODC in a timely manner, a panel of the Commission on Lawyer Conduct (Panel) recommended a four-month suspension. Neither Respondent nor ODC have filed exceptions to the Panel report. We find Respondent committed misconduct and impose a four-month definite suspension.

I.

Respondent was admitted to the Bar in 1993 and has always been a criminal defense trial lawyer, primarily in a one-person law firm. The complaint at issue in

this matter stems from his representation of a client on a motion for reconsideration following an *Alford* plea.[1] Respondent did not represent the client at the time of the plea, but he was later hired by the client's mother to handle the motion for reconsideration. Following the denial of the motion for reconsideration, the client wished to appeal. Although Respondent attempted to file and serve a notice of appeal and motion to be relieved as counsel, it was untimely and lacked the Rule 203(d)(1)(B)(iv), SCACR, explanation demonstrating there is a reviewable issue, which is required in appeals from an *Alford* plea. Over the next four months, the Court of Appeals wrote Respondent several letters explaining the deficiencies and how to correct them and warned Respondent that his request to be relieved as counsel could not be considered until the required explanation was received. However, Respondent incorrectly believed the Appellate Division of the South Carolina Commission on Indigent Defense had taken over the matter and that he was merely being provided courtesy copies of the letters; therefore, he did not open or take any action on them. Thereafter, the Court of Appeals issued an order directing Respondent to file the required explanation within ten days or the appeal would be dismissed. Respondent failed to take the action ordered by the Court of Appeals, and due to Respondent's neglect, the client's appeal was dismissed.

The client subsequently filed a complaint with ODC, which sent Respondent a Notice of Investigation. Respondent's response was thirteen days late.[2] Likewise, his response to ODC's request for follow-up information was thirty-six days late.

At the Panel hearing, Respondent admitted he failed to properly perfect the client's appeal or take the actions the Court of Appeals directed him to take. He also admitted he failed to timely respond to ODC's inquiries in this matter, and in the matters involved in his disciplinary history.[3] Respondent expressed remorse and

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

[2] In the meantime, ODC sent Respondent a letter pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), via certified mail; however, Respondent failed to sign for the certified copy of the letter.

[3] Respondent's disciplinary history includes a 2014 Public Reprimand, citing the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.1 (competence); Rule 1.2 (abide by client decisions concerning objectives of representation); Rule 1.4 (communication); Rule 1.15(f) (not disbursing funds from trust account until funds are collected); Rule 8.1(b) (failure to respond to ODC inquiry); and Rule 8.4(e) (conduct prejudicial to the administration of justice). *In re Smiley*, 409 S.C. 256, 762 S.E.2d 28 (2014).

maintained that his failure to respond was not willful; rather, he contended it was because he is a busy trial lawyer and he struggles to carve out time to open his mail, file correspondence, or otherwise mind the administrative aspects of his practice. He also explained that he had never before handled an appeal from a plea and admitted that things went awry when he failed to put together his typical "appeal packet."

II.

We find Respondent's conduct violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 3.4(c) (knowing failure to comply with rules of a tribunal); Rule 8.1(b) (failure to respond to ODC inquiry); and Rule 8.4(e) (conduct prejudicial to the administration of justice). We further conclude Respondent's conduct violated the Lawyer's Oath in Rule 402(h)(3), SCACR.

This misconduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement in Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules of Professional Conduct); Rule 7(a)(3) (failure to respond to ODC); Rule 7(a)(5) (conduct tending to pollute the administration of justice); Rule 7(a)(6) (violating the Lawyer's Oath); and Rule 7(a)(7) (willful violation of valid order from Court of Appeals).

Accordingly, we impose a definite suspension of four months with the following conditions: (1) prior to being reinstated, Respondent must appear before the Committee on Character and Fitness and complete the Legal Ethics and Practice Program Law Office Management School; and (2) upon reinstatement, Respondent must enter into and comply with a contract with a Law Office Monitor selected by Counsel to the Commission on Lawyer Conduct (Commission), timely pay the Monitor's fee, and file monthly reports from the Monitor with the Commission for a period of one year.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. Within thirty days of the date of this opinion, Respondent shall: (1) make restitution to his client in the amount of $1,000; and (2) pay or enter into a reasonable payment plan with the Commission to pay the costs of these disciplinary proceedings.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of P. Michael DuPree, Respondent.

Appellate Case No. 2021-000369

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

s\Donald W. Beatty ____________________ C.J.
FOR THE COURT

Columbia, South Carolina
April 16, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lamar Clark, Appellant,

v.

Philips Electronics/Shakespeare, Employer, and Gallagher Bassett Services, Carrier, Respondents.

Appellate Case No. 2018-001197

Appeal From The Worker's Compensation Commission

Opinion No. 5809
Submitted February 1, 2021 – Filed March 10, 2021
Withdrawn, Substituted, and Refiled April 21, 2021

REVERSED AND REMANDED

William B. Salley, Jr., of Salley Law Firm, P.A., of Lexington, for Appellant.

Brooke Ann Payne, of Payne Law Group, LLC, of Mt. Pleasant, for Respondents.

HILL, J.: Lamar Clark was hurt in July 2011 while working for Philips Electronics (Philips). Philips admitted the injury, and Clark continued working for them another six months. An October 2011 MRI of Clark's back revealed a herniated disc at L5-S1. He began having "new onset radicular pain down to the buttocks." Dr. Daniel Sheehan diagnosed Clark with lumbar radiculopathy, also called sciatica, a condition often caused when a herniated disc pinches a lumbar spinal nerve and

radiates pain to the legs and other lower extremities. A conservative course of treatment, including pain medication and physical therapy, was prescribed. Dr. Thomas Holbrook began treating Clark in February 2012 and confirmed Clark "has lumbar radiculopathy on the left, secondary to a herniated disc on the left at L5-S1." Dr. Holbrook performed a microdiscectomy (a general anesthesia surgery to remove parts of a herniated disc to relieve pressure on the affected nerve). This relieved Clark's pain but only temporarily. Dr. Holbrook referred Clark to Dr. Steven Storick for pain management. Dr. Holbrook ordered another MRI, which showed a herniated disc at the left L4-5 with nerve root compression. Clark underwent a second microdiscectomy in September 2013. Again, the surgery appeared to help with Clark's pain but did not stop it. Clark continued with physical therapy and pain medications. In July 2015, at Dr. Storick's urging, Clark underwent a radiofrequency rhizotomy (a procedure designed to relieve chronic pain by destroying affected nerves). This procedure, along with prescribed painkillers, provided Clark some relief.

Over the years since his injury, Clark's medical providers have also addressed his mental health, attempting to combat the depression and anxiety caused by his persistent pain. Dr. Storick contemplates Clark may benefit from a spinal cord stimulator but does not recommend the treatment until Clark's depression and other aspects of his mental health have improved.

Dr. Robert Brabham, a psychologist and vocational rehabilitation expert with over fifty years' experience, concluded Clark was totally and permanently disabled. Jan Westmoreland, M.Ed., whom Philips engaged to evaluate Clark's ability to work, found Clark's medical records disclosed he could work at sedentary or light duty jobs. She listed several suitable positions available in the market, including cashier, attendance monitor, and movie ticket taker. When Westmoreland later learned Clark had completed a second year of college, she amended her report to state Clark could find work in IT support, computer programming, or as a security guard.

At the hearing before the Single Commissioner, Clark sought an award of permanent and total disability, alleging injuries to his back, left leg, left hip, and left foot, as well as psychological overlay. *See* S.C. Code Ann. § 42-9-10 (2015). He alternatively claimed he was totally and permanently disabled because he had lost more than fifty percent of the use of his back. *See* S.C. Code Ann. § 42-9-30(21) (2015).

A month before the hearing, it became known that Clark had claimed a back injury in 2006 while working for Tile Depot in Florida, and he had filed for worker's compensation and unsuccessfully sought social security disability income (SSDI) in 2008 and 2009 related to this injury. Clark had not disclosed this to Philips, who highlighted at the hearing that Clark claimed extensive physical limitations and pain symptoms in his SSDI paperwork and that he had sought mental health treatment. It was also discovered Clark had presented to a local hospital several months before the 2011 injury complaining of back pain.

The Single Commissioner ruled Clark was permanently and totally disabled pursuant to § 42-9-10, having proven injury to more than one body part (his back and legs) that destroyed his earning capacity. The Single Commissioner also found Clark totally and permanently disabled due to loss of use of fifty percent of his back pursuant to § 42-9-30(21). The Single Commissioner ruled Clark reached maximum medical improvement (MMI) on May 25, 2016, and Philips would be responsible for Clark's future medical and psychological care related to the injuries from the 2011 accident. *See* S.C. Code Ann. § 42-15-60 (2015).

Philips appealed to the Appellate Panel. It reversed, finding Clark was not permanently and totally disabled, suffered no psychological injury, had reached MMI on July 23, 2014, and sustained a twenty percent permanent partial disability to his back, entitling him to benefits of $14,477.40. The Panel, however, ordered Clark to reimburse Philips $33,539.31, the net credit owed to Philips for the temporary total benefits it had paid Clark after the July 23, 2014 MMI date.

Clark now appeals. He claims the Panel's order is not supported by substantial evidence, and several of its factual findings are clearly erroneous. For the reasons that follow, we agree with Clark and reverse and remand.

I. STANDARD OF REVIEW

A. The Substantial Evidence Standard

We must affirm the factual findings of the Panel if they are supported by substantial evidence. S.C. Code Ann. § 1-23-380(5) (2005 & Supp. 2020); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132–33, 276 S.E.2d 304, 305 (1981). Like any other finder of fact, the Panel may not rest its findings on speculation or guesswork. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) ("Workers' compensation awards must not be based on surmise, conjecture or speculation.").

We may reverse the Panel's decision if its findings are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," resulting in prejudice to Clark's substantial rights. § 1-23-380(5)(e). The Panel must anchor its ruling on evidence substantial enough to provide a reasonable basis for its findings. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012).

B. Credibility Determination

The Panel concluded Clark's lack of credibility "undermined the medical opinions and treatment received . . . as the opinion and conclusions of [Clark's] providers were based upon self-serving assertions of the claimant." The order noted Clark's "lack of truthfulness" was "an impediment to supporting the Single Commissioner's decision."

The Panel was entitled to conclude Clark's credibility crumbled when it was learned he had not disclosed his 2006 back injury. We are also mindful that factual findings based on credibility calls can, and often do, amount to substantial evidence that requires us to affirm. But a credibility finding has no force independent of context—deciding a party is not credible does not make all of the party's other evidence incredible. Instead, the trier of fact must weigh and measure each piece of evidence. The Panel, bound as it is to make findings based on substantial evidence, "must explain how the credibility determination is important to making the particular factual finding." *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 647, 842 S.E.2d 349, 354 (2020). The lesson of *Crane* is that the Panel may not base a factual finding on a credibility determination without explaining both the basis of the credibility determination and how the determination rationally affects the disputed fact. An unexplained credibility determination or an unexplained use of a credibility finding means the factfinder's approach was arbitrary rather than rational.

II. ANALYSIS

A. Section 42-9-10 Disability

Clark seeks permanent and total disability under § 42-9-10 on the theory that he had injured a body part scheduled by § 42-9-30 as well as another body part and experienced a loss of earning capacity. *See Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 105–06, 580 S.E.2d 100, 102–03 (2003).

1. Injury to More Than One Body Part

The Panel found Clark had a twenty percent "impairment to his back, taking into account any affects to his legs." Despite acknowledging Clark had injured his back and legs, the Panel proceeded to deny Clark permanent and total disability under section 42-9-10, reasoning he only injured one body part (his back) and had no lost earning capacity. This was clear error. There is no substantial basis in the record permitting the Panel to find Clark only injured one body part. The Panel gave the opinions of Clark's authorized treating physicians, Dr. Holbrook and Dr. Storick, the greatest weight; they both concluded Clark's injury to his back had affected and impaired at least one of his legs. *See Dent v. East Richland Cty. Pub. Serv. Dist.*, 423 S.C. 193, 201–03, 813 S.E.2d 886, 890–91 (Ct. App. 2018).

Although the Panel declared Clark's woeful credibility befouled his entire medical record, it still agreed with Dr. Holbrook and Dr. Storick that Clark had suffered a twenty percent whole person impairment. Philips contends the Panel rightly treated all of the medical evidence as suspect because Clark did not disclose his 2006 injury. But Dr. Storick deflated this theory when he testified that learning of the 2006 injury did not change his opinion that the 2011 injury caused Clark's injuries. Philips could have offered contrary evidence; without any, the Panel had no basis to discount the objective medical evidence, and *Crane* tells us a vague nod to credibility cannot close the gap. Clark's lack of candor did not corrupt the credibility of his MRI results or the physical examinations of his treating physicians. Commissioner Taylor, the Single Commissioner, understood this. She deemed Clark "not credible at all," yet still fairly and impartially weighed the medical evidence. The Panel concluded the doctors' opinions were based upon "self-serving assertions of the claimant," but no doctor has said this. What people say when seeking medical help is usually self-serving and sometimes unreliable. Doctors are trained to detect such things, and we are confident that if the doctors believed they were duped into their opinions they would have said so.

The Panel's absolutist treatment of Clark's credibility in effect adopts the Latin maxim, well known to lawyers and a stalwart of closing arguments, which translates as "false in one, false in all." The maxim was discredited by *State v. Littlejohn*, 33 S.C. 599, 11 S.E. 638 (1890), and as far as we can tell, last appeared in a reported South Carolina case almost a hundred years ago as an aside in the infamous Upstate moonshine murder saga of *State v. Pittman*, 137 S.C. 75, 134 S.E. 514 (1926).

Wigmore denounced the maxim as "primitive psychology" that "is in itself worthless . . . because in one form, it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the others it is absolutely false as a maxim of life." 3A Wigmore *Evidence* §1008 at 982 (Chadbourn rev. 1970); *see also Virginia Ry. Co. v. Armentrout*, 166 F.2d 400, 405 (4th Cir. 1948) (noting the "harsh" maxim "has little or no place in modern jurisprudence"). Dubious and archaic as the saying may be, we are not aware of any instance where it has been used to disregard not just a party's testimony but their entire array of proof.

We therefore reverse the impairment rating and the finding that Clark injured only one body part and remand to the Panel for further findings. On remand, the Panel shall also revisit its impairment rating of Clark's back and explain why the twenty percent whole person rating does not translate to a higher rating for Clark's back alone.

2. Lost Earning Capacity

We agree with Clark that the Panel's finding that he has not lost earning capacity lacks substantial evidence. The finding—which appears in the "Conclusions of Law" section—floats on air, unsupported by any visible explanation or evidence. The "Findings of Fact" do not discuss either Dr. Brabham's or Ms. Westmoreland's reports, so we have no way of knowing what the Panel used to find Clark's earning capacity was intact. If it was Ms. Westmoreland's report, it would seem the Panel would have to explain why, unlike Dr. Brabham, Ms. Westmoreland chose not to take into account Clark's mental health diagnoses in concluding Clark could return to work. Dr. Brabham concluded Clark's depression and anxiety so affected his concentration and attention that he could not find work in the stable job market. Ms. Westmoreland's report "assumes" Clark can work twenty to forty hours per week. We reverse the Panel's conclusion that Clark has not lost earning capacity and remand for a de novo hearing resulting in conclusions of law supported by findings of fact.

B. Psychological Overlay

The Panel ruled Clark had "pre-existing psychological issues," and had not proven his 2011 injury at Philips aggravated them. *See* S.C. Code Ann. § 42-9-35 (2015). The Panel concluded his "current psychological condition, if any, is unrelated to his work injury."

The Panel pointed to Clark's response of "Yes" on one of his SSDI applications to a question asking whether he had been "seen by a doctor/hospital/clinic or anyone else for emotional or mental problems that limit your ability to work?" Yet, Clark replied, "No," to the same question on his other SSDI application, and in neither did he state he was seeking benefits for a psychological injury. There is no evidence of any pre-existing mental health diagnosis before his 2011 injury. The way the SSDI question is worded does not prove a pre-existing treatment or diagnosis. Nor does it provide any basis to identify the type, nature, or degree of the supposed pre-existing condition.

On the other hand, the objective medical evidence of the existence, causation, and degree of Clark's depression and anxiety is uncontradicted. The record details the chronic pain, sleeplessness, and sense of helplessness and hopelessness Clark has experienced because of his 2011 injury. He has been examined or treated by at least ten medical doctors, several of whom are mental-health experts. Not one of them suggests Clark is malingering or faking. The Panel's conclusion that his concealment of a supposed pre-existing condition undermines this objective medical evidence is another misuse of the credibility metric. We therefore reverse the Panel's finding that Clark suffered no psychological overlay and remand to the Panel for a de novo hearing.

C. Date of MMI

The Panel calculated Clark reached MMI on July 23, 2014. No party pushed this date; Philips argued the correct MMI date was August 27, 2015. The Panel drew the date from a form Dr. Holbrook had filled out, but he had handed Clark off to Dr. Storick, who testified Clark reached MMI on August 27, 2015. Because the Panel did not explain how it resolved the clashing MMI evidence, we vacate and remand this finding to solve the mystery. *See Canteen v. McLeod Reg'l Med. Ctr.*, 400 S.C. 551, 558–59, 735 S.E.2d 246, 250 (Ct. App. 2012) (remanding case where an Appellate Panel failed to make sufficient findings on issue where evidence conflicted: "The findings of fact made by the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings."); *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) ("Where material facts are in dispute, the administrative body must make specific, express findings of fact.").

III. CONCLUSION

We reverse the Panel's decision and remand for a new hearing and findings as to Clark's § 42-9-10 claim for total and permanent disability based on injury to multiple body parts and loss of earning capacity, psychological overlay, date of MMI, and, if appropriate, future medical care and costs. We decide this case without oral argument pursuant to Rule 215, SCACR.

REVERSED AND REMANDED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Ernest Perry, Jr., Appellant.

Appellate Case No. 2017-002107

Appeal From York County
Paul M. Burch, Circuit Court Judge

Opinion No. 5816
Heard June 3, 2020 – Filed April 21, 2021

REVERSED AND REMANDED

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

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Kevin Scott Brackett, of York, all for Respondent.

KONDUROS, J.: John Ernest Perry Jr. appeals his conviction of attempted murder. He maintains because he told the police his gun "went off" accidentally as he attempted to dispose of the gun during a police chase, the trial court erred in charging the jury "when the intent to do an act that violates the law exists, motive

becomes immaterial," because attempted murder was a specific intent crime and this was essentially a general intent instruction. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Officers Dalton Taylor and Shaun Bailey of the Rock Hill Police Department were conducting a night patrol on June 22, 2016. Officer Taylor observed a vehicle turn without using a turn signal and in response initiated a traffic stop. The driver of the vehicle jumped out of the vehicle, without putting the vehicle into park, and ran from the scene. Officer Bailey and Officer Taylor pursued the driver on foot. The driver jumped a fence, and the officers followed him. As the driver was running, he pulled a firearm from his waistband. The driver fired two shots, which did not strike anyone.[1] According to Officer Taylor, he and the driver were about five to seven feet apart, and the area was sufficiently lit. Officer Taylor returned fire, striking the driver, but the driver continued to flee, and Officer Taylor lost sight of him.

Officers identified the driver as Perry from paperwork found in the vehicle and a video recording from a nearby convenience store. Law enforcement officers later took Perry into custody outside a camper in Fairfield County. Officers discovered in the camper the weapon Perry had fired.

A grand jury indicted Perry for attempted murder. At trial, Officer Taylor testified Perry fired directly at him once. Officer Taylor opined that it was not an accidental discharge and Perry was trying to shoot him in order to escape. On cross-examination, Officer Taylor acknowledged that his written statement about the incident provided that Perry fired the first shot in the air. He indicated he perceived Perry as pointing the weapon at him with the intent to kill. Officer Bailey testified he also pursued Perry and observed Perry fire twice in the air.

Special Agent Melissa Wallace from South Carolina Law Enforcement Division (SLED) testified she became involved with this case because it was an officer involved shooting. She provided she rode with Perry in the ambulance to the hospital after he had been apprehended. During the ambulance ride, she read Perry

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[1] The evidence conflicts as to whether the first shot was fired in the air or in a "bladed position," whether the second shot was fired directly at Officer Taylor, and whether the gun accidentally went off.

his *Miranda*[2] rights. He answered her questions during the ride and while he was at the hospital. He informed her that he had been involved in a shooting with police. He provided he had run because he had some unpaid warrants outstanding and he possessed the gun and knew he could not be caught with it. According to Special Agent Wallace, Perry stated "[h]e was jumping what he called the gate and the gun accident[al]ly went off while he was trying to get it out of his pants." She further noted Perry stated that as he was pulling the gun out, he had it "in front of his waist pointed towards the left-hand side of his body" when it went off. Perry also told Special Agent Wallace he threw the gun he used in the shooting in a field. SLED searched the field but did not recover a weapon there. Perry admitted in a subsequent interview the gun found in the camper was the gun he used in the incident.

Following the close of the State's case, Perry moved for a directed verdict, which the trial court denied. Perry did not present a defense. Following closing arguments, the trial court charged the jury on attempted murder and the lesser included offenses of assault and battery in the first, second, and third degree. The trial court informed the jury the attempted murder statute states, "A person who with intent to kill attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder." The court also described to the jury what malice meant.

Following deliberations, the jury requested to be recharged on attempted murder and the various degrees of assault and battery. The trial court repeated the jury charge it had previously given for those offenses, including the description of malice. After the jury resumed deliberations, the jury requested a copy of the charge on malice. The jury then asked if malice was only associated with the attempted murder charge or if it was also associated with the assault and battery charges. The attorneys and the court agreed it was only an element of attempted murder. The jury also asked, "What is meant by intent? It was not charged." The trial court proposed charging the jury with the definition of intent from *Black's Law Dictionary*, which stated: "The state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists motive becomes immaterial." Perry stated, "I don't like the end of that with motive being in there," and the trial court indicated the last

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

sentence could be left off. Perry continued, arguing "that's almost implying that use of a deadly weapon," before the trial court cut him off and stated it did not "see any need for that" sentence. However, the State argued because motive was not an element it had to prove, charging that sentence would not be prejudicial to Perry. The State asserted, "It says motive is immaterial, which we think motive is immaterial under the attempted murder statute . . . ." The trial court stated, "I mean as far as the last sentence. So the defense objects to the last sentence. I agree with the State, motive becomes immaterial so we'll note your objection and after I charge it be sure and preserve the record again on it, okay?" The trial court charged the jury: "Intent. The state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists motive becomes immaterial." The jury returned to its deliberations. Perry renewed his objection, stating:

> Your Honor, I just to renew my objection to the intent that you just read based on about the motive being immaterial. Also my concern is that attempted murder with case law out there saying that it is a specific intent crime, I mean, in my opinion is what was read was more of a general intent type of thing so that's my -- I'm objecting to the charge.

The court asked, "Your objection is with the last sentence?" and Perry responded, "That's correct, Your Honor." The court stated "based on what we've already discussed I see no reason to recharge and adjust that charge. But it is on the record."

Following a note from the jury, the trial court gave the jury an *Allen*[3] charge. The jury resumed its deliberations and ultimately reached a verdict. The jury convicted Perry of attempted murder. The trial court sentenced him to life imprisonment. This appeal followed.

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[3] *Allen v. United States*, 164 U.S. 492 (1896).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate "[c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

Perry argues the trial court erred in instructing the jury that "when the intent to do an act that violates the law exists, motive becomes immaterial," as attempted murder is a specific intent crime, and this was essentially a general intent instruction and was highly prejudicial because he told the police his gun went off accidentally as he attempted to dispose of it during the police chase. We agree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). The trial court is required to charge the law as determined from the evidence presented at trial. *State v. Gates*, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). If any evidence supports a charge, it should be given. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). A charge is correct if it adequately explains the law and contains the correct definition when read as a whole. *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "A jury charge [that] is substantially correct and covers the law does not require reversal." *Id*. "The substance of the law is what

must be charged to the jury, not any particular verbiage." *Adkins*, 353 S.C. at 318-19, 577 S.E.2d at 464. "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)).

"[S]ome principles of law should not always be charged to the jury." *State v. Perry*, 410 S.C. 191, 202, 763 S.E.2d 603, 608 (Ct. App. 2014); *see also State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019) (stating some matters appropriate for jury argument are not proper for charging the jury). "Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002); *see also id.* at 205, 208 n.1, 573 S.E.2d at 803, 804 n.1 (reversing a conviction even though a jury charge was a correct principle of law because it "was not warranted by the facts adduced at trial"). "The impression is sometimes gained that any language from an appellate court opinion is appropriate for a charge to any jury, but this is not always true." *State v. Grant*, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980). "Oftentimes a sentence, or sentences, taken from an appellate opinion must be supplemented by additional relevant statements of the law because of the particular factual situation." *Id.* "The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error." *State v. Washington*, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000).

When a jury submits a question to the trial court following a jury charge, "[i]t is reasonable to assume" the jury is "focus[ing] critical attention" on the specific question asked and that the information relayed by the trial court to the jury is given "special consideration." *State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978).

Attempted murder is codified as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied . . . ." S.C. Code Ann. § 16-3-29 (2015). In *State v. King*, 422 S.C. 47, 50, 810 S.E.2d 18, 19-20 (2017), our supreme court affirmed as modified this court's decision to reverse a conviction of attempted murder when the trial court charged the jury a specific intent to kill was not an element and "a general intent to commit serious bodily

harm" was all that was required. The supreme court "agree[d] with the [c]ourt of [a]ppeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'" *Id.* at 55, 810 S.E.2d at 22 (quoting *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), and *overruled on other grounds by Burdette*, 427 S.C. at 504 n.3, 832 S.E.2d at 583 n.3). The supreme court found:

> Because the phrase "with intent to kill" in section 16-3-29 does not identify what level of intent is required, the [c]ourt of [a]ppeals properly looked to the legislative history of section 16-3-29 and appellate decisions holding that "attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime." *King*, 412 S.C. at 409, 772 S.E.2d at 192. Further, while we agree with the State that the statement referenced from *Sutton*[[4]] constitutes dicta, it is still an accurate statement of law. *Id.* ("'Attempted murder would require the specific intent to kill,' and 'specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense.'" (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)).

King, 422 S.C. at 55-56, 810 S.E.2d at 22 (last alteration by court).

The supreme court determined the two parts of section 16-3-29—"with intent to kill" and "malice aforethought"—needed to be addressed as they demonstrate "the General Assembly created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either express or implied' to require a higher level of *mens rea* for attempted murder than that of murder." *Id.* at 61, 810 S.E.2d at 25.

The supreme court further explained:

[4] *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000).

> "The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses on the dangerousness of the actor, not the act." Thus, "[a]s the crime of attempt is commonly regarded as a specific intent crime and as it is logically impossible to attempt an unintended result, prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter."

Id. at 56, 810 S.E.2d at 22-23 (alteration by court) (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156 (2016)).[5]

"Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence . . . of the intent to commit the crime when intent or state of mind is in issue." *State v. Sweat*, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (omission by court) (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)). "State of mind is an issue any time malice or willfulness is an element of the crime." *Id.* at 124-25, 606 S.E.2d at 512 (quoting Danny R. Collins, *South Carolina Evidence* 319 (2d ed. 2000)).

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[5] The lesser included offenses charged in this case were also attempt crimes. *See* S.C. Code Ann. § 16-3-600(C)(1) (2015) ("A person commits the offense of assault and battery in the first degree if the person unlawfully: . . . (b) offers or attempts to injure another person with the present ability to do so . . . ."); S.C. Code Ann. § 16-3-600(D)(1) (2015) ("A person commits the offense of assault and battery in the second degree if the person . . . offers or attempts to injure another person with the present ability to do so . . . ."); S.C. Code Ann. § 16-3-600(E)(1) (2015) "(A person commits the offense of assault and battery in the third degree if the person . . . offers or attempts to injure another person with the present ability to do so."). Therefore, they also required specific intent. *See State v. McGowan*, 430 S.C. 373, 380, 845 S.E.2d 503, 506 (Ct. App. 2020) (holding for the attempt alternative of the statutory offense of assault and battery in the first degree, our case law provides "[t]o prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent" (quoting *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011))).

In *United States v. Hammond*, 642 F.2d 248, 249-50 (8th Cir. 1981), the Eighth Circuit Court of Appeals found a "prosecutor's statement of the law was misleading" when "[i]t suggested that motive had no relevance to the issues in this case, when in fact motive may have been very relevant to a determination of whether [the defendant] knowingly committed the acts charged in the indictment and purposely intended to violate the law by so doing." Additionally, the Eighth Circuit found "somewhat confusing" the following jury instruction by the trial court:

> I advise you that intent and motive should never be confused. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done. Personal advancement and financial gain are two recognized motives for much of human conduct. These laudable motives or others may prompt one person to do voluntary acts of good, and others to do voluntary acts of crime.
>
> Good motive alone is never a defense where the act done or admitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of the state of mind or intent of the defendant.

Id. at 250. However, the Eighth Circuit ultimately affirmed the trial court, finding that when the instructions were read together with earlier portions of the charge, they correctly stated the law and sufficiently presented that element of the offenses to the jury. *Id.* at 250-51. It noted that although the trial court asked for any misstatements or errors and objections to any instructions it had given or had failed to give, the defendant did not object or request additional instructions and had earlier endorsed most of the instructions. *Id.*

In the present case, the trial court erred in the definition of intent it provided the jury. The State contended at trial because motive was not an element it had to prove, charging the last sentence of the definition would not be prejudicial to Perry. The State argued, "It says motive is immaterial, which we think motive is immaterial under the attempted murder statute . . . ." Because motive was not

material, the mention of it in the definition of intent could have confused the jury. *See Washington*, 338 S.C. at 400, 526 S.E.2d at 713 ("Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error."); *see also Hicks*, 330 S.C. at 218, 499 S.E.2d at 215 ("The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean."). The jury could have found the sentence unclear when it had asked for the definition of intent. Because motive had not been mentioned during the trial, the jury could have been confused by the definition.

The trial court only referenced intent in the original jury instructions when describing the offense of attempted murder, defining the offense as when a "person who with intent to kill attempts to kill another person with malice aforethought, either express or implied."[6] The trial court repeated this same statement when the jury asked to be recharged on the offenses. In light of these limited statements about intent, we cannot say the trial court's later definition of intent in response to the jury's question was not misleading. *See Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251 ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions [that] may be misleading do not constitute reversible error."); *see also Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (providing that in reviewing jury charges, a charge is correct if when read as a whole, it adequately explains the law and contains the correct definition); *id.* ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 463)).

Further, because the definition of intent was given in response to the jury's question, it was unduly emphasized as well, instead of just being part of the original instructions given. *See Blassingame*, 271 S.C. at 46-47, 244 S.E.2d at 529-30 (noting when a jury submits a question to the trial court following a jury charge, "[i]t is reasonable to assume" the jury is "focus[ing] critical attention" on the specific question asked and the information relayed by the trial court to the jury is given "special consideration"). Additionally, because attempted murder and the lesser included offenses are all specific intent crimes, the definition of intent could have been confusing for the jury because only specific intent was applicable here. Therefore, the trial court erred in its response to the jury's question about intent. Accordingly, the trial court is

[6] Perry did not object to this charge nor request a *King* specific intent charge.

REVERSED AND REMANDED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Matthew Carter, Appellant.

Appellate Case No. 2018-001032

Appeal From Lancaster County
Brian M. Gibbons, Circuit Court Judge
Steven H. John, Circuit Court Judge

Opinion No. 5817
Submitted December 1, 2020 – Filed April 21, 2021

AFFIRMED

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

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, both of Columbia, and Solicitor Randy E. Newman, Jr., of Lancaster, all for Respondent.

HEWITT, J.: David Matthew Carter appeals his convictions for three counts of criminal sexual conduct with a minor in the first degree. Carter argues the trial court erred in granting the State's request for the minor Victim—his twelve-year-old stepdaughter—to testify outside of his presence.

Carter contends Victim was not "very young" within the meaning of a victim's rights and protection statute; S.C. Code Ann. § 16-3-1550(E) (2015). He also argues that Victim did not claim she would be completely unable to testify with Carter in the courtroom, that testimony about Victim's post-traumatic stress disorder was inconsistent, and that the circumstances simply did not justify abridging the preference for face-to-face confrontation. The circuit court's decision was detailed, well-reasoned, and plainly not an abuse of discretion. We affirm.

FACTS

As noted above, Carter is Victim's stepfather. Victim learned about sexual abuse in the fourth grade when a teacher read her class a book titled "Not in Room 204." A few months later, Victim informed her mother of the purported abuse.

Victim had just turned twelve at the time of trial but said Carter began abusing her when she was around five years old. The alleged abuse normally occurred at home behind Carter's locked bedroom door while Victim's siblings were in their rooms and her mother was at the store. Victim explained that after each assault, Carter threatened to whip her if she told anyone and made Victim "feel like it was [her] fault that he was doing all this to [her]."

Two different judges addressed the State's request that Victim not be in the same room with Carter when she testified. After a hearing the month before trial, Judge Gibbons found that "the emotional distress suffered by . . . [V]ictim . . . is more than mere nervousness or excitement or some reluctance to testify. It would be traumatic." He also found that Victim "testifying in the same room as [Carter] would impede [Victim's] ability to fully and accurately testify in this case." Still, Judge Gibbons deferred to "the trial judge to conduct an in camera interview of [Victim] to see and hear testimony if [the trial judge] so wishes as the gate keeper of the trial."

Judge John heard this same issue when the trial started. In that hearing, Victim's counselor testified that Victim suffered from post-traumatic stress disorder (PTSD). The counselor detailed Victim was afraid of Carter and did not like to talk about him. The counselor described Victim as crawling into a shell and said he had even seen Victim hide behind her mother at the mention of Carter's name. The counselor believed if Victim were forced to testify with Carter in the courtroom, "she [would] freeze and not be able to be open and upfront with what she needs to say." The counselor stated he rarely recommended a victim testify outside a defendant's

presence and estimated he had done so only three or four times over the course of seeing thousands of patients in his twenty-six year career.

The pre-trial proceedings briefly adjourned following the counselor's testimony. The trial court did this so the counselor could meet with Victim and determine whether the counselor's opinion remained current. The counselor re-administered a PTSD evaluation during the break. Victim's score was below the "cutoff score" for a positive PTSD diagnosis, but the counselor explained he was convinced Victim had PTSD and that Victim still experienced significant symptoms.

The trial court also heard directly from Victim and asked her:

> Q: All right. Now, I know it may be a tough question; but if David Carter were sitting at that table over there, could you answer any of the questions?
>
> A: One or two.
>
> Q: Okay. And what do you think would happen after that?
>
> A: I'd probably freeze up and have a meltdown.

Victim's mother gave similar testimony, saying she believed Victim would "shut down" if Victim had to testify in front of Carter.

In announcing its ruling, the trial court found Victim would be traumatized by having to testify in front of Carter. The court held that "not only would her testimony be hindered, but based upon the testimony of [Counselor, Mother, and Victim,] she would . . . freeze up and not be able to answer the questions whatsoever."

The trial court ruled Victim would testify in the courtroom in an effort to place the jury in the best position to assess her credibility. Carter observed from the courtroom next door via a video monitor. One of Carter's attorneys remained in the main courtroom while Victim testified. Carter's other attorney was with him in the adjacent courtroom. The attorneys were able to communicate with each other via email.

Carter was ultimately convicted and sentenced to forty years' imprisonment. This appeal followed.

ISSUE

The sole issue is whether the trial court erred in employing special procedures for Victim's testimony. As already noted, Carter argues Victim was too old to qualify as "very young" under the relevant statute and alleges Victim did not claim she would be completely unable to testify with Carter in the courtroom. Carter also argues counselor's testimony was inconsistent and that overall, the testimony simply did not justify deviating from ordinary face-to-face confrontation.

ANALYSIS

The law favors face-to-face confrontation but requires the court to "treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate." § 16-3-1550(E). Precedent explains that a court evaluating whether to employ special procedures to protect a child witness must make:

> a case-specific determination of the need for [special procedures]. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and hear the child, should have counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

State v. Murrell, 302 S.C. 77, 80–81, 393 S.E.2d 919, 921 (1990) (footnote omitted).

"A trial court's decision to allow videotaped or closed-circuit testimony is reversible 'only if it is shown that the trial judge abused his discretion in making such a decision[.]'" *State v. Bray*, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting *Murrell*, 302 S.C. at 82, 393 S.E.2d at 922). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

We respectfully reject Carter's argument that Victim's age prevented the court from employing any special procedures. The State has a compelling interest "in the physical and psychological well-being of child abuse victims" and may employ special procedures to protect child witnesses from the trauma of testifying if there is "an adequate showing of necessity." *Maryland v. Craig*, 497 U.S. 836, 853–55 (1990). The circuit court found the twelve-year-old Victim would be traumatized by having to face Carter when she testified and that she would basically freeze up and not be able to answer any questions whatsoever. Regardless of how one defines "very young," we think it is indisputable that the circumstance of protecting a child witness from trauma qualifies as a "special need."

We also respectfully disagree with Carter's argument that the court could not adopt special procedures unless Victim claimed she would be completely unable to testify with Carter in the court room. An "adequate showing of necessity" exists when the special procedure is needed to protect the child's welfare, when the child would be traumatized by the defendant's presence, and when the child's emotional distress caused by the defendant's presence is "more than mere nervousness or excitement or some reluctance to testify." *State v. Lewis*, 324 S.C. 539, 545, 478 S.E.2d 861, 864 (Ct. App. 1996) (quoting *Craig*, 497 U.S. at 856–57). The trial judge made precisely these findings and explicitly grounded them on testimony.

Carter argues Victim's counselor's testimony was inconsistent and specifically points to the counselor's admission that Victim's PTSD had improved while also standing by his diagnosis that Victim was still experiencing PTSD. This argument is foreclosed by the abuse of discretion standard. As already noted, that standard generally requires an error of law or a factual finding that lacks any evidentiary support. *See Pagan*, 369 S.C. at 208, 631 S.E.2d at 265. The counselor was firm in his overall opinion that Victim had PTSD and continued experiencing symptoms. It was within the trial judge's discretion to find Victim would be traumatized based on this testimony plus the testimony from Victim and her mother.

This same exact reasoning—the fact that it was within the judge's discretion to view the evidence in this record as making an "adequate showing of necessity"—controls Carter's argument that "the overall testimony here did not justify such an extreme measure" of denying face-to-face confrontation. We are not permitted to re-weigh the testimony. There is evidence supporting the judge's decision, and thus no abuse of discretion.

CONCLUSION

Based on the foregoing, Carter's convictions are

AFFIRMED. [1]

THOMAS and HILL, JJ., concur.

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