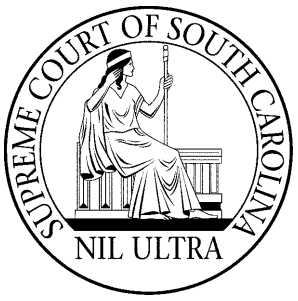

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 26, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent-Petitioner,

v.

Ontavious Derenta Plumer, Petitioner-Respondent.

Appellate Case No. 2021-000643

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenwood County
Edward W. Miller, Circuit Court Judge

Opinion No. 28152
Heard March 7, 2023 – Filed April 26, 2023

AFFIRMED AS MODIFIED

E. Charles Grose Jr., of The Grose Law Firm, LLC, of Greenwood, for Petitioner-Respondent.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent-Petitioner.

JUSTICE JAMES: Ontavious Derenta Plumer shot and wounded Oshamar Wells (Victim) during an aborted drug deal. Plumer was convicted of attempted murder and possession of a weapon during the commission of a violent crime. He was sentenced to life without parole (LWOP)[1] for attempted murder and to a concurrent five-year term on the weapon charge. The court of appeals affirmed Plumer's convictions but vacated the five-year weapon sentence. *State v. Plumer*, 433 S.C. 300, 857 S.E.2d 796 (Ct. App. 2021). We granted cross-petitions for certiorari and address two issues in this opinion. First, we address Plumer's contention that the court of appeals erred in affirming the trial court's refusal to instruct the jury on self-defense. Second, we address the State's contention that even though the five-year weapon sentence is prohibited by statute, that issue was not raised to the trial court and is thus not preserved for appellate review. We affirm the court of appeals as modified on both issues.

Background

The court of appeals' opinion presents the factual background of this case. The following basic facts are sufficient for our review. The shooting occurred during a drug deal in which Plumer and Jamel Brownlee planned to buy approximately $3,600 worth of marijuana from Victim. The deal was convened in the kitchen of Victim's cousin's house. Victim testified that instead of paying for the marijuana, Plumer pulled out a pistol in an apparent attempt to rob Victim. Victim testified that in response to Plumer displaying his pistol, Victim reached for a pistol he knew his mother kept in a cabinet within arm's reach of the table. Both men began shooting at one another, and both were wounded. Plumer was indicted for armed robbery, attempted murder, and possession of a firearm during the commission of a violent

[1] Under South Carolina Code section 16-3-29, a person convicted of attempted murder "must be imprisoned for not more than thirty years." (2015). However, attempted murder is classified as a "most serious offense." S.C. Code Ann. § 17-25-45(C)(1) (2014 & Supp. 2022). A person convicted of two "most serious offenses" must be sentenced to LWOP. S.C. Code Ann. § 17-25-45(A)(1)(a) (2014). This conviction was Plumer's second conviction for a most serious offense, a point which Plumer does not contest. The solicitor has complete discretion on whether to seek LWOP for a second most serious conviction. S.C. Code Ann. § 17-25-45(G) (2014). Notice of intent to seek LWOP must be given by the solicitor to the defendant and his attorney "not less than ten days before trial." S.C. Code Ann. § 17-25-45(H) (2014). Plumer does not contend improper notice was given.

crime. The jury acquitted Plumer of armed robbery but found him guilty of the latter two charges.

I. Self-Defense Instruction

Our holding in *State v. Williams*, 427 S.C. 246, 830 S.E.2d 904 (2019), is dispositive of the self-defense issue.[2] As we noted in *Williams*, one of the elements of self-defense is that the defendant must have been without fault in bringing on the difficulty. We held "intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction is 'calculated to produce a violent occasion[,]'" and a person who does so cannot be without fault in bringing on the difficulty. *Id.* at 251, 830 S.E.2d at 907. As was the case in *Williams*, Plumer unlawfully possessed the firearm he employed during this illegal drug transaction. Plumer argues there is evidence he was not aware the gathering in the kitchen was for an illegal drug deal. We disagree. The only reasonable inference to be derived from the record is that Plumer intentionally took a loaded firearm to what he knew would be an illegal drug transaction. It matters not who drew his weapon first or who fired first. For the reasons we expressed in *Williams*, Plumer was not entitled to a self-defense instruction.

II. Weapon Sentence

A defendant who is convicted of possession of a weapon during the commission of a violent crime faces a mandatory five-year sentence "in addition to the punishment provided for the principal crime." S.C. Code Ann. § 16-23-490(A) (2015); *see* S.C. Code Ann. § 16-1-60 (2015 & Supp. 2022) (defining attempted murder as a violent crime). However, the "five-year sentence does not apply in cases where . . . a life sentence without parole is imposed for the violent crime." S.C. Code Ann. § 16-23-490(A).

[2] Plumer was tried in 2015, and this case was argued before the court of appeals in 2020. The State submitted *Williams* as a supplemental citation to the court of appeals, but the court of appeals did not rely upon *Williams* in affirming Plumer's conviction.

The State concedes Plumer's five-year weapon sentence is an illegal sentence[3] because it is prohibited by subsection 16-23-490(A); however, the State contends the issue is not preserved for appellate review because Plumer failed to raise the illegality of the weapon sentence to the trial court. Plumer acknowledges he did not raise the issue to the trial court.

In *State v. Johnston*, we corrected an illegal sentence even though the issue was not raised to and ruled upon by the trial court. 333 S.C. 459, 463-64, 510 S.E.2d 423, 425 (1999). We noted the standard issue preservation rule but vacated the illegal sentence because (1) the State conceded the sentence imposed was excessive and (2) the defendant faced a "real threat" of remaining incarcerated beyond the legal sentence. *Id*.

On occasion, we encounter illegal sentences to which no objection was taken in the trial court. In such cases, it is inefficient and a waste of judicial resources to delay the inevitable by requiring the appellant to file a post-conviction relief action or petition for a writ of habeas corpus. Therefore, we modify *Johnston* and hold that when a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence on direct appeal or remand the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence. However, we do not agree with the court of appeals' conclusion that the correction of the sentence is a function of "criminal equity." *Plumer*, 433 S.C. at 315, 857 S.E.2d at 803. "The general rule is well settled that equity has no criminal jurisdiction . . . ." *State ex rel. McLeod v. Holcomb*, 245 S.C. 63, 67, 138 S.E.2d 707, 708 (1964); *see Ezell v. Ritholz*, 188 S.C. 39, 46-47, 198 S.E. 419, 422 (1938). With that modification, we affirm the court of appeals on this issue.

Conclusion

Williams forbids a self-defense instruction under the facts of this case. We therefore affirm as modified the court of appeals' decision on that issue. We affirm the court of appeals as modified with regard to the illegal five-year weapon sentence in accordance with our holding today.

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[3] For purposes of this case, we define an "illegal sentence" as a sentence in excess of that permitted by law, even if there is no real threat of incarceration beyond the legal sentence.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE, FEW and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Town of Sullivan's Island, Petitioner,

v.

Michael Murray, Respondent.

Appellate Case No. 2021-001260

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 28153
Submitted April 3, 2023 – Filed April 26, 2023

AFFIRMED IN RESULT

John Joseph Dodds, III, of The Law Firm of Cisa & Dodds, LLP, of Mt. Pleasant; and George Trenholm Walker and John Phillips Linton, Jr., of Walker Gressette Freeman & Linton, LLC, of Charleston, all for Petitioner.

Mary Duncan Shahid, of Nexsen Pruet, LLC, and Stephen Peterson Groves, Sr., of Butler Snow, LLP, both of Charleston, for Respondent.

PER CURIAM: Respondent was convicted in a municipal court bench trial of violating Sullivan's Island Town Code sections 21-75 and 5-10 (the ordinances). The municipal court imposed a $1040 fine as punishment. On direct appeal, the circuit court affirmed the conviction. The court of appeals reversed, holding the ordinances were unconstitutionally vague and failed to provide Respondent with fair notice his actions would result in a criminal violation. In addition, the court held the Town of Sullivan's Island failed to present evidence the dock built by Respondent interfered with navigation or extended into the channel in violation of the ordinance. *Town of Sullivan's Island v. Murray*, 435 S.C. 22, 864 S.E.2d 909 (Ct. App. 2021).

Because we agree with the court of appeals that there was no evidence Respondent violated any provision of the ordinance, we grant the petition for a writ of certiorari to the court of appeals, dispense with briefing, and affirm the result of the court of appeals' opinion reversing Respondent's conviction.

AFFIRMED IN RESULT.

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

The Supreme Court of South Carolina

Re: Amendment to Rule 1.15(e), Rule 407, South Carolina Appellate Court Rules

Appellate Case No. 2022-000516

ORDER

The South Carolina Bar proposes amending Rule 1.15(e) of the Rules of Professional Conduct (RPC), which are found in Rule 407 of the South Carolina Appellate Court Rules (SCACR). The amendments allow lawyers to resolve a competing claim to property in the possession of a lawyer if the claim is between a client and a third party and disbursement to the client is not otherwise prohibited by law or court order. The Bar also proposes to amend Comment 4 to the rule.

Pursuant to Article V, § 4 of the South Carolina Constitution, we adopt the Bar's proposed amendments with minor changes. We further amend various other portions of the rule to refer to rule provisions as "paragraphs," rather than "Subsections," for consistency, since all other rules within the RPC refer to rule provisions as paragraphs.[1] The amendments to paragraph (e) and Comment 4 are set forth in the attachment. These amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

[1] These amended references are contained in paragraph (f)(2) and Comments 7 and 8 of Rule 1.15.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
April 26, 2023

Rule 1.15(e), RPC, Rule 407, SCACR, is amended to provide:

(e)(1) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute. Disputed property shall be kept separate until one of the following occurs:

(i) the parties reach an agreement on the distribution of the property;

(ii) a court order resolves the competing claims; or

(iii) distribution is allowed under paragraph (e)(2) of this Rule.

(2) Where competing claims to property in the possession of a lawyer are between a client and a third party and disbursement to the client is not otherwise prohibited by law or court order, the lawyer may provide written notice to the third party of the lawyer's intent to distribute the property to the client, as follows:

(i) The notice must inform the third party that the lawyer may distribute the property to the client unless the third party files a civil action and provides the lawyer with written notice and a copy of the filed action within 90 calendar days of the date of service of the lawyer's notice. The lawyer's notice shall be served on the third party in the manner provided under Rules 4(c) and (d) of the South Carolina Rules of Civil Procedure.

(ii) If the lawyer does not receive written notice of the filing of a civil action from the third party within the 90-day period, the lawyer may distribute the property to the client after consulting with the client regarding the advantages and disadvantages of disbursement of the disputed property and obtaining the client's informed consent to the distribution, confirmed in writing.

(iii) If the lawyer is notified in writing of a civil action filed within the 90-day period, the lawyer shall continue to hold the property in accordance with paragraph (e)(1) of this Rule unless and until the parties reach an agreement on distribution of the property or a court resolves the matter.

(iv) Nothing in this rule is intended to alter a third party's substantive rights.

Comment 4 to Rule 1.15, RPC, Rule 407, SCACR, is amended to provide:

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim has become a matured legal or equitable claim under applicable law and unless distribution is otherwise allowed under this rule, the lawyer must refuse to surrender the property to the client until the claims are resolved. Except with regard to the procedures set out in paragraph (e)(2) of this Rule, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. Alternatively, when a lawyer reasonably believes there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jack's Custom Cycles, Inc., d/b/a Jack's Motor Sports,
Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appellate Case No. 2019-001831

Appeal From The Administrative Law Court
Ralph King Anderson, III, Chief Administrative Law Judge

Opinion No. 5970
Heard November 16, 2022 – Filed February 15, 2023
Withdrawn, Substituted, Refiled April 26, 2023

AFFIRMED

Nicole Martin Wooten, Marcus Dawson Antley, III, and Jason Phillip Luther, all of the South Carolina Department of Revenue, of Columbia, for Appellant.

John Aaron Ecton and Margaret Weatherly Dukes, both of Ecton Law Firm, P.A., of Irmo, for Respondent.

THOMAS, J.: The South Carolina Department of Revenue (SCDOR) appeals a decision by the Administrative Law Court (ALC) that held retail sales of all-terrain vehicles (ATVs) and side-by-side vehicles or utility task vehicles (UTVs) are

entitled to the South Carolina partial sales tax exemption found in section 12-36-2110(A) of the South Carolina Code (Supp. 2022). SCDOR argues the ALC erred in (1) broadly construing the partial tax exemption statute by concluding ATVs and UTVs are motor vehicles for the purposes of section 12-36-2110(A); (2) failing to give deference to SCDOR's long-standing interpretation of the statute that it is authorized to administer; and (3) considering Chandler's Law to ascertain the intent of the South Carolina Legislature regarding the partial tax exemption statute. We affirm.

FACTS

Jack's Custom Cycles, Inc. d/b/a Jack's Motor Sports (Jack's) is a retailer in South Carolina in the business of selling ATVs[1] and UTVs.[2] As it is a business that sells tangible personal property, the sales of ATVs and UTVs are subject to the full 7% sales tax unless the transaction is expressly exempted as a matter of law.[3] Jack's collected and remitted sales tax up to $300 on the retail purchase price of each ATV and UTV because Jack's considered them to be "motor vehicles" for the purpose of section 12-36-2110(A).[4] However, SCDOR issued a final agency decision on August 13, 2018, finding the retail sales of ATVs and UTVs at Jack's

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[1] The parties stipulated that ATVs are defined as "three-and-four wheeled vehicles, generally characterized by large, low-pressure tire[s], a seat designed to be straddled by the operator and handlebars for steering. ATVs are intended for off-road use. ATVs are capable of being driven forward and in reverse. ATVs also have headlamps and brake lights."

[2] The parties stipulated that UTVs are defined as "four-wheeled vehicles with a steering wheel and foot pedals, wherein the operator sits in a bench styled seat or single seat with seat belts and occupants have side-by-side forward facing seats. UTVs can have single front row or front and back row seating capacity. UTVs are capable of being driven forward and in reverse. UTVs also have [headlamps] and brake lights."

[3] The State's sales tax rate is 6%. *See* S.C. Code Ann. §§ 12-36-910(A) (2014) and 12-36-1110 (2014). Jack's business is located in Lexington County, and Lexington County imposes an additional 1% school district tax on sales at retail. *See* S.C. Code Ann. § 4-10-420 (2021) (providing authority to impose county sales and use taxes for school districts).

[4] Section 12-36-2110(A) provides for a maximum tax of $300 for the sales and leases of motor vehicles and motorcycles.

were not entitled to the partial sales tax exemption found in section 12-36-2110(A). Thus, SCDOR assessed Jack's $177,642.59 in sales and use tax, penalties, and interest as of September 11, 2018, for the sales and use tax periods of August 31, 2013 through July 31, 2016 (Audit Period).[5] Jack's requested a contested case hearing with the ALC to challenge the agency's decision.

On March 22, 2019, SCDOR filed a motion for summary judgment, which the ALC denied in part and granted in part in an order dated May 15, 2019. The ALC granted SCDOR's motion with respect to the tax assessed on utility trailers but denied the motion as to the ATVs and UTVs. SCDOR filed a premature motion for reconsideration on May 28, 2019, and the court considered it as a part of its decision on the merits.

The ALC held a hearing on July 18, 2019, and issued its final order on September 13, 2019, reversing SCDOR's assessment of Jack's retail sales of ATVs and UTVs during the Audit Period. SCDOR filed a motion to alter or amend pursuant to Rule 59(e), SCRCP and ALC Rule 29(D). On October 2, 2019, the ALC issued an amended final order, reflecting changes made to the initial order upon consideration of SCDOR's motion to alter or amend. In the amended order, the ALC deleted certain findings of fact from the initial order and ruled on two arguments that were presented by SCDOR during the hearing but not ruled upon in the initial order. This appeal followed.

STANDARD OF REVIEW

"Upon exhaustion of his prehearing remedy, a taxpayer may seek relief from the department's determination by requesting a contested case hearing before the Administrative Law Court." S.C. Code Ann. § 12-60-460 (2014). "In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). S.C. Code Ann. § l-23-610(B) (Supp. 2022) provides the applicable standard:

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[5] SCDOR assessed the full 7% sales tax on the retail sales of ATVs and UTVs sold during the Audit Period because it concluded those sales were not entitled to the partial exemption under section 12-36-2110(A).

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676. "The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008).

LAW/ANALYSIS

I. Motor Vehicle

SCDOR argues the ALC erred in broadly construing a partial tax exemption statute by concluding ATVs and UTVs are motor vehicles for the purposes of section 12-36-2110(A). We disagree.

"If a statute is ambiguous, the courts must construe its terms." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 343, 762 S.E.2d 561, 567 (2014). The "interpretation of a statute is a question of law for the

[c]ourt." *Hopper v. Terry Hunt Const.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009). This court will correct the decision of the ALC if it is affected by an error of law or if "substantial evidence does not support the findings of fact." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012); *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 741 (Ct. App. 2014). "The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (quoting *John D. Hollingsworth on Wheels, Inc. v. Greenville Cnty. Treasurer*, 276 S.C. 314, 317, 278 S.E.2d 340, 342 (1981)). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002).

Section 12-36-2110(A)(1) (Supp. 2022) provides a maximum tax of $300 is imposed on the sale or lease of the following specific items:

> (a) aircraft, including unassembled aircraft which is to be assembled by the purchaser, but not items to be added to the unassembled aircraft;
> (b) motor vehicle;
> (c) motorcycle;
> (d) boat and watercraft motor;
> (e) trailer or semitrailer, pulled by a truck tractor, as defined in Section 56-3-20, and horse trailers, but not including house trailers or campers as defined in Section 56-3-710 or a fire safety education trailer;
> (f) recreational vehicle, including tent campers, travel trailer, park model, park trailer, motor home, and fifth wheel; or
> (g) self-propelled light construction equipment with compatible attachments limited to a maximum of one hundred sixty net engine horsepower.

S.C. Code Ann. § 12-36-2110(A)(1) (Supp. 2022). The term "motor vehicle" is undefined in Title 12.

SCDOR argues the definition of "motor vehicle" in section 56-3-20(2), of Motor Vehicle Registration and Licensing, should be used to clarify its meaning under section 12-36-2110(A). However, this definition was removed in 2018 by 2017 Act No. 89 (H.3247), § 12.[6] SCDOR further contends the definition "vehicle" in section 56-3-20(1) is necessary to determine the meaning of "motor vehicle." However, this definition was also removed in 2018. SCDOR also argues section 56-15-10(a) (Supp. 2021), titled "Regulation of Manufacturers, Distributors, and Dealers," defines "motor vehicle" as "any motor driven vehicle required to be registered pursuant to Section 56-3-110." Section 56-3-110 (2018) provides that "[e]very motor vehicle . . . driven, operated or moved upon a highway in this State shall be registered and licensed" and "[i]t shall be a misdemeanor for any person to drive, operate or move upon a highway . . . any such vehicle which is not registered and licensed." SCDOR asserts ATVs and UTVs are not motor vehicles and cannot be registered or licensed; thus, they do not meet the requirements of section 56-3-110 and do not satisfy the definition of motor vehicle as stated in section 56-15-10(a). As a result, SCDOR asserts Jack's is not entitled to the partial tax exemption provided for in section 12-36-2110(A) because ATVs and UTVs do not meet the statutory definition of "motor vehicle."

The ALC noted that although SCDOR contends ATVs and UTVs are not motor vehicles, ATVs and UTVs can reach speeds of between 65-110 miles per hour, and Jack's sold ATVs and UTVs to customers who intended to operate them on public highways and have done so. The ALC found that pursuant to section 12-36-2110, the maximum tax applies to both motor vehicles and motorcycles; however, SCDOR did not distinguish between its application of the maximum tax to off-road motorcycles and those driven on the public highways. Therefore, the ALC noted SCDOR's interpretation of the maximum tax statute attaches an additional requirement to motor vehicles that does not exist for motorcycles. The ALC also found SCDOR's reliance on the definition of "motor vehicle" in Title 56 was problematic because it governs motor vehicle registration and licensing of vehicles used on public highways, and off-road vehicles, like ATVs and UTVs, are not

[6] We note the definitions for "motor vehicle" and "vehicle" still remain in section 56-1-10(7) and (28) (Supp. 2022); however, these definitions are not specific to vehicle licensing.

licensed to operate on highways.[7] Moreover, the court wrote that restricting the regulation of "motor vehicles" under Title 56 to a subset of vehicles that are driven on the public highways suggests there are other "motor vehicles" that are not driven on the public highways. The ALC noted that in section 12-36-2110(A)(1)(e), the legislature specifically instructs SCDOR to consult the definitions in Title 56 to determine whether a "house trailer" or a "camper" is entitled the maximum tax, but it does not direct SCDOR to Title 56 for the definition of "motor vehicle." The court noted if the legislature had intended for the definitions of Title 56 to be used to determine what a motor vehicle is under section 12-36-110(A)(1)(b), then presumably the legislature would have referenced the definitions found in Title 56, as it did in section 12-36-2110(A)(1)(e). Further, the court noted the All-Terrain Vehicle Safety Act, also known as Chandler's Law, defines an ATV as "a motorized vehicle designed primarily for off-road travel on low-pressure tires which has three or more wheels and handle bars for steering, but does not include lawn tractors, battery-powered children's toys, or a vehicle that is required to be licensed or titled for highway use." S.C. Code Ann. § 50-26-20 (Supp. 2022). Other parts of Title 56 also recognize ATVs as motorized vehicles, thus supporting a broader definition of motor vehicle than what SCDOR argues. Specifically, section 56-1-10(20) defines an ATV as "a motor vehicle measuring fifty inches or less in width, designed to travel on three or more wheels and designed primarily for off-road recreational use, but not including farm tractors or equipment, construction equipment, forestry vehicles, or lawn and grounds maintenance vehicles." S.C. Code Ann. § 56-1-10(20) (Supp. 2022). Finally, Title 39 defines ATVs as "three-and-four-wheeled motorized vehicles, generally characterized by large, low-pressure tires, a seat designed to be straddled by the operator and handlebars for steering, which are intended for off-road use by an individual rider on various types of nonpaved terrain." S.C. Code Ann. § 39-6-20(7)(d) (2023). Therefore, the ALC found SCDOR erred when it failed to consider all the statutes that clarify the legislature's viewpoint regarding ATVs, and it held ATVs and UTVs are motor vehicles for the purpose of the maximum tax under section 12-36-2110(A).

"Motor vehicle" was defined in *Gunn v. Burnette*, 236 S.C. 496, 499, 115 S.E.2d 171, 172 (1960):

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[7] We again note the definition of "motor vehicle" was removed from section 56-3-20(2) in 2018.

> The word 'vehicle' is derived from the Latin word 'vehere,' meaning to carry, and Webster defines the noun as that in or on which a person or thing is or may be carried from one place to another, etc. In 60 C.J.S. Motor Vehicles § 1, p. 109 a motor vehicle is defined as one which is operated by a power developed within itself and used for the purpose of carrying passengers or materials.

See 60 C.J.S. *Motor Vehicles* § 1, 118-119 (2012) ("[T]he term "motor vehicle" ordinarily means a vehicle which is self-propelled and is designed primarily for travel on the public highways even though the vehicle is not one which may legally be self-propelled or operated upon a highway. . . . Generally, a motor vehicle is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials, and it is commonly defined as including all vehicles propelled by any power other than muscular power except traction engines, road rollers, and such motor vehicles as run only upon rails."); *see also White v. S.C. Dep't of Parks, Recreation & Tourism*, 271 S.C. 91, 94, 245 S.E.2d 125, 127 (1978) (determining under the Tort Claims Act that a tram, a self-propelled vehicle designed to carry passengers that did not operate on highways, comes within the definition of a motor vehicle as defined in *Gunn*); *but see Anderson v. State Farm Mut. Auto. Ins. Co.*, 314 S.C. 140, 143, 442 S.E.2d 179, 181 (1994) (finding for insurance purposes that a farm tractor does not come under the Motor Vehicle Financial Responsibility Act's plain and unambiguous definition of a motor vehicle because it is not "designed for use upon a highway" although it may be incidentally used on a highway). Merriam Webster's Collegiate Dictionary defines a motor vehicle as an "automotive vehicle not operated on rails." *Merriam Webster's Collegiate Dictionary* 760 (10th ed. 1993). The American Heritage College Dictionary defines a motor vehicle as a "self-propelled wheeled conveyance, such as a car or truck, that does not run on rails." *Am. Heritage Coll. Dictionary* 891 (3rd ed. 1993); *see Lee*, 352 S.C. at 91-92, 572 S.E.2d at 303 ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.").

Because Title 12 does not define "motor vehicle," the ALC properly determined it must employ the rules of statutory construction to ascertain and effectuate the intent of the legislature to discern if the maximum tax statute under section 12-36-2110(A) is applicable to ATVs and UTVs. *See Ferguson Fire*, 409 S.C. at 343,

762 S.E.2d at 567 ("If a statute is ambiguous, the courts must construe its terms."); *Hawkins*, 353 S.C. at 39, 577 S.E.2d at 207 ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating the words of a statute must be given their "plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand the statute's operation"). A tax exemption statute is strictly construed against the taxpayer claiming the exemption. *TNS Mills, Inc.*, 331 S.C. at 620, 503 S.E.2d at 476. "This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor." *CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (quoting *Se. Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981)). "It does not mean that we will search for an interpretation in [SCDOR]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* "It is '[o]nly when the literal application of a statute produces an absurd result will we consider a different meaning.'" *Id.* at 75, 716 S.E.2d at 881 (quoting *Se. Kusan, Inc.*, 276 S.C. at 489-90, 280 S.E.2d at 58). The clear language of section 12-36-2110(A) does not restrict or condition the exemption to motor vehicles that are used on highways. The dictionary definitions of a motor vehicle are an "automotive vehicle not operated on rails" and a "self-propelled wheeled conveyance, such as a car or truck, that does not run on rails." ATVs and UTVs are motorized, self-propelled, wheeled, and do not run on rails. Further, SCDOR directs us to Title 56, which in section 56-1-10(20) defines an ATV as "a motor vehicle measuring fifty inches or less in width, designed to travel on three or more wheels and designed primarily for off-road recreational use . . . ." Therefore, we find the decision of the ALC that ATVs and UTVs are motor vehicles under section 12-36-2110(A) is supported by substantial evidence. *See Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676 ("The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.").

II. Statutory Interpretation

SCDOR argues the ALC erred in failing to give deference to SCDOR's long-standing interpretation of the statute that it is authorized to administer. We disagree.

"An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose." *SGM-Moonglo, Inc.*, 378 S.C. at 295, 662 S.E.2d at 488. Questions of law are reviewed de novo; however, this court generally gives deference to an agency's interpretation of its own statutes and regulations. *See Blue Moon of Newberry*, 397 S.C. at 260-61, 725 S.E.2d at 483 (stating the construction of a regulation is a question of law that is reviewed de novo); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (recognizing this court "generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation"). "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 (Ct. App. 2014) (quoting *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (alteration by court)); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts . . . will defer to the agency's interpretation absent compelling reasons. . . ."). While this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain language of the statute is contrary to the agency's interpretation. *Brown*, 354 S.C. at 440, 581 S.E.2d at 838. "Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 (quoting *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). Further, although the "construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons," an administrative construction "affords no basis for the perpetuation of a patently erroneous application of the statute." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575-76 (2010) (quoting *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) and *Monroe v. Livingston*, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968)). Courts will reject an agency's interpretation if it conflicts with the statute's plain language. *CFRE, LLC*, 395 S.C. at 77, 716 S.E.2d at 882.

In 2000, SCDOR issued an advisory opinion that "it is the department's opinion that sales of [ATVs] . . . as described in the facts, are not entitled to the maximum tax under Code Section 12-36-2110." S.C. Rev. Advisory Bulletin #00-3, 1. The

opinion defined ATVs as "vehicles with three or more wheels designed for off road use. These vehicles can be titled but cannot be licensed for use on the highways of South Carolina." In 2018, SCDOR issued a ruling that the maximum tax does not apply to the sale or lease of "[ATVs], legend race cars, golf carts and any other items not meeting the definition of a motor vehicle." S.C. Rev. Ruling #18-1, 7.

SCDOR argues the ALC erred in not giving deference to its interpretation because Title 12 defines motor vehicle three times as a vehicle that is registered for highway use.[8] It also argues the ALC relied upon an incomplete definition of "motor vehicle" from the dictionary, and the complete definition supports SCDOR's position that "motor vehicle" is a vehicle that is used upon a highway. SCDOR asserts the Department of Motor Vehicles (SCDMV) is authorized to administer Title 56, and SCDMV issued several publications informing licensed dealers that retail sales of ATVs do not qualify for the partial sales tax exemption.[9] Further, SCDOR states the legislature similarly defined "motor vehicle" in Title 12 and Title 56; thus, these statutes are in pari materia and should be construed together. *See Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014) ("[S]tatutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). SCDOR asserts that under the ALC's interpretation, a lawn mower or battery-powered children's toy would be considered a "motor vehicle" because each are self-propelled and not operated on rails, and courts will not construe a statute in a way that leads to an absurd result.

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[8] Section 12-28-110(41) (2014 & Supp. 2022), "Motor Fuels Subject to User Fees," provides a "motor vehicle" is "a vehicle that is propelled by an internal combustion engine or motor and is designed to permit the vehicle's mobile use on highways," but "does not include: . . . (c) machinery designed principally for off-road use." Section 12-54-122(A)(3) (2014), "Uniform Method of Collection and Enforcement of Taxes Levied and Assessed by the South Carolina Department of Revenue," states a "motor vehicle" is "a self-propelled vehicle which is registered for highway use under the laws of any state or foreign country." Sections 12-37-2810(B), (C) and (D) (Supp. 2022), "Assessment of Property Taxes," provide motor vehicles as being used for the transportation of property on a highway.

[9] In SCDMV's "Dealer Connection" publications from August 2017 and February 2018, dealers were informed that ATVs purchased prior to November 19, 2018, were not subject to the maximum sales tax of $300 and the dealers must remit sales tax to SCDOR.

See Tempel v. S.C. State Election Comm'n, 400 S.C. 374, 378, 735 S.E.2d 453, 455 (2012) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."); *Sonoco Prods. Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."). Finally, it argues case law confirms SCDOR's consistent interpretation of section 12-36-2110(A) is entitled to "great weight" because the legislature has not amended the statute since SCDOR issued guidance to the public in 2000. *See Marchant v. Hamilton*, 279 S.C. 497, 500, 309 S.E.2d 781, 783 (Ct. App. 1983) ("Administrative interpretations of statutes, consistently followed by the agencies charged with their administration and not expressly changed by Congress, are entitled to great weight."). SCDOR states the legislature could have amended the maximum tax statute when it enacted Title 50, Chapter 26 (the All-Terrain Motor Vehicle Safety Act, referred to as "Chandler's Law") in 2011 if it intended to make retail sales of ATVs subject to the maximum sales tax.

The ALC found SCDOR's interpretation was not entitled to deference for several reasons. First, SCDOR argued its resort to Title 56 for a definition of "motor vehicle" was no different from SCDOR turning to a dictionary for the definition; however, the ALC held SCDOR cannot create a flawed definition that is unsupported by the dictionary and apply that definition to its interpretation of the statute and then claim it is entitled to deference. Second, although SCDOR is entitled to deference to its interpretation of statutes in Title 12 because it administers the statutes, it is not permitted to bootstrap its own interpretation of Title 56 to its interpretation of Title 12 because Title 56 is administered by SCDMV. Further, SCDOR ignores the dictionary definition of "motor vehicle" and the plain language defining ATVs as "motor vehicles" in Chandler's Law, both of which are contrary to its interpretation. The ALC notes SCDOR is not insulated from a finding that its interpretation is erroneous just because its interpretation is long-standing.

Because we already found the ALC correctly determined ATVs and UTVs are motor vehicles under section 12-36-2110(A), we also find the ALC correctly found SCDOR's interpretation of section 12-36-2110(A) was not entitled to deference. *See Brown*, 354 S.C. at 440, 581 S.E.2d at 838 (holding that while this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain language of the statute is contrary to the agency's

interpretation); *Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 ("Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." (quoting *Epstein*, 393 S.C. at 285, 711 S.E.2d at 917)); *CFRE, LLC*, 395 S.C. at 77, 716 S.E.2d at 882 (stating courts will reject an agency's interpretation if it conflicts with the statute's plain language). We also find the ALC correctly found SCDOR is not entitled to deference of its interpretation of Title 56, which is administered by SCDMV, not SCDOR. *See Brown*, 354 S.C. at 440, 581 S.E.2d at 838 (recognizing this court generally gives deference to an administrative agency's interpretation of an applicable statute). Further, SCDOR's arguments that the ALC erred in not giving deference to its interpretation because Title 12 defines motor vehicle three times as a vehicle that is registered for highway use and the ALC relied upon an incomplete definition of "motor vehicle" from the dictionary were not raised to or ruled upon by the ALC; thus, they are not preserved for our review. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

III. Chandler's Law

SCDOR argues the ALC erred in considering Chandler's Law to ascertain the intent of the South Carolina Legislature regarding a partial tax exemption statute. We already found the ALC did not err in finding ATVs and UTVs are motor vehicles under section 12-36-2110(A) because the substantial evidence supports its decision. Therefore, we need not reach this issue. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, the order of the ALC is

AFFIRMED.

WILLIAMS, C.J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BEI-BEACH, LLC, Plaintiff,

v.

Mashburn Christman, JV, Lend Lease (US) Construction, Inc., f/k/a Bovis Lend Lease, Inc., and McCrory Construction Company, LLC, Defendants,

v.

Mashburn Christman, JV, Third-Party Plaintiff,

v.

Wallcraft Construction, Inc.; Alpha Insulation & Waterproofing, Inc.; Baker Roofing, Inc.; Collins & Wright, Inc.; Liberty Mutual Insurance Company; Old Republic Surety Company; Hartford Fire Insurance Co.; Travelers Casualty and Surety Company of America; The Muhler Company, Inc., and Companion Property and Casualty Insurance Company, Third-Party Defendants,

Lend Lease (US) Construction, Inc. f/k/a Bovis Lend Lease, Inc., Third-Party Plaintiff,

v.

Spann Roofing & Sheet Metal, Inc.; Travelers Casualty and Surety Company of America; Strickland Waterproofing Company; Merchants Bonding Company; Everest Reinsurance Company; Wallcraft Constuction, Inc., Old Republic Insurance Company; Madison Construction Group, Inc., Worthington Integrated Building Systems; McDowell Commercial Construction,

LLC; Jollay Masonry; National Fire Insurance Company of Hartford; R.J. Kenney Associates, Inc.; Antunovich Associates; TG Construction, LLC; Luis Benegas d/b/a Luis Trim Work; Nora Del Carmen Laos, Nora Del Carmon Lagos d/b/a Luis Trim Work; and Ovation Custom Trim, LLC, Third-Party Defendants,

McCrory Construction Company, LLC, Third-Party Plaintiff,

v.

Collins & Wright; Baker Roofing; Glasstech Inc.; Palmetto State Roofing and Sheet Metal; Strickland Waterproofing; Maiday, Inc.; and Atlas Drywall & Acoustics, Inc., Third-Party Defendants,

Spann Roofing & Sheet Metal, Inc., Fourth-Party Plaintiff,

v.

Coastal Commercial Roofing Co., Inc., and Daniel Kniffen d/b/a East Coast Improvements, Fourth-Party Defendants.

Wallcraft Construction, Inc., Fourth-Party Plaintiff,

v.

Vienamin Petresku d/b/a BT Construction, LLC, Fourth-Party Defendant,

of which Lend Lease (US) Construction Inc., f/k/a Bovis Lend Lease, Inc. is the Appellant,

and

Antunovich Associates is the Respondent.

Appellate Case No. 2019-002001

Appeal From Horry County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5982
Heard November 15, 2022 – Filed April 26, 2023

AFFIRMED

Francis Heyward Grimball, of Richardson Plowden & Robinson, PA, of Mount Pleasant, and James Atkinson Bruorton, IV and Elizabeth Foy Nicholson, both of Rosen Hagood, LLC, of Charleston, all for Appellant.

Michael B.T. Wilkes, of Wilkes Atkinson & Joyner, LLC, of Spartanburg, and James Alexander Joyner, of Wilkes Atkinson & Joyner, LLC, of Charleston, both for Respondent.

MCDONALD, J.: In this construction defect litigation, Lend Lease (US) Construction, Inc. (Lend Lease) appeals the circuit court's grant of partial summary judgment to Antunovich Associates (Antunovich). Lend Lease argues the circuit court erred in (1) failing to recognize its independent cause of action for professional negligence against architect Antunovich; (2) failing to recognize the special relationship between an architect and contractor for purposes of Lend Lease's breach of warranty claim; and (3) limiting Lend Lease to a claim of equitable indemnity. We affirm.

Facts and Procedural History

In January 2011, Plaintiff BEI-Beach, LLC (BEI) purchased The Market Common, a 113-acre multi-use development in Myrtle Beach, from the developer, LUK-MBl, LLC (LUK). Lend Lease was the general contractor for Market Common buildings A6, A7, and A8; Antunovich, through its contract with LUK, was the architect for buildings A2, A3, A4, A5, A6, A7, and A8 (the A-Buildings). After BEI purchased Market Common, it discovered defects and deficiencies in the A-buildings.

In October 2015, BEI sued Lend Lease and two other general contractors, alleging various construction defects and building code violations. Lend Lease then filed a third-party complaint against Antunovich, Antunovich's principal, and several subcontractors, alleging design deficiencies and subcontractor errors. Lend Lease's third-party action against Antunovich included claims for contribution, professional negligence, equitable indemnity, and breach of warranty of plans and specifications.

With its third-party complaint, Lend Lease filed the affidavit of licensed engineer Richard H. Moore, who opined the vinyl windows Antunovich specified for buildings A6, A7, and A8 were inappropriate for the designated wind zone design pressure requirements for Market Common's location. In Moore's professional opinion, Antunovich breached "a design professional's standard of care" in the performance of its obligations to BEI and Lend Lease.

Antunovich moved for partial summary judgment as to Lend Lease's third-party claims for contribution, negligence, and breach of warranty. Following a hearing, the circuit court granted Antunovich's motion, finding Lend Lease's contribution claim was premature and Lend Lease's claims for negligence and breach of warranty were "merely disguised equitable indemnity claims" subject to dismissal under *Stoneledge at Lake Keowee Owners' Association, Inc. v. Clear View Construction, LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (*Stoneledge I*) and *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders Firstsource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (*Stoneledge II*).

In granting partial summary judgment, the circuit court rejected Lend Lease's argument that its negligence and breach of warranty claims alleged damages to

Lend Lease's business and business reputation independent of the claims BEI asserted against Lend Lease; the circuit court also rejected Lend Lease's argument that it suffered business reputation damages separate and distinct from the damages recoverable through its indemnity claim. The circuit court further found Lend Lease failed to present admissible evidence that it incurred any such business reputation damages.

Lend Lease filed a Rule 59(e), SCRCP motion as to its negligence and breach of warranty claims but did not seek reconsideration of the dismissal of its contribution claim. The circuit court denied the Rule 59(e) motion.

Standard of Review

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant summary judgment if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Stoneledge I*, 413 S.C. at 620, 776 S.E.2d at 429. "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Id.* "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Id.* (quoting *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Id.* (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)).

Law and Analysis

I. Negligence

Relying on *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995), Lend Lease argues the circuit court erred as a matter of law in failing to recognize a contractor's independent cause of action for professional negligence against an architect. We disagree.

In support of its negligence claims against Antunovich, Lend Lease asserted:

> The Plaintiff has alleged property damage resulting from alleged construction and design deficiencies that violate the applicable plans and specifications, applicable building codes, applicable manufacturer's instructions and generally recognized and accepted construction industry standards and good construction practices.
>
> . . . .
>
> Specifically as to the design professional services, [Antunovich's] actions as [they relate] to the performance of his professional obligations owed to the Owner and Contractor, constitute[ ] a breach of a design professional's standard of care and responsibilities as set forth in the Affidavit of Richard H. Moore, P.E. being filed along herewith.
>
> As a result of the Third-Party Defendants [sic] gross negligence and recklessness, Lend Lease has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.

In *Tommy L. Griffin Plumbing*, our supreme court explained that a "breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action." 320 S.C. at 54–55, 463 S.E.2d at 88. Often, this duty arises from a special relationship between the tortfeasor and the injured party. *See id*. at 55, 463 S.E.2d at 88 ("When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.").

For example, South Carolina courts have permitted negligence actions against lawyers, accountants, and engineers based on their professional duties owed to plaintiffs. *Id.* at 55, 463 S.E.2d at 89. Yet, *Tommy L. Griffin Plumbing* does not hold that a contractor owed such a duty may maintain tort claims against a design professional without having suffered direct damages to support its claims. *Id.* In *Tommy L. Griffin Plumbing*, the general contractor sought indemnification but also claimed various tortious acts the defendant engineer allegedly committed directly against it during the course of the project:

> [General contractor] brought this action claiming Engineer wrongfully closed the job for nearly a month due to false allegations of OSHA violations, Engineer made demands of [general contractor] which were not in the contract, Engineer wrote a disparaging letter to [general contractor's] bonding company, Engineer erroneously interpreted the contract to the County and [general contractor], and Engineer's false interpretations of the contract required [general contractor] to hire an expert to interpret the contract between [general contractor] and the County. . . . County refused to compensate [general contractor] for costs incurred by [general contractor] as a result of Engineer's acts.

Id. at 51–52, 463 S.E.2d at 86–87.

Here, Lend Lease contends Antunovich provided deficient plans and specifications (presumably to developer LUK) from which Lend Lease's claimed damages flow:

> The damages to Lend Lease included the costs and fees, including attorneys' fees, associated with the investigations and defense of the Plaintiffs claims, as well as special and consequential damages, including injury and damage to Lend Lease's business reputation and the liability for the damage to the Project building, which, according to Plaintiffs' allegations, include deterioration and failure of the building structure and systems due to the acts and omissions of the Third-Party Defendants . . . .

Lend Lease further contends it "has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial." On appeal, Lend Lease lists the following actual damages:

> - Cost of windows purchased by Lend Lease that do not meet required wind load, which are now recommended for removal and replacement;
> - Investigative fees paid to Richard H. Moore, P.E., to analyze the project documents and determine whether the windows specified and approved by Antunovich meet applicable building code requirements at the time of construction;
> - Loss of business revenues as a result of pending construction defect claim.

Under South Carolina law, a claimant cannot maintain derivative tort or breach of warranty claims arising only from the claimant's potential liability for another party's damages and the claimant's need to defend itself in litigation; such contingent claims properly lie in indemnity. *Stoneledge I*, 413 S.C. at 622, 776 S.E.2d at 430; *Stoneledge II*, 413 S.C. at 637, 776 S.E.2d at 438. In the *Stoneledge* cases, a homeowners' association sued a general contractor and its subcontractors for construction defects at a townhome complex. *Stoneledge I*, 413 S.C. at 619, 776 S.E.2d at 428; *Stoneledge II*, 413 S.C. at 634, 776 S.E.2d at 436. The general contractor filed cross-claims against its subcontractors for breach of contract, breach of warranty, negligence, and equitable indemnity. *Stoneledge I*, 413 S.C. at 619, 776 S.E.2d at 428; *Stoneledge II*, 413 S.C. at 634, 776 S.E.2d at 436. Because the general contractor's cross-claims were contingent upon whether the plaintiff HOA prevailed against the general contractor, this court concluded the general contractor's "cross-claims arose only when it faced potential liability for Stoneledge's damages and incurred fees and costs defending against Stoneledge's lawsuit. [The general contractor's] breach of contract and breach of warranty cross-claims are nothing more than claims for equitable indemnity." *Stoneledge II*, 413 S.C. at 637, 776 S.E.2d at 438; *see also Stoneledge I*, 413 S.C. at 621, 776 S.E.2d at 429 (finding cross-claimant's negligence allegations showed Stoneledge

was the party suffering damages and contractor's "injuries arose exclusively from having to defend itself in Stoneledge's lawsuit").

Like the general contractor in the *Stoneledge* cases, Lend Lease has not shown it suffered independent damages as a result of Antunovich's alleged negligence. Rather, Lend Lease's allegations and prayer for relief seek damages arising exclusively from Lend Lease's need to defend itself against a potential judgment in BEI's Market Common litigation, for which Lend Lease also seeks indemnity. Thus, in granting partial summary judgment, the circuit court properly held Lend Lease's negligence claims are not independent of its indemnity claim.

II. Breach of Warranty of Plans and Specifications

Lend Lease next argues the circuit court erred in failing to recognize the special relationship between an architect and a contractor that would properly support a cause of action for breach of warranty of the architect's plans and specifications. As to its breach of warranty claims, Lend Lease asserted:

> The Plaintiff has alleged multiple construction deficiencies for [the A-Buildings] against three (3) separate general contractors who each had different subcontractors working for them. The only constant variable among all buildings alleged to have deficiencies by the Plaintiff is the Architect [Antunovich].
>
> Deficiencies in the design professional services, as set forth in the Affidavit of Richard H. Moore, by [Antunovich] constitutes a breach of the warranty of plans and specifications owed by [Antunovich] to Lend Lease.
>
> As a result of the Architect's breaches of warranty of plans and specifications, Lend Lease has incurred, and will continue to incur actual damages in the amount of any money adjudged to be owed to the Plaintiff by Lend Lease, or which Lend Lease must pay Plaintiff in settlement of the Plaintiffs' claims, plus the costs associated with investigating the Plaintiffs' claims and

> defending this action. In addition, Lend Lease has incurred and will continue to incur special and consequential damages, including damage to its business and business reputation . . . .

Lend Lease contends it presented evidence, through Moore's affidavit, that Antunovich erred in preparing the design documents upon which Lend Lease relied in completing its work on Market Common. And, Lend Lease correctly notes our supreme court has recognized a duty owed by a design professional to a contractor, independent of contractual duties, with regard to the design or supervision of a project. *See Tommy L. Griffin Plumbing*, 320 S.C. at 55, 463 S.E.2d at 89 ("We see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties.").

However, as with the negligence claim discussed in Section I, *supra*, under the *Stoneledge* cases, Lend Lease's allegations set forth no proper independent claim resulting from any breach of warranty by Antunovich. Instead, the allegations demonstrate BEI is the party that allegedly suffered damages, and Lend Lease's alleged injuries arise exclusively from having to defend itself against BEI's lawsuit. The damages Lend Lease seeks to recover would result only from its potential liability to BEI and from the expenses Lend Lease must incur in defending itself. Accordingly, the circuit court properly found Lend Lease's breach of warranty claims are not independent of its equitable indemnity claim.

Additionally, we agree with Antunovich that Lend Lease's argument is without merit under the *Spearin* doctrine. In *United States v. Spearin*, "considered by many to be the most significant construction law case,"[1] the United States Supreme Court explained:

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen

[1] Buckner Hinkle, Jr., *Still Spearin After All These Years?*, 12 Journal of the American College of Construction Lawyers 1 (January 2018) (quoting *Bruner & O'Connor on Construction Law* § 9.1 (West 2016)).

> difficulties are encountered. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.

248 U.S. 132, 136 (1918). Therefore, assuming arguendo that Lend Lease in fact complied with Antunovich's plans and specifications, Lend Lease cannot be held responsible if it can prove the specifications were defective, the defective specifications caused the problem, and Lend Lease relied on the defective specifications. *See, e.g.*, *Robert E. Lee & Co. v. Comm'n of Pub. Works of City of Greenville*, 248 S.C. 84, 90, 149 S.E.2d 55, 58 (1966) ("The statement in SC-25 before quoted, that the owner had made auger borings along the pipe line route to determine the character of the subsurface materials, and that the location and logs of these test holes were shown on the plans, was a representation that the subsurface information revealed by the test hole borings had been accurately and fully disclosed on the plans. The contractor was entitled to rely upon that representation; and the owner's responsibility under it was not overcome by the disclaimer clauses above quoted.").

III. Equitable Indemnity

Lend Lease also challenges the circuit court's finding under *Stoneledge I* that a contractor's claims against an architect in a construction defect case are limited to claims of equitable indemnity. Specifically, Lend Lease seeks to distinguish its claims from those in *Stoneledge I* by noting the *Stoneledge* claims arose from the relationship between a general contractor and subcontractor rather than the special relationship between a general contractor and an architect. We see this as a distinction without a difference.

In *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971), a foundational South Carolina equitable indemnity case, the supreme court explained:

> Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action

> over for indemnity against the person whose wrong has thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury.

Id. at 34, 183 S.E.2d at 710 (quoting *North Carolina Elec. Power Co. v. French Broad Mfg. Co.*, 105 S.E. 394, 396 (N.C. 1920)). The court concluded that in indemnity actions, "brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." *Id.*

For a party to properly maintain an equitable indemnity claim, there must be a sufficient relationship between the claimant and the party against which it seeks to recover. *See Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 132, 414 S.E.2d 118, 121 (1992) ("A sufficient relationship exists when the at-fault party's negligence or breach of contract is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct."); *Tommy L. Griffin Plumbing*, 320 S.C. at 55, 463 S.E.2d at 89 (holding a special relationship sufficient to create an extra-contractual duty of care may exist between a general contractor and a design professional).

The circuit court's order granting summary judgment on Lend Lease's negligence and warranty claims neither ignored nor misapplied *Tommy L. Griffin Plumbing* because it did not defeat Lend Lease's ability to maintain its equitable indemnity claim against Antunovich. Instead, the circuit court determined Lend Lease's negligence and warranty claims failed as a matter of law because they are "nothing more than equitable indemnity claims."

Conclusion

Due to the derivative nature of Lend Lease's negligence and breach of warranty claims, the circuit court's order granting partial summary judgment in favor of Antunovich is

AFFIRMED.

GEATHERS, J., and HILL, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jennifer Lauren Greene, Appellant,

v.

Zachary Daniel Greene, Respondent.

Appellate Case No. 2019-001747

Appeal From Greenville County
Katherine H. Tiffany, Family Court Judge

Opinion No. 5983
Heard March 22, 2023 – Filed April 26, 2023

AFFIRMED AS MODIFIED AND REMANDED

Vanessa Hartman Kormylo, of Vanessa Hartman Kormylo, P.A., and Scarlet Bell Moore, of Scarlet Moore Law, both of Greenville, for Appellant.

Kimberly Fisher Dunham, of Kimberly Dunham, Attorney at Law, of Greenville, for Respondent.

MCDONALD, J.: Jennifer Lauren Greene (Mother) appeals the family court's order awarding joint custody of the parties' young daughter (Child). She further challenges the family court's grant of primary decision-making authority for Child's education and health care needs to Zachary Daniel Greene (Father), as well as the court's award of the annual dependent tax deduction, child support, and

attorney's fees. We affirm as modified and remand the fee award to the family court for consideration in accordance with this opinion.

Facts and Procedural History

Mother and Father were married in Anderson County in 2011. The couple have one child, a daughter born in August 2013. Mother and Father separated on July 23, 2017; the following day, Mother filed a complaint seeking, *inter alia*, an order of separate support and maintenance, custody, child support, equitable division of marital property, and attorney's fees.

Prior to the initial temporary hearing, the parties notified the family court that they had reached an agreement and sought to submit a consent order; however, the parties were unable to agree on Father's visitation.

On September 4, 2017, Mother contacted the South Carolina Department of Social Services (DSS) and the Travelers Rest Police Department (TRPD) to report Child had made a statement about Father touching her "tickle spot," which Mother claimed Child identified by pointing to her clitoris. On September 15, 2017, Mother filed an amended complaint and motion for pendente lite relief seeking rehabilitative alimony and suspension of Father's visitation.

Following Mother's reporting, Child participated in a forensic interview at the Julie Valentine Center (JVC) in Greenville. During this interview, Child "easily engaged" with the interviewer but did not disclose abuse and "denied any [inappropriate] touches by nanna, mommy or daddy." Later that day, Mother asked Father to consent to a second opinion, and Father agreed (through counsel) to a joint private forensic evaluation with licensed professional counselor Cindy Stichnoth. Father further agreed the parties would split these costs, and his attorney asked that Stichnoth also examine any parental alienation issues. Around this same time, Mother began attending support group sessions at JVC, and Child began therapy with licensed independent social worker Sarah Davis.

On September 26, 2017, Mother filed an amended motion for pendente lite relief requesting that Father complete a psychosexual evaluation, turn over his electronic devices for review, and execute a medical disclosure authorization. On November 13, 2017, Stichnoth submitted an interim report recommending both parents submit to "psychological evaluations to assess parenting capacity" and "possible emotional

instability." She also suggested that since Child had been "separated from her father for more than sixty days, placing her at higher risk of possible alienation or estrangement . . . [Child] may benefit from a clarification session with father in order to resume visitation with smooth transition."
One week later, DSS found "[t]he investigation/assessment did not produce a preponderance of the evidence that the child is an abused or neglected child." The TRPD likewise declined to file charges and closed its file.

On January 24, 2018, Dr. Mary Fran Croswell began a forensic medical evaluation but was unable to complete Child's physical examination due to the presence of labial adhesions.[1] Dr. Croswell advised Mother to return with Child for further evaluation once the adhesions resolved.[2] In talking with Dr. Croswell, Child, again, did not disclose abuse.

Following a January 30, 2018 temporary hearing, the family court awarded temporary custody to Mother and visitation to Father every other Saturday and Sunday. The court ordered Father's visitation be supervised in sight and sound by Father's father[3] or another adult approved by the guardian ad litem (GAL). The court further ordered Father to submit to a psychosexual evaluation, pay monthly

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[1] According to Dr. Croswell, "[l]abial adhesions are adherence of two layers of tissue of the female genital area." The labia minora become adhesed together, "obscuring the underlying structures."

[2] Dr. Croswell testified labial adhesions are "very common" in young girls through age six due to low estrogen levels, "[u]sually secondary to some sort of inflammation or irritation in the area." Upon further questioning, Dr. Croswell agreed she had "seen labial adhesions in patients who have been sexually abused" but noted urine (through exposure to a wet diaper) and fragrant soaps are common causes of such irritation and adhesions.

[3] In her appellate brief, Mother claimed there is no evidence in the record that Child is close with her paternal grandfather or that Child had any relationships with Father's family prior to these supervised visits. At trial, however, Mother testified Child has relationships with Father's mother, father, brother, sister-in-law, sister, and niece and noted these family members had the opportunity to interact with Child throughout the family court litigation.

child support of $692, and participate in discovery "including but not limited to a request to review one another's current devices."

A few months later, during a March 1, 2018 therapy session with Davis, Child stated Father "tickled" her vagina.[4] Child told Davis "she was three years old when this happened and it happened in the living room at their old house when she was naked." Following this report, Davis contacted TRPD and DSS. Although DSS opened a new investigation, TRPD did not.

Mother did not appear for Father's March 3, 2018 supervised visitation. Because Father believed Mother had blocked his number, Father asked his father to text her to see if she was still coming—Mother did not respond.

Around this same time, licensed clinical psychologist James Ruffing conducted a psychosexual evaluation of Father. Dr. Ruffing completed his initial report on March 8, 2018, finding, "There does not appear to be a propensity for sexual maladjustment or sexual impulsivity and the test results did not reflect unpredictability or peculiarity in thought and action, particularly in the sexual area." After reviewing Dr. Ruffing's report, the GAL emailed the parties' counsel, noting the report indicated Father "has no issues concerning abuse of children."[5] The GAL then recommended Father have unsupervised standard visitation.

On April 2, 2018, the family court entered a supplemental consent order changing Child's therapist from Sara Davis to licensed professional counselor Meredith Thompson-Loftis; the parties further agreed to equally divide Child's therapy costs.

On April 9, 2018, during a second forensic interview at JVC, Child disclosed Father had tickled her vagina. The following exchange took place:

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[4] Child subsequently disclosed to multiple other people.

[5] Mother later sought to submit collateral information purportedly related to the evaluation. Thus, pursuant to instructions in a supplemental temporary order, Dr. Ruffing issued a supplemental report, noting his "examination of the documents [specifically, Father's journal from the early 2000s] would not alter or change the psychological findings and the professional opinion" provided in his initial report.

[Interviewer]: You don't remember. But you were in the bath and then—then what happened?

[Child]: I told her everything in the bath.

[Interviewer]: You told her everything in the bath?

[Child]: I don't really want to do this. I want to see my mom and told—told her I did—I told you.

[Interviewer]: You want to tell your mom that you told me?

[Child]: Yeah.

[Interviewer]: Well has anybody told you what to tell me or what to say to me today?

[Child]: No. But only my mom told me—told me that I had to tell you this.

[Interviewer]: She told you that—that you had to tell me this? How come she wanted me to tell you that?

[Child]: It [sic] because it [sic] important.

[Interviewer]: Because it's important. And how do you know that it's important?

[Child]: I'm [sic] just know.

Licensed clinical psychologist Luther Diehl completed a psychological evaluation of Mother on April 26, 2018. Dr. Diehl determined Mother has "adequate psychological resources to function in the role of a custodial parent." His diagnostic impression of Mother included passive aggressive personality traits but no specific categorization of parental alienation. However, Dr. Diehl specifically noted "it is difficult to establish alienating dynamics by evaluating one individual in a family system. In this case, it does not appear that [Mother] is markedly angry

and hostile toward her estranged husband, but does have negative feelings because of what she has reportedly heard from her daughter." Diehl opined Mother "did not present a markedly negativistic statement regarding a belief that [Father] should not ever have any further visits with [Child, but she] did present some indications of some conflict in terms of her opinion about what should take place."

On May 8, 2018, the GAL filed an additional motion for temporary relief. Following a hearing, the family court removed the supervision requirement for Father's visitation. In its supplemental temporary order, the family court also noted the parties were free to supplement the information provided to Dr. Ruffing and Dr. Diehl for purposes of their respective psychological evaluations of the parties.[6]

On June 20, 2018, TRPD reopened its investigation after receiving a copy of the DVD of Child's second forensic interview and reviewing additional affidavits provided by Mother. However, after considering Father's polygraph results, conducting further investigation, and consulting with a local magistrate, the TRPD investigator determined "there is no probable cause to believe that there was any sexual activity between [Father] and [Child]. This case is unfounded."[7]

On October 8, 2018, Father filed a motion for temporary relief, seeking a holiday visitation schedule and division of the proceeds from the sale of the marital home. The motion further noted:

> The Guardian ad Litem has requested that the minor child not wear the Gizmo watch to visitation with her Father. The Gizmo watch allows the Mother to hear conversations going on in the Father's residence during

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[6] At trial, Father expressed concerns that Mother was "less than candid" with Dr. Diehl for purposes of her own psychological evaluation. However, Father admitted he failed to provide Dr. Diehl with additional information regarding the omissions in his report, including but not limited to the fact that Mother was still breastfeeding Child—then four years old—at the time of Dr. Diehl's inquiry.

[7] Polygraph reports provided to Dr. Diehl prior to his evaluation of Mother indicated Father "was not being deceptive about inappropriate touching of his daughter."

> periods when he has visitation and to GPS track the minor child. Mother has refused not to send the watch.

Two days later, Mother filed a motion to remove the GAL. At the November 15, 2018 hearing addressing these matters, Thompson-Loftis provided an affidavit stating she saw no clinical reason why Father's visitation with Child should not be expanded. The family court subsequently awarded Father holiday visitation, enjoined and restrained the parties from posting anything about the case or the opposing party on social media,[8] denied Mother's motion to remove the GAL, and raised the GAL's fee cap. The court declined Father's request for an order enjoining Mother from sending the Gizmo watch with Child for Father's visitation but noted nothing prevented Father "from taking it off as the parent with physical placement" of Child. Following this hearing, Mother cancelled Child's scheduled counseling appointment with Thompson-Loftis.

The Honorable Katherine Tiffany presided over the final merits hearing from February 11 through February 15, 2019, and on July 8, 2019. Because the matter could not be completed during the week allotted, the court issued an interim order raising the GAL's fee cap and granting Father visitation pursuant to "Judge Brown's Standard Visitation Schedule." This schedule, which Judge Tiffany helpfully attached with her order, essentially provides the non-custodial parent alternating weekends with a Thursday night early dinner visit during the week the custodial parent has the weekend. Notably, the family court ordered Child "shall immediately resume weekly counseling with Meredith Thompson-Loftis."

In addition to testifying about Child's alleged disclosures, Mother explained that when Child was an infant, she observed Father bathing Child's genitalia with his bare hands. Mother also stated that when Child was two or three, she noticed Father bathing Child's genitalia with his finger, prompting Mother to tell him Child could wash herself. While Father denies any misconduct, he does not dispute that he has bathed Child without a washcloth in the past. Father further testified Child is "fairly reliable and fairly responsible" for her age and "doesn't tend to be deceitful on a regular basis."

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[8] Mother posted numerous Facebook entries directly and indirectly addressing the divorce and sexual abuse allegation.

The parties presented various experts addressing the parental dynamic and Child's purported disclosures. Regarding Father's psychosexual evaluation, Dr. Selma Watson, Mother's expert in clinical and forensic psychology, testified she would have utilized a penile plethysmograph (PPG) and Limestone Visual Preference Test, interviewed both parents, and considered as many sources of information as possible had she evaluated Father. Dr. Watson further critiqued Dr. Ruffing's approach to Father's evaluation as more appropriate for a civil commitment proceeding than a family court matter.[9]

Counselor Stichnoth also testified and provided an affidavit stating,

> There is no evidence presented to indicate [Child] has experienced sexual abuse or is at risk of sexual abuse by her father. While I believe that [Child] did make a statement about "my tickle spot" to her mother during a bath on September 4, 2017, I am aware of a multitude of factors related to timing of events, level of parental distress, and dynamics of this enmeshed family system which impact my interpretation of that statement and basis for [Mother's] resulting misbelief that [Child] spontaneously disclosed sexual abuse by her father. My interpretation is also highly informed by the stark contrast between [Mother's] detailed account of this 'disclosure' and [Child's] presentation in the first forensic interview. The most significant difference between the first forensic interview (no disclosure) and the second forensic interview (problematic disclosure) is [Child's] method of providing information. In the first interview, [Child] demonstrated understanding of questions and responded in detail, was unsure why her parents no longer lived together, and verbalized healthy attachments and experiences with healthy touching equally among her mother and father, but did not demonstrate a need to confirm details of her mother's report that [Child] disclosed her father had touched her inappropriately. In

[9] Dr. Ruffing testified a PPG was unnecessary because he did not find "any markers that raised concern for me with [Father]."

the second interview, after six months of counseling and maternal behavior directed toward enabling disclosure, before the interviewer could complete [the] rapport portion and begin [the] interview portion, [Child] volunteered "I have something to tell you . . . so, my dad tickled my vagina once . . . my dad don't live with us because [of] that." After [the] interviewer completed [the] rapport portion and focused on inquiries for details, [Child] provided minimal responses peppered with "I don't know . . . I don't remember." . . . [Child] went on to deny experience of healthy touches/tickles with her mother and denied being ticklish, in stark contrast to her demonstrated enjoyment of being ticklish on feet, hands, and armpits during [her] first interview. When asked where she initially made the disclosure to her mother, [Child] stated "bedroom . . . actually the bathroom . . . and I was taking a bath." When [the] interviewer prompted her to tell more about that event, [Child] responded "I don't remember . . . I told her everything in the bath . . . I don't really want to do this . . . I want to see my mom and told, told her I did, I told you." When [the] interviewer asked if anyone told [Child] what to say to her, she responded "No, but only my mom told me, told me that I had to tell you this." [Child] went on to answer mom wanted her to tell "because it's important" and how she knew it was important "I just know." In my opinion, counseling services and maternal behavior, advocating for the protection of a child believed to be a victim at risk of further abuse, has collectively served to skew [Child's] true experience of her parents, while instilling belief that she is responsible for her parent[s'] divorce and reinforcing existing enmeshment with her mother. Additionally, the outcome of [the] second interview has reinforced [Mother's] misbelief that she must continue to disparage and reject [Father] in order to protect [Child].

After completing the merits hearing, the family court awarded Mother and Father joint custody, with Father to have primary decision-making authority for Child's education and health care, and Mother to have primary decision-making authority for her extracurricular activities and religious training. The court ordered Mother, Father, and Child to attend individual counseling, and ordered Mother and Father to engage in counseling to address co-parenting. The court awarded Mother child support in the amount of $78 per month and Father the yearly dependent tax deduction. The family court further awarded Father $35,000 in attorney's fees, but permitted Mother to partially satisfy this fee obligation by foregoing receipt of her equitable share of Father's 401(k) (amounting to $11,138.40) as partial payment.

Neither Mother nor Father moved to reconsider, but both timely appealed. Father subsequently withdrew his cross-appeal.

Standard of Review

"Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019); *Stoney v. Stoney*, 422 S.C. 593, 595 n.2, 813 S.E.2d 486, 487 n.2 (2018) (noting an abuse of discretion standard is to be used for reviewing a family court's evidentiary or procedural rulings). While this broad scope of review allows the appellate court to find facts in accordance with its own view of the preponderance of the evidence, it does not require this court to disregard the findings of the family court. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). The appellant bears the burden of convincing the appellate court that the family court committed error or the preponderance of the evidence is against the family court's findings. *Id*. at 392, 709 S.E.2d at 655.

Law and Analysis

I. Joint Custody and Decision-Making Authority

Mother argues the family court erred in awarding joint custody and in granting Father primary decision-making authority for Child's education and health care needs. We disagree.

The family court has exclusive jurisdiction "to order joint or divided custody where the court finds it is in the best interests of the child." S.C. Code Ann.

§ 63-3-530(A)(42) (Supp. 2022). Section 63-15-230 of the South Carolina Code (Supp. 2022) mandates the following regarding a final custody determination:

> (A) The court shall make the final custody determination in the best interest of the child based upon the evidence presented.
>
> (B) The court may award joint custody to both parents or sole custody to either parent.
>
> (C) If custody is contested or if either parent seeks an award of joint custody, the court shall consider all custody options, including, but not limited to, joint custody, and, in its final order, the court shall state its determination as to custody and shall state its reasoning for that decision.
>
> (D) Notwithstanding the custody determination, the court may allocate parenting time in the best interest of the child.

In considering custody, the best interest of the child is "the primary, paramount, and controlling consideration." *Klein v. Barrett*, 427 S.C. 74, 80, 828 S.E.2d 773, 776 (Ct. App. 2019) (quoting *McComb v. Conard*, 394 S.C. 416, 422, 715 S.E.2d 662, 665 (Ct. App. 2011)). "In determining a child's best interest in a custody dispute, the family court should consider several factors, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties, including the guardian ad litem, expert witnesses, and the children; and the age, health, and gender of the children." *Simcox-Adams v. Adams*, 408 S.C. 252, 260, 758 S.E.2d 206, 210 (Ct. App. 2014). "While numerous prior decisions set forth criteria that are helpful in such a determination, there exist no hard and fast rules and the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." *Clark v. Clark*, 423 S.C. 596, 605, 815 S.E.2d 772, 777 (Ct. App. 2018) (quoting *Davenport v. Davenport*, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975)).

"Although the legislature gives family court judges the authority 'to order joint or divided custody where the court finds it is in the best interests of the child'" our

supreme court has concluded that "joint or divided custody should only be awarded where there are exceptional circumstances." *Lewis*, 400 S.C. at 365, 734 S.E.2d at 327 (quoting *Patel v. Patel*, 359 S.C. 515, 528, 599 S.E.2d 114, 121 (2004) (*Patel II*)); *see also Mixson v. Mixson,* 253 S.C. 436, 446, 171 S.E.2d 581, 586 (1969) (finding "[d]ivided custody is usually harmful to and not conducive to the best interest and welfare of the children"); and *Scott v. Scott*, 354 S.C. 118, 125, 579 S.E.2d 620, 623-24 (2003) (opining "section 20–7–420(42) did not change the law in this State that, generally, joint custody is disfavored.").[10]

Here, Child purportedly made a sexual abuse disclosure to Mother, and Stichnoth acknowledged she believes Child made some statement to Mother regarding her "tickle spot."[11] However, DSS issued two separate notices of unfounded investigations/assessments after its investigation did not produce a preponderance of the evidence that Child is an abused or neglected child. TRPD likewise twice declined to file charges and closed its file.

More significantly, the guardian ad litem, Thompson-Loftis, and Stichnoth recommended Father have expanded, unsupervised visitation. And notably, Dr. Ruffing's report states, "There does not appear to be a propensity for sexual maladjustment or sexual impulsivity and the test results did not reflect unpredictability or peculiarity in thought or action, particularly in the sexual area."

Although Thompson-Loftis believed both Mother and Father were capable of handling Child's temperament and meeting her developing needs, she testified, "I think there is a huge disconnect between the two of them. If you're talking about a custody situation where there's a split custody, in my opinion, those are some of the worst ones because of the fact that the parents don't communicate."

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[10] We continue to express concern about our appellate joint custody jurisprudence, specifically the language the supreme court incorporated from *Mixson*, *supra*, a 1969 case, after the General Assembly amended the statute to include joint custody as an option for family courts to consider. As we noted in *Klein*, *supra*, "The General Assembly imposed no 'exceptional circumstances' requirement in 1996, when it codified joint custody as an option for family courts to consider in a child custody determination." 427 S.C. at 86 n. 9, 828 S.E.2d at 779 n. 9.

[11] Adding to the confusion, Child at times identified "tickle spots" under her arms, on her feet, and on her hand.

Thompson-Loftis stated, "And that is—that is very—that has been evident in all of my work with [Child], and that's something that I think [Child] struggles with, which is the anxiety that she knows her parents don't talk and they don't get along."

Thompson-Loftis explained that although Father was willing to communicate with Mother, Mother was not willing to communicate with Father; she further noted their communication was strained even before their separation. While Thompson-Loftis believed Father would encourage Child's relationship with Mother, she testified Mother would not be able to encourage a relationship between Child and Father. She described Mother and Child as enmeshed, noting Mother "coddled" Child and "kind of enabled some of the—the attachment and the—the difficulty in separation."

Through her affidavit, Stichnoth opined:

> [Child] is not an alienated child as she demonstrates attachments to both parents, however unhealthy family dynamics and mental health professionals that are not qualified to provide balanced and objective treatment for children in court-related cases have placed [Child] at high risk to become alienated or estranged; without provision of appropriate forensically informed treatment services for [Child] and her parents, she is at high risk for inhibited development and emotional dysfunction such as is currently demonstrated by her parents. In my opinion[, Child] is best diagnosed …. as [a] Child Affected by Parental Relationship Distress or CAPRD. This diagnosis is defined in the DSM-5 as "negative effects of parental relationship discord (i.e., high levels of conflict, distress, or disparagement) on a child in the family, including effects on a child's mental or other medical disorders."
>
> . . . .
>
> In my opinion both [Father and Mother] care deeply for [Child] and want to provide her with the best chances to be healthy and successful in life; I see no evidence to

> suggest either of them has intentionally engaged in behavior to harm [Child], however their ability to accept and engage in a treatment plan to improve their own emotional health and parental capacity is paramount to [Child's] future health.

Mother "asked for sole custody of [Child] with visitation, but if ultimately that's what's best for [Child], then I have agreed to joint custody with me having final say of, you know, any matters that are disputed." Mother clarified she and Father should make joint decisions for Child, but she asked to have the final say when the parties could not agree.

With regard to custody and decision-making, Father testified, "In a perfect world, there would be 50/50 joint physical and everything else. I think both of us are capable of that. The reality and given the history and everything else, a standard visitation schedule would be fine. I would love to have her Friday to Monday. On holidays and in the summertime, I think that would be great." However, when directly asked what he wanted, Father replied, "Joint custody. 50/50 split. Week on/week off." Father also noted he would be thrilled with "any visitation."

Considering Child's best interest as the paramount concern, we find the family court properly awarded the parties joint custody. *See e.g.*, *Klein*, 427 S.C. at 80, 828 S.E.2d at 776 ("In a child custody case, the welfare of the child and what is in the child's best interest is the primary, paramount, and controlling consideration of the court." (quoting *McComb*, 394 S.C. at 422, 715 S.E.2d at 665)). Our de novo review of the record reveals that prior to the parties' separation and for approximately two years afterwards, Mother was Child's primary caretaker.[12] Following the sexual abuse allegation, Father's visitation with Child was extremely limited from September 2017 through August 2019. Mother and Father had virtually no contact from September 2017 through March 2019, when they began

[12] Mother stopped working outside the home around the time Child was conceived due to the stress of her job at Verizon Wireless. When Child was an infant, Father took ten to twelve weeks of family leave from his job to be with Mother and Child. In 2015, Mother started a residential cleaning business, which she still ran at the time of the final merits hearing.

communicating through text messages with encouragement from Child's counselor, Thompson-Loftis.

Mother and Father have been rotating Child's placement on a weekly basis without further involvement from the family court, DSS, or law enforcement since August 30, 2019. While Mother indicated at oral argument that the visitation schedule was not working for Child, Father disagreed—and noted neither party has sought a modification based on any change in circumstances. Finally, there is a consensus among knowledgeable third parties, including the GAL and treating experts, that both Mother and Father are fit and loving parents. Thus, we find the circumstances of this case—including but not limited to Child's attachment to both parents, Mother's reactions to recommendations she finds unfavorable, and Mother's potential for unhealthy enmeshment with Child—constitute exceptional circumstances warranting the family court's award of joint custody. *See, e,g.*, *Clark*, 423 S.C. at 608, 815 S.E.2d at 778–79 (finding the passage of time and the good reports on the minor child's welfare and mental adjustment comprise exceptional circumstances warranting joint custody).

We further agree with the family court that Mother and Father should have delineated categories of responsibility for major decisions concerning Child. Despite their many disagreements and differing opinions, Mother and Father seem to mostly agree on Child's schooling, religious education, and pediatrician. To the extent they do not agree, however, the record supports the family court's assignment of the decision-making categories for Child's parenting.

II. Dependent Tax Deduction

Mother argues the family court erred in awarding Father the annual dependent tax deduction. We agree with Mother and thus modify the deduction award.

Section 20-3-130(F) of the South Carolina Code (2014) provides "[t]he Family Court may allocate the right to claim dependency exemptions pursuant to the Internal Revenue Code and under corresponding state tax provisions and to require the execution and delivery of all necessary documents and tax filings in connection with the exemption." *See also Hudson v. Hudson*, 340 S.C. 198, 203, 530 S.E.2d 400, 402–03 (Ct. App. 2000) (noting the custodial parent is generally entitled to claim the deduction under the governing provisions of the Internal Revenue Code).

Because Mother and Father were awarded joint custody, we find it more appropriate to award this deduction to Father and Mother in alternating years. Accordingly, going forward, Father shall claim Child for even years beginning with tax year 2022, and Mother shall claim her for odd years beginning with tax year 2023. Therefore, we affirm as modified the family court's order as to the dependent tax deduction.

III. Child Support

Mother next argues the family court erred in calculating child support. We disagree.

Mother's only argument addressing the question of child support notes that had the family court awarded Mother sole custody, a proper calculation based on the figures provided by the parties would result in Father's payment to Mother of $609.00 in monthly support. Thus, it appears Mother has abandoned this issue. *See* Rule 208(b)(1)(D), SCACR (requiring "discussion and citations of authority" for each issue in an appellant's brief); *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned where the party's brief cited only one family court rule and presented no argument as to how the family court's ruling was an abuse of discretion or constituted prejudice). Yet, even upon consideration of the merits, we would affirm the family court's support analysis because the calculation followed DSS's Child Support Guidelines and properly considered that Father will maintain Child's health insurance through his employment, pay a greater percentage of any uncovered health care expenses Child might incur, and be responsible for work related child care expenses during the school year.

IV. Attorney's Fees

Finally, Mother asserts the family court erred in awarding attorney's fees to Father while failing to award fees to her. We remand the fee award for further consideration as discussed below.

In determining whether to award attorney's fees, the family court considers four factors: "(1) the party's ability to pay his/her own attorney's fee; (2) [the] beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) [the] effect of the attorney's fee on each party's standard of living."

E.D.M. v. T.A.M., 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). "Failing to cooperate and prolonging litigation can serve as an additional ground for awarding attorney's fees." *Daily v. Daily*, 432 S.C. 608, 630, 854 S.E.2d 856, 868 (Ct. App. 2021). When determining the reasonableness of attorney's fees, the family court considers "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) [the] professional standing of counsel; (4) [the] contingency of compensation; (5) [the] beneficial results obtained; [and] (6) [the] customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). "The family court can also consider a litigant's uncooperative and evasive behavior when determining the reasonableness of the fees." *Daily*, 432 S.C. at 630–31, 854 S.E.2d at 868.

Again, Mother's main argument is that since she should have prevailed at trial on the issues of custody, visitation, child support, the tax credit, and certain restraining orders, the family court should have awarded *her* attorney's fees, not Father. But Mother did not obtain beneficial results before the family court, and other than adjusting the award of the dependent tax deduction, we have affirmed the majority of the family court's well-reasoned order. Regarding the parties' respective abilities to pay and financial conditions, Mother testified she has received financial support from her mother in order to purchase a home and to fund her legal fees. Still, we note the family court's findings that "[b]oth parties earn or have the ability to earn modest incomes, and enjoy modest but not extravagant lifestyles. Neither can easily afford attorney's fees and costs on their incomes. But both have access to some resources from which they can pay such fees and costs." We also appreciate the option given by the family court for Mother to forego a portion of her equitable apportionment—$11,138.50 from Father's 401(k)—as partial payment of her fee obligation.

However, to the extent Mother's fees and costs include monies paid to digital forensic examiner James Boswell and/or attorney's fees expended to address Father's likely wiping of his devices upon learning he would be required to produce them, we find Father should be responsible for all such fees because he took "significant actions . . . on each of the computer devices that . . . impeded [the digital] investigation."[13] Additionally, we find Father responsible for any GAL

[13] Just days after the hearing addressing discovery and production of electronic devices, Father "unintentionally" wiped his computer by installing a Linux operating system. Boswell testified that between February 1 and March 9, 2018,

fees related to Boswell, the computer forensic report, and the family court's consideration of discovery related to Father's electronic devices.

Therefore, while we affirm the family court's denial of attorney's fees to Mother, we remand Father's fee award for the family court to calculate the figure to which Mother is entitled as an offset for all fees and costs related to her investigation of Father's actions associated with the production of his electronic devices, including but not limited to the attorney's fees and costs Mother has incurred in addressing Father's discovery behavior before the family court. Once the parties have provided any necessary supplemental information detailing these specific fees and costs, the family court will be able to calculate the appropriate figure associated with the discovery of Father's electronic devices. This figure should be added to the $11,138.50 discussed above, further offsetting Mother's attorney's fee obligation to Father, which we affirm other than as modified here.

Conclusion

For the foregoing reasons, the family court's decision is

AFFIRMED AS MODIFIED AND REMANDED.

THOMAS and HEWITT, JJ., concur.

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the day Father turned over his devices to the GAL, "significant actions were taken on each of the computer devices that would have impeded [his] investigation." Boswell further explained this is a "more involved process than just reinstalling an operating system," as Father's actions would have taken approximately one and a half to two hours per device. Father admitted to the GAL that he deleted "a single photo" of an unclothed woman from his cell phone because, in his opinion, it "wasn't relevant to anything."