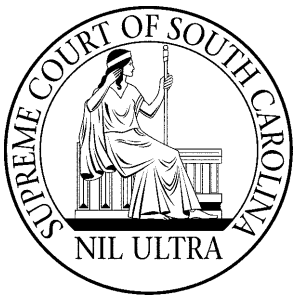

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
May 25, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Angel Catina Underwood of the Chester County Magistrate Court, Respondent.

Appellate Case No. 2022-000130

Opinion No. 28096
Submitted May 6, 2022 – Filed May 25, 2022

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Deputy Disciplinary Counsel Carey Taylor Markel, both of Columbia, for the Office of Disciplinary Counsel.

I.S. Leevy Johnson, of Johnson Toal & Battiste, PA, of Columbia, for Respondent.

PER CURIAM: In this judicial disciplinary matter, Respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the issuance of any sanction in Rule 7(b), RJDE, up to a six-month suspension. We accept the Agreement and suspend Respondent from office for six months.

I.

In 2017 and 2018, Respondent was the Chief Magistrate of Chester County and her husband was the Chester County Sheriff. The Chester County Sheriff's Department (Sheriff's Department) had a Facebook page through which members

of the public could send private tips regarding criminal activity. Respondent accessed the Sheriff's Department's Facebook messages on the Sheriff's behalf for the purpose of transmitting the information to Sheriff's Department Employees and requesting that certain actions be taken in response to various complaints, including suspected drug activity and trash and noise complaints. In doing so, Respondent copied the messages from Facebook, then used her Chester County-issued judicial email account to forward the complaints to Sheriff's Department employees. Respondent's emails included a signature block in which she identified herself as a Chester County Magistrate and listed the address and telephone number for the magistrate's court.

Additionally, in 2018, Respondent assisted her husband with drafting a disciplinary action concerning a Sheriff's Department employee. Respondent used her judicial email account to forward the draft of the disciplinary action to her husband for his review. That same year, Respondent prepared a letter for the Sheriff's Department in which the Community Services Division recommended a student for a scholarship. Using her judicial email account, Respondent emailed the Sheriff's Department staff directing them to place the letter on Sheriff's Department letterhead and place it in a Sheriff's Department envelope.[1]

II.

"Our judicial system should stand as the symbol of fairness and justice, and of equal protection dispensed to every citizen." *In re Eaken*, 150 A.3d 1042, 1055 (Pa. Ct. Jud. Disc. 2016). "An independent and honorable judiciary is indispensable to justice in our society." Canon 1A, Code of Judicial Conduct, Rule 501, SCACR. A judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2A, Code of Judicial Conduct, Rule 501, SCACR. Judicial "misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct." *In re Brown*, 625 N.W.2d 744, 745 (Mich. 2000).

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[1] The Agreement also contains a second disciplinary matter involving eviction documents and the Chester County Supervisor. However, the factual summary included in the Agreement and the March 9, 2022 supplement is inadequate to support a finding by this Court that Applicant committed misconduct in that matter. Accordingly, this opinion does not address those allegations.

The Agreement establishes Respondent accessed the Sheriff's Department Facebook messages, received citizen complaints, forwarded those complaints using her judicial email account, involved herself in Sheriff's Department personnel matters, and prepared correspondence on behalf of the Sheriff's department. These actions blurred the boundaries between her role as an independent and impartial magistrate and someone acting on behalf of the Sheriff's Department. Regardless of whether Respondent intended her emails and actions to remain private, her conduct served to erode public confidence in the judiciary. Accordingly, we find Respondent's pattern of conduct with the Sheriff's Department is sufficient to create in reasonable minds a perception that her ability to carry out her judicial responsibilities impartially is impaired, thereby violating Canon 2A of the Code of Judicial Conduct, Rule 501, SCACR.

III.

In the Agreement, Respondent admits her misconduct constitutes grounds for discipline under Rule 7(a)(1), RJDE, Rule 502, SCACR (providing a violation of the Code of Judicial Conduct shall be a ground for discipline).[2] In light of Respondent's disciplinary history,[3] we find a suspension from judicial duties is appropriate. We therefore accept the Agreement for Discipline by Consent and suspend Respondent from office for six months. Within thirty days, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by Disciplinary Counsel and the Commission on Judicial Conduct.

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[2] Respondent is not licensed to practice law in South Carolina. However, as an officer of the unified judicial system eligible to perform judicial functions in South Carolina, she is subject to the jurisdiction of the Commission on Judicial Conduct. *See* Rule 2(r), RJDE, Rule 502, SCACR (defining a judge as "anyone, whether or not a lawyer, who is an officer of the unified judicial system, and who is eligible to perform judicial functions"); Rule 3(b)(1), RJDE, Rule 502, SCACR (providing the Commission on Judicial Conduct has "jurisdiction over judges").

[3] *In re Underwood*, 417 S.C. 433, 790 S.E.2d 761 (2016) (publicly reprimanding Respondent for handling cases involving the Chester County Sheriff's Department while her husband was Sheriff of Chester County without properly following the remittal of disqualification requirements of Canon 3F, Code of Judicial Conduct, Rule 501, SCACR).

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Millholland, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2020-000521

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

Opinion No. 5909
Submitted May 12, 2022 – Filed May 25, 2022

REVERSED AND REMANDED

James Millholland, pro se.

Kensey Evans, of South Carolina Department of Corrections, of Columbia, for Respondent.

PER CURIAM: James Millholland appeals an order from the Administrative Law Court (ALC) arguing the ALC erred in dismissing his appeal from the South Carolina Department of Corrections (SCDC). Millholland argues SCDC violated his right to due process when it automatically charged him a $250 processing fee for the collection of his DNA pursuant to the South Carolina DNA Identification

Record Database Act[1] (the DNA Act) when he had already submitted a DNA sample following a previous conviction. We reverse the ALC's dismissal of Millholland's appeal and remand for a hearing on the merits.

In 2016, Millholland was sentenced to nine years' imprisonment for manufacturing methamphetamine. Pursuant to the DNA Act, SCDC charged Millholland a $250 DNA-sample processing fee, which it deducted from Millholland's inmate trust account. Millholland asserts that he previously gave a DNA sample pursuant to the DNA Act as a condition of his probation served for a previous offense, and therefore, he contends SCDC should not have automatically applied a second $250 fee. He filed a Step 1 grievance asserting these claims, and when SCDC denied it, he filed a Step 2 grievance arguing SCDC had violated his Fifth Amendment rights. SCDC also denied the Step 2 grievance, and Millholland appealed to the ALC. The ALC summarily dismissed the appeal, finding it lacked subject matter jurisdiction because Millholland's claim did not implicate a state-created liberty or property interest.

Although we believe the specific issue Millholland raises on appeal was not well articulated, in broadly construing his arguments, we find the ALC erred in summarily dismissing Millholland's appeal because his grievance implicated a protected property interest—his inmate trust account. *See Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972))). Although no South Carolina case has addressed this issue, federal courts have consistently found that inmates have a property interest in their inmate accounts. *See, e.g.*, *Campbell v. Miller*, 787 F.2d 217, 222 (7th Cir. 1986) ("It is beyond dispute that Campbell has a property interest in the funds on deposit in his prison account."); *Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985) ("There is no question that Quick's interest in the funds in his prison account is a protected property interest."); *Jensen v. Klecker*, 648 F.2d 1179, 1183 (8th Cir. 1981) (stating inmates "obviously have a property interest in the funds on deposit in their inmate accounts"). Thus, we find Millholland's appeal implicated a protected property interest, and the ALC erred in finding it did not

[1] S.C. Code Ann. §§ 23-3-600 to -700 (2007 & Supp. 2021).

have subject matter jurisdiction to hear the appeal. *See Furtick v. S.C. Dep't of Corr.*, 374 S.C. 334, 340, 649 S.E.2d 35, 38 (2007) ("[T]he ALC has jurisdiction over **all** inmate grievance appeals that have been properly filed; the ALC, however, is not required to hold a hearing in every matter."), *abrogated on other grounds by Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 733 S.E.2d 211 (2012); *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004) (holding summary dismissal is appropriate "where the inmate's grievance does not implicate a state-created liberty or property interest"); *Quick*, 754 F.2d at 1523 ("Once a protected interest is found, the court must then decide what process is due. This is a question of law."). Accordingly, we find the ALC erred in failing to hold a hearing to determine whether Millholland's due process rights were violated. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014) ("[T]he Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law."). Thus, we reverse and remand to the ALC for a hearing on the merits.

REVERSED AND REMANDED.[2]

THOMAS, MCDONALD, and HEWITT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rubiela Williams, Respondent,

v.

Ennis Williams, Appellant.

Appellate Case No. 2017-002358

Appeal From Richland County
Michelle M. Hurley, Family Court Judge
Gwendlyne Y. Jones, Family Court Judge

Opinion No. 5910
Submitted March 1, 2021 – Filed May 25, 2022

REVERSED

Ennis Williams, pro se, of Charlotte, North Carolina.

Rubiela Williams, pro se, of Columbia.

KONDUROS, J.: In this divorce action, Ennis Williams (Husband) appeals the family court's determination it had jurisdiction over him to divide his military retirement benefits. We reverse.[1]

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

FACTS/PROCEDURAL HISTORY

Husband married Rubiela Williams (Wife) on February 14, 1990, in Michigan. They had two children—one born in 1997 and one in 2000. Husband joined the United States Navy in January 1993 and retired on February 28, 2014. The parties separated around July 20, 2015, and have been "living separate and apart" since then.

In late 2015, Wife filed a complaint in South Carolina for divorce. She also requested, *inter alia*, custody of the parties' minor child; child support; alimony; equitable apportionment of the parties' assets, debts, and property, including retirement accounts; and an order requiring Husband to set aside his "GI Bill Benefits" for the children equally. At the time of filing, Wife had been a resident of Richland County for at least one year and Husband lived in Mecklenburg County, North Carolina, where the parties last resided together.

On April 14, 2016, Husband filed a Rule 12(b), SCRCP, motion to dismiss, contending that under 10 U.S.C.A. § 1408(c)(4),[2] the family court did not have jurisdiction to divide his military benefits because he currently lived in North Carolina and had never been a resident or domiciled in South Carolina. He stated that he did "not absolutely nor implicitly consent to the jurisdiction of the [family] court." He therefore asserted Wife's causes of action related to his military retirement benefits should be dismissed.

On April 20, 2016, the family court held a hearing on temporary relief. Husband's attorney began by requesting that the court not consider anything related to military retirement because of Husband's pending motion to dismiss that claim for lack of jurisdiction. Husband's attorney then noted Husband was requesting custody of the minor child. That same day—April 20, 2016—Husband filed an answer and counterclaim. In it, he again denied the family court had jurisdiction to divide his retirement military benefits, pursuant to 10 U.S.C.A. § 1408(c)(4). He

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[2] 10 U.S.C.A. § 1408(c)(4) provides that a court can divide military retirement benefits only if "the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court."

asserted the family court did not have jurisdiction over him because he did not reside in the state, he was not domiciled in the state, and he did not consent to the jurisdiction of the court.[3] He also counterclaimed seeking, *inter alia*, a divorce; custody of the minor child or in the alternative, visitation; and attorney's fees.

The family court held a hearing on May 11, 2016, on Husband's motion to dismiss for lack of jurisdiction. On May 18, 2016, the family court issued an order finding Husband consented to the family court's jurisdiction through his affirmative actions—specifically, that he filed an answer and counterclaim and appeared and participated in the temporary hearing.[4]

On May 25, 2015, Husband filed a motion for reconsideration of the family court's order. He argued he

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[3] Husband also asserted "post 9/11 GI Bill benefits" could not be treated as marital property and were not subject to equitable division. *See Eicher v. Shulkin*, 29 Vet. App. 57, 60 (2017) ("For more than 70 years, veterans have received educational assistance through various 'GI Bills' . . . ."); *Thompson v. United States*, 119 F. Supp. 3d 462, 465 (E.D. Va. 2015) ("'The Post 9/11 Veterans Education Assistance Act of 2008[]' or the 'Post 9/11 GI Bill' . . . provide[s] monetary benefits to eligible military members to assist veterans in readjusting to civilian life, and particularly to assist veterans in paying for higher education." (codified at 38 U.S.C.A. §§ 3301 to 3327)); 38 U.S.C.A. §§ 3311 to 3312 (establishing that individuals who after September 11, 2001, serve on active duty for a specified period of time are entitled to thirty-six months of education assistance); 38 U.S.C.A. § 3313 (providing the assistance includes payment of tuition and fees and a monthly housing stipend, plus a lump sum amount for books, supplies, equipment, and other costs); *Thompson*, 119 F. Supp. 3d at 465 ("[V]eterans who were eligible for retirement on August 1, 2009[,] were entitled to transfer their educational benefits to their spouse or children.").

[4] The family court stated it was not addressing the GI Bill benefits issue because Wife's complaint did not request the benefits be treated as marital property subject to equitable division but only requested the benefits be preserved for the minor children. *But see Thompson*, 119 F. Supp. 3d at 465 ("[A]n individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement only while serving as a member of the armed forces when the transfer is executed." (quoting 38 U.S.C.A. § 3319(f)(1))).

> was placed in an impossible predicament that he either not appear to the temporary hearing and forfeit the ability to contest the issues that this [c]ourt did have jurisdiction over . . . , including child custody, alimony/spousal support, visitation, and child support, because the long[-]arm statute vested this [c]ourt with jurisdiction over him as he was served with this action while in this [s]tate.

He also asserted he filed the motion to dismiss six days prior to the temporary hearing and attempted to have the motion heard prior to or on the same day as the temporary hearing but the clerk of court informed his attorney it was impossible to do so. He further contended that prior to the commencement of the temporary hearing, his attorney informed the family court a motion to dismiss for lack of jurisdiction was pending and asked the court to address the motion or in the alternative, continue the temporary hearing until after the court heard the motion to dismiss. He maintained the motion to continue was not granted and the temporary hearing commenced over his objections.

The family court denied the motion for reconsideration on June 13, 2016. The family court issued a subsequent order on October 31, 2016, reiterating its findings from the initial order denying Husband's motion to dismiss for lack of jurisdiction, stating it was denying Husband's motion for reconsideration dated September 26, 2016.[5]

At the hearing regarding the final divorce decree on August 7, 2017,[6] after Husband, appearing pro se, asserted the family court did not have jurisdiction over the military retirement, the family court stated it was again denying Husband's motion regarding jurisdiction.

On October 31, 2017, the family court granted Wife a divorce on the basis of one year's continuous separation. The decree noted the parties had reached a partial settlement primarily on the matter of custody. Regarding Husband's military retirement, the family court found "[Husband] meets the jurisdiction/venue

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[5] The record on appeal does not include a motion for reconsideration with this date.
[6] The Honorable Michelle M. Hurley had presided over all of the proceedings discussed before this point. The Honorable Gwendlyne Y. Jones presided over the final divorce hearing and issued the divorce decree.

requirements for the State of South Carolina and consented with his appearance and that of his former attorney to [the] presiding court's jurisdiction by filing his answer and counterclaim." The family court also determined Wife was entitled to a percentage of Husband's military retirement.[7] This appeal followed.

STANDARD OF REVIEW

An appellate court reviews decisions of the family court de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence. *Id.* at 388, 709 S.E.2d at 653. "*Lewis* did not address the standard for reviewing a family court's evidentiary or procedural rulings, which we review using an abuse of discretion standard." *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018) (per curiam). "An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support." *Sellers v. Nicholls*, 432 S.C. 101, 113, 851 S.E.2d 54, 60 (Ct. App. 2020) (quoting *Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004)). "A failure to exercise discretion amounts to an abuse of that discretion." *Id.* at 114, 851 S.E.2d at 60 (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)).

LAW/ANALYSIS

I. Timing of Hearing Jurisdictional Challenge and Motion for Continuance

Husband contends the family court erred in failing to first decide his prepleading personal jurisdiction challenge made at the outset of the case. He also maintains the family court erred in failing to grant him a continuance until his motion to dismiss for lack of personal jurisdiction could be heard. We agree.

"As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court." *Sellers v. Nicholls*, 432 S.C. 101, 113-14, 851 S.E.2d 54, 60 (Ct. App. 2020) (quoting Rule 40(i)(1), SCRCP).

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[7] The family court found Husband "agreed he would allow both children use of his total GI Bill, unless such was being utilized by [him]."

At the start of the temporary hearing, the family court first stated that the hearing was on the motion to dismiss for the jurisdictional issue. Husband's counsel stated "that motion to dismiss was actually scheduled for May 11. I would like to continue it until we can get that --." The court responded "I just didn't see where there was a motion --." Wife's counsel interjected "we were not even served with this motion until this morning, and we're asking that the temporary issues at least as far as custody, child support, alimony be heard this morning." Husband's counsel responded, "The motion is regarding dismissing their claim for his military retirement and also in the [a]nswer and [c]ounterclaim with regard to the G.I. Bill." The family court then stated, "I misstated that. We are here only on [Wife's] motion for temporary relief . . . , so we will not hear your motion to dismiss, but we will hear your motion for temporary relief." Following Wife's argument, Husband's counsel responded and began by noting there was a motion to dismiss on the military retirement benefits for lack of jurisdiction. In the temporary order following the hearing, the family court stated "[Husband's] counsel moved to continue [Wife's] Motion for Temporary Relief scheduled for today until [Husband's] Motion to Dismiss for lack of jurisdiction with regard[] to his military retirement and GI Bill benefits, which was filed on April 14, 2016, could be heard on May 11, 2016." The family court stated it "denied [Husband's] Motion to Continue and the hearing commenced."

"Under the current Rules of Civil Procedure, a defense of lack of jurisdiction over the person is made by a Rule 12(b)(2) motion." 5 S.C. Jur. *Abatement, Revival, and Survival of Actions Assignments* § 4 (1991); Rule 12(b), SCRCP ("[T]he following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."). "The defenses specifically enumerated (1)-(8) in subdivision (b) of this rule . . . shall be heard and determined before trial on application of any party, unless the [c]ourt orders that the hearing and determination thereof be deferred until the trial." Rule 12(d), SCRCP.

"Rule 1, SCRCP[,] provides that the Rules of Civil Procedure shall be 'construed to secure the just, speedy[,] and inexpensive determination of every action.'" *Royster Co. v. E. Distrib., Inc.*, 301 S.C. 18, 21, 389 S.E.2d 863, 864 (1990). The South

Carolina Rules of Civil Procedure apply in family court when no family court rule provides otherwise. Rule 81, SCRCP.

In *Combs v. Bakker*, the United States Court of Appeals for the Fourth Circuit criticized the district court for causing "awkwardness" with its "approach" of "address[ing] first the challenge under Rule 12(b)(6) to the merits" before "the more fundamental challenge under Rule 12(b)(2) to personal jurisdiction." 886 F.2d 673, 675 (4th Cir. 1989). The Fourth Circuit determined the "proper course in review is to consider first whether the district court had grounds for personal jurisdiction as to all or any of the claims, that being the actual breadth of the defendants' Rule 12(b)(2) motion, and also the more fundamental challenge." *Id.*; *see also Dunbar v. Vandermore*, 295 S.C. 493, 497, 369 S.E.2d 150, 152 (Ct. App. 1988) (finding federal case law persuasive in interpreting the federal rules (citing Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 7 (1st ed. 1985))).

Because Husband's motion asserted the family court's lack of personal jurisdiction over him in relation to his military retirement benefits, the family court should have considered it first. We agree with Husband that by not hearing the motion to dismiss first, he was placed in the position of either not answering Wife's complaint or potentially waiving his jurisdictional issue. The family court should have first considered whether it had jurisdiction over the military retirement benefits. Accordingly, the family court erred in not first hearing Husband's motion to dismiss for lack of jurisdiction.

II. Consent to Jurisdiction over Military Retirement Benefits

Husband contends the family court erred in ignoring federal law by ruling Wife was entitled to a share of his military retirement benefits based on the family court's finding Husband consented to jurisdiction over his military retirement benefits by his appearance and filing of an answer and counterclaim. Husband asserts the family court relied solely on South Carolina's long-arm statute in determining personal jurisdiction instead of the requirements 10 U.S.C.A § 1408(c) established. He therefore maintains this court should reverse the family court's award of a portion of his military retirement benefits to Wife. We agree.

A. The Uniformed Services Former Spouses' Protection Act

"Domestic relations are preeminently matters of state law." *Delrie v. Harris*, 962 F. Supp. 931, 933 (W.D. La. 1997). However, "[t]he Uniformed Services Former Spouses' Protection Act [(the USFSPA or the Act)] presents a rare instance where Congress has directly and specifically legislated in the area of domestic relations." *Id.* (citation omitted). "When Congress legislates on a subject . . . within its constitutional control and over which it has jurisdiction, the state law must yield when there is a conflict with a valid federal law." *Kovacich v. Kovacich*, 705 S.W.2d 281, 283 (Tex. App. 1986) (citing *Free v. Bland*, 369 U.S. 663 (1962)).

The USFSPA provides that "a court may treat disposable retired pay payable to a member [of the military] . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court," "[s]ubject to the limitations of this section." 10 U.S.C.A. § 1408(c)(1).[8] However, the Act specifies:

> A court may not treat the disposable retired pay of a member [of the military] in the manner described . . . unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

10 U.S.C.A. § 1408(c)(4); *see also Blackson v. Blackson*, 579 S.E.2d 704, 712 (Va. Ct. App. 2003) ("Under the provisions of the USFSPA, a state court may acquire jurisdiction to divide a service member's disposable retired pay in three circumstances: (1) if the member is domiciled in the state; (2) if the member is a resident of the state; or (3) if the member gives consent to the state's jurisdiction.").

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[8] This authorization applies to "pay periods beginning after June 25, 1981." 10 U.S.C.A. § 1408(c)(1). The statute restricts a court from treating the retirement as property "if a final decree of divorce, dissolution, annulment, or legal separation . . . (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse." *Id.*

B. History of the USFSPA

Congress passed the Act in 1982 due to the Supreme Court's decision the prior year in *McCarty v. McCarty*, 453 U.S. 210 (1981), which "held that federal law precludes a state court from dividing military retirement pay pursuant to state community property law." *Delrie*, 962 F. Supp. at 933; *see also Brown v. Harms*, 863 F. Supp. 278, 281 (E.D. Va. 1994) ("In 1981, the Supreme Court held that the existing federal laws granted husbands and wives no right to their spouses' military pensions, and that state courts were precluded from applying their community property laws to such pensions." (citing *McCarty*, 453 U.S. at 223-36)). Because "Congress[was] concerned with the effect *McCarty* would have on the divorced spouses of military personnel but wish[ed] to retain certain protections for military retirees, [it] enacted the [USFSPA]." *Delrie*, 962 F. Supp. at 933. "The Act modified *McCarty* and, in effect, permitted states to treat military retirement benefits as either the property of the military member or as community property, with certain specified conditions." *Id.*; *see also Petters v. Petters*, 560 So. 2d 722, 725 (Miss. 1990) ("Congress enacted [the] []USFSPA and resolved a controversy theretofore existing regarding state authority to adjudge the rights of (ex)spouses in a retired serviceman's military retirement pension.").

C. Preemption of State Long-Arm Statutes

"Section[] 1408 . . . (c)(4) impose[d] new substantive limits on state courts' power to divide military retirement pay." *Mansell v. Mansell*, 490 U.S. 581, 590 (1989). "Because . . . th[is] provision[] pre[]empts state law, the argument that the Act has no pre[]emptive effect of its own must fail. Significantly, Congress placed each of these substantive restrictions on state courts in the same section of the Act as § 1408(c)(1)." *Id.* at 591-92 (footnote omitted).

Generally, "[a] court may exercise personal jurisdiction over a person domiciled in, . . . doing business [in], or maintaining his . . . principal place of business in[] this State as to any cause of action." S.C. Code Ann. § 36-2-802 (2003). "Traditionally, our courts have employed a two-step analysis in determining whether it is proper to exercise personal jurisdiction over a nonresident defendant." *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008). "First, the trial court must determine that the South Carolina long-arm

statute applies. Second, the trial court must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements." *Id.*

However, "[b]y virtue of the Supremacy Clause, th[e] federal enactment [of the USFSPA] overrides [a] state's long-arm statute[] to the extent that [the] state's law would exceed the limitations of the federal enactment." *Petters*, 560 So. 2d at 725; *see also In re Marriage of Booker*, 833 P.2d 734, 739 (Colo. 1992) (en banc) ("The question of whether a trial court acquires jurisdiction over a military member's military pension is governed not by principles of state rules of in personam jurisdiction or procedure, but rather by the specific terms of the Act that, by virtue of the Supremacy Clause of the United States Constitution, in effect preempt state rules of procedure insofar as jurisdiction to consider this particular asset is concerned." (citing U.S. Const. art. VI, cl. 2; *Petters*, 560 So. 2d at 725; *Mortenson v. Mortenson*, 409 N.W.2d 20, 22 (Minn. Ct. App. 1987); *Kovacich*, 705 S.W.2d at 283; *Allen v. Allen*, 484 So. 2d 269 (La. Ct. App. 1986))).

"[S]ection 1408 places a strict limitation on the court's exercise of jurisdiction to dispose of [a member's] military retirement pay. This federal law preempts the application of [the state statute], which would determine whether [the member] had 'minimum contacts' with the state sufficient to confer jurisdiction over his person." *Pender v. Pender*, 945 S.W.2d 395, 396 (Ark. Ct. App. 1997). "[T]he 'minimum contacts' test does not apply in a suit for the partition of military retirement pay, making the requirements for personal jurisdiction those set out in 10 U.S.C.A. § 1408(c)(4)." *Id.* (citing *Southern v. Glenn*, 677 S.W.2d 576 (Tex. App. 1984)). The fact that a military member meets the minimum-contacts test does not determine the matter of personal jurisdiction when the member does not meet the terms of the federal statute regulating disposition of military retirement pay. *Id.* at 396-97 (citing *Southern*, 677 S.W.2d at 582). "Because Congress legislated on a subject within its constitutional parameters and over which it has jurisdiction, the state law must yield when it conflicts with federal law." *Id.* at 397. "[Section] 1408(c)(4) refers to personal jurisdiction. For this . . . Congress chose not to use state law. Instead, it usurped state long-arm statutes and provided in § 1408(c)(4)(A)-(C) its own tests of personal jurisdiction that all state courts must apply." *Wagner v. Wagner*, 768 A.2d 1112, 1117 (Pa. 2001).

"[Section] 1408(c)(4) prohibits state courts from exercising authority to determine the status of a military member's pension unless the court, as of the commencement of the action, has personal jurisdiction over the member by virtue of residence

(other than because of military assignment), domicile, or consent." *In re Marriage of Akins*, 932 P.2d 863, 867 (Colo. App. 1997). "Jurisdiction under the USFSPA, therefore, is more restrictive than the minimum contacts test, pursuant to which an out-of-state defendant may be subjected to the jurisdiction of the forum state." *Id.* (citing *Flora v. Flora*, 603 A.2d 723 (R.I. 1992); *Southern*, 677 S.W.2d at 582); *see also Uniform Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. Rev. 1, 18 (1999) ("When Congress enacted the USFSPA, it limited the subject matter jurisdiction of state courts over military retirement pay to those instances in which personal jurisdiction existed over the military member other than by virtue of military assignment. These jurisdictional provisions are more restrictive than the minimum contacts test which will subject an out-of-state defendant to the jurisdiction of the forum state." (footnotes omitted)). "[S]tates have . . . held uniformly, in this limited context, that a state's process arm is not nearly so long as otherwise." *Petters*, 560 So. 2d at 726 (citing *In re Marriage of Hattis*, 242 Cal. Rptr. 410 (Cal. Ct. App. 1987); *Southern*, 677 S.W.2d at 582; *Dunn v. Dunn*, 708 S.W.2d 20 (Tex. App. 1986); *White v. White*, 543 So. 2d 126 (La. Ct. App. 1989); *In re Marriage of Parks*, 737 P.2d 1316 (Wash. Ct. App. 1987); *Mortenson v. Mortenson*, 409 N.W.2d 20 (Minn. Ct. App. 1987)).

"Congress allows 'courts of competent jurisdiction' to partition retirement pay 'in accordance with the law of the jurisdiction of such court.'" *Wagner*, 768 A.2d at 1117 (quoting 10 U.S.C.A. § 1408(a)(1)(A), (c)(1)). "[T]he Act only allows courts to apply state divorce laws to military pensions. It does not purport to do more." *Brown*, 863 F. Supp. at 281. "Nowhere does it expressly or impliedly grant any court the power to adjudicate any cause, nor does it provide any substantive rule for the treatment of military pensions in divorce or domestic relations contexts." *Id.*

D. Obtaining Jurisdiction Under the Act and the Meaning of Consent

"Congress has authorized state courts to consider the status of a military pension in a dissolution proceeding on the express condition that the court has obtained personal jurisdiction over the military member in accordance with the specific statutory criteria of § 1408(c)(4)." *In re Marriage of Akins*, 932 P.2d at 867. "This limitation on a court's jurisdiction was apparently adopted to curtail 'forum-shopping' by spouses who might file proceedings in states with favorable marital property laws but with which the military pensioner had little contact." *Id.*; *see*

also Mansell, 490 U.S. at 591 ("[Section] 1408(c)(4) prevents spouses from forum shopping for a [s]tate with favorable divorce laws."); *Petters*, 560 So. 2d at 726 ("The political history of [the] []USFSPA makes clear a purpose to limit forum shopping and protect former servicemen from being required to defend their retirement pensions in foreign forums with which they have little contact."). "The law was not designed, however, to permit the military pensioner to likewise 'forum shop' by changing his domicile to avoid the jurisdiction of a court." *In re Marriage of Akins*, 932 P.2d at 867.

"Section 1408(c)(4) prohibits state courts from exercising authority to determine the status of a military member's pension unless personal jurisdiction over the member is acquired by one of three specific methods." *In re Marriage of Booker*, 833 P.2d at 739. "Many courts have concluded that section 1408(c)(4) constitutes a limitation on the subject matter jurisdiction of state courts over military pensions." *Id.* (citing *Steel*, 813 F.2d at 1552; *Lewis v. Lewis*, 695 F. Supp. 1089 (D. Nev. 1988); *Allen*, 484 So. 2d at 270-71; *Seeley v. Seeley*, 690 S.W.2d 626 (Tex. App. 1985)). "Other courts have construed the statute as restricting state court exercise of otherwise valid in personam jurisdiction over military personnel." *Id.* (citing *Kovacich*, 705 S.W.2d at 282; *Seeley*, 690 S.W.2d at 627).

> Whatever the theory, . . . Congress has in effect both permitted state courts to consider what status to accord military pensions in the context of dissolution proceedings and prescribed the manner by which personal jurisdiction must be obtained over the military member who is a party to such proceedings before they may apply the substantive laws of their states to that particular asset.

Id.

Of the three ways prescribed by Congress for a state to acquire the authority to divide a military member's pension under § 1408(c)(4), the only one relevant here is the member's consent. "The USFSPA's jurisdictional provision does not set forth the manner in which the service member must consent to the forum state's jurisdiction." 2 Brett R. Turner, *Equitable Distribution of Property* § 6:4 (4th. 2021). "There is a considerable body of case[ ]law from . . . states directed toward what constitutes consent under § 1408(c)(4)(C)." *Williams v. Williams*, 367 P.3d

1267, 1272 (Kan. Ct. App. 2016), *aff'd sub nom. In re Marriage of Williams*, 417 P.3d 1033 (Kan. 2018). South Carolina has not expressed a position on the meaning of consent in this context. *See Coon v. Coon*, 364 S.C. 563, 614 S.E.2d 616 (2005) (discussing the USFSPA but not analyzing the meaning of consent under the statute). The states that have weighed in have "conflicting interpretations" of "the meaning of 'consent' under subsection (c)(4)(C) of the [US]FSPA." *Davis v. Davis*, 284 P.3d 23, 26 (Ariz. Ct. App. 2012); *Williams*, 367 P.3d at 1272 (acknowledging "the divergent views . . . courts have taken on the issue" (citing Ann K. Wooster, Annotation, *Construction and Application of Federal Uniformed Services Former Spouse Protection Act in State Court Divorce Proceedings*, 59 A.L.R. 6th 433 (2010))); *see also* Captain Kristine D. Kuenzli, *Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. Rev. 1, 18-19 (1999) ("This provision has raised two primary issues in case law regarding jurisdiction. The first question focused on what was required for the court to find that the member had 'consented' to the court's jurisdiction.").

E. Implied Consent to Jurisdiction

Some courts have concluded the Act requires only implied consent to the court's general jurisdiction to obtain personal jurisdiction over a service member.

"Some courts discuss the issue of consent in terms of whether § 1408(c)(4)(C) is a provision dealing with 'subject matter jurisdiction' or 'personal jurisdiction.' Other courts discuss whether § 1408(c)(4)(C) requires 'express consent' or if 'implied consent' is sufficient." *Williams*, 367 P.3d at 1272; *see also Broadbent v. Broadbent*, 451 P.3d 930, 932 (Okla. Civ. App. 2019) (noting state courts are "split [over] whether consent by a military spouse may be express or implied"); *Davis*, 284 P.3d at 26 ("The disagreement [over the meaning of consent] stems from whether implied consent satisfies the requirements of subsection (c)(4)(C)."). "While some states have rejected the theory of implied consent, others have held that implied consent satisfies the requirements of the [US]FSPA or that the protections of the [US]FSPA may be waived through state procedural rules." *Davis*, 284 P.3d at 26.

In *Williams*, the Kansas Court of Appeals observed the parties' contrary positions each had "substantial support" from "the case[ ]law of [its] sister states." 367 P.3d at 1272. In that case, the husband "contend[ed] that the USFSPA requires 'express

consent' and he did not expressly consent to the court's jurisdiction by 'filing an answer, appearing, and actively participating in the case'" and that "if 'implied consent' is sufficient, the consent 'must be specific to the issue of military retirement, when the underlying case involves multiple issues.'" *Id.* Whereas the wife "argue[d] that [the husband] consented to jurisdiction when he appeared and participated in the proceedings without objecting to the district court's jurisdiction over his military retirement." *Id.*

One court recognizing the split between states observed courts have had conflicting interpretations of consent when "a service member remains silent regarding the court's authority to divide the military benefits, *i.e.* implied consent." *Broadbent*, 451 P.3d at 932-33 (citing *Johnson v. Johnson*, 386 P.3d 1049, 1055 (Okla. Civ. App. 2016)). That court noted that the *Johnson* opinion had cited to *Davis*, 284 P.3d at 27, "which held that § 1408(c)(4)(C) does not require express consent, and that 'a state court may exercise personal jurisdiction' over a military member's retirement when that member 'makes a general appearance without expressly contesting personal jurisdiction.'" *Broadbent*, 451 P.3d at 933 (citing *Johnson*, 386 P.3d at 1055; *White v. White*, 543 So. 2d 126 (La. Ct. App. 1989) (finding consent can be implied after a general appearance, which waives all personal jurisdiction objections); *Judkins v. Judkins*, 441 S.E.2d 139 (N.C. Ct. App. 1994) (holding member consented by making general appearance and filing answer with counterclaims without contesting jurisdiction); *Morris v. Morris*, 894 S.W.2d 859, 862 (Tex. App. 1995) (deciding member consented by filing general answer and not contesting court's jurisdiction until appeal)).

"[S]tates have held that consent by a military spouse may be express or implied, and that a general appearance coupled with a failure to timely object to personal jurisdiction constitute implied consent under [s]ection 1408(c)(4)(C)." *Pierce v. Pierce*, 132 So. 3d 553, 562 (Miss. 2014) (citing *Judkins*, 441 S.E.2d at 140; *Kildea v. Kildea*, 420 N.W.2d 391, 394 (Wis. Ct. App. 1988); *Southern*, 677 S.W.2d at 583); *see also* Kuenzli, *Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. Rev. at 19 ("The majority of jurisdictions have concluded that a general appearance is tantamount to consent to the court's jurisdiction for all purposes, including division of the military pension. *Since no requirement exists for the member to specifically consent to the court's authority to divide the military retirement pay*, this reading of the statute seems appropriate. After all, the USFSPA only requires consent to the jurisdiction of the court, *not consent to the court's authority to divide the*

pension." (emphases added) (footnote omitted)). "Most courts in other states have held that a party impliedly consents to jurisdiction under [the] []USFSPA where he or she waives a challenge to the court's personal jurisdiction under state law." *In re Marriage of Robinson*, 33 N.E.3d 260, 266-67 (Ill. App. Ct. 2015) (citing *In re Marriage of Booker*, 833 P.2d at 740; *Gowins v. Gowins*, 466 So. 2d 32, 34-35 (La. 1985); *Pierce*, 132 So. 3d at 562-63; *Davis*, 284 P.3d at 27; *Judkins*, 441 S.E.2d at 140; *Seeley*, 690 S.W.2d at 628; *Blackson*, 579 S.E.2d at 712; *In re Marriage of Peck*, 920 P.2d 236, 239 (Wash. Ct. App. 1996); *Kildea*, 420 N.W.2d at 394); *see also Pierce*, 132 So. 3d at 562 ("[T]he protections of [s]ection 1408(c)(4), like other limitations on a state's authority to acquire personal jurisdiction, may be waived." (quoting *Petters*, 560 So. 2d at 726)); *id.* ("[A] waiver c[an] be accomplished through a general appearance or 'anything else which might be construed as a present waiver.'" (quoting *Petters*, 560 So. 2d at 726)); *Petters*, 560 So. 2d at 726 ("Other states have recognized this waiver doctrine in cases where the defendant entered a general appearance or waived the service of process upon him."); 2 Turner, *Equitable Distribution of Property* § 6:4 ("The service member clearly consents by litigating the case without expressly raising the jurisdictional provision as an issue. In other words, the burden of invoking the USFSPA's jurisdictional provision is on the service member." (footnote omitted)); *id.* ("The service member also clearly consents by expressly agreeing to a state's jurisdiction in a stipulation or settlement agreement."); *id.* ("A majority of state courts held that the service member consents to the state's jurisdiction by requesting affirmative relief in the case or otherwise making a general appearance." (footnote omitted)).

Wisconsin is one of those states that follows the position that § 1408(c)(4) "only requires consent to the jurisdiction of the court, not consent to the court's authority to divide the pension." *Kildea*, 420 N.W.2d at 393. The Wisconsin Court of Appeals has held that "[h]ad Congress intended specific consent to be a requirement, it would have been a simple matter to draft the statute to do so." *Id.* The court opined that "[b]y drafting it as Congress did, the statute curtails 'forum shopping' by the nonmilitary spouse, but does not give an absolute 'veto power' to the military spouse." *Id.* at 394 (citing *Southern*, 677 S.W.2d at 583). The court "conclude[d] that . . . [§] 1408(c)(4) is clear on its face and that consent to personal jurisdiction is sufficient to give the court authority to divide the pension. We decline to adopt the strained interpretation urged by [the husband]." *Id.* The court noted, "Other jurisdictions have likewise concluded that a general appearance is tantamount to consent to the court's jurisdiction for all purposes, including division of the military pension." *Id.* (citing *In re Marriage of Jacobson*, 207 Cal. Rptr. 512

(Cal. Ct. App. 1984); *Seeley*, 690 S.W.2d at 628). The court determined that in that case, the husband's "general appearance and failure to timely object to personal jurisdiction gave the trial court the authority to divide his military pension." *Id.*

In another case adopting the same position, after the appellate court found the husband had consented when he had not objected to the jurisdiction of the court to divide his military retirement benefits during the divorce and first objected nineteen years later, once the wife filed a motion to garnish his retirement, the husband argued to the Kansas Supreme Court that consent must be (1) explicit because "the plain meaning of 'consent' is not 'failure to object'" and (2) specific to jurisdiction over the military benefits. *In re Marriage of Williams*, 417 P.3d at 1037-38, 1047. The court was "not persuaded that the USFSPA requires specific consent to the consideration of retirement benefits. . . . [Section] 1408(c)(4)(C) states the service member must 'consent to the jurisdiction of the court.' It does not say he or she must consent to the court dividing military retirement benefits." *Id.* at 1047. The court determined that "[u]nder the circumstances of th[at] case, a Kansas court with personal jurisdiction over an individual has subject-matter jurisdiction to divide marital property, including military retirement benefits." *Id.*

Many of the cases discussing the subject of consent to jurisdiction over military retirement differ from the present case in that in those cases, the military members did not raise an objection to jurisdiction and made a general appearance. The Arizona Court of Appeals stated that it "agree[d] with those courts holding that a state court may exercise personal jurisdiction over a military member who makes a general appearance without expressly contesting personal jurisdiction." *Davis*, 284 P.3d at 27 (citing *Gowins*, 466 So. 2d at 36 ("10 U.S.C.A. § 1408(c)(4)(C) does not require express consent. A military spouse can give implied consent to a state court's jurisdiction by making a general appearance, waiving all jurisdictional objections."); *Judkins*, 441 S.E.2d at 140 (state court obtained personal jurisdiction over military member where he made a general appearance by seeking affirmative relief in his answer without contesting personal jurisdiction); *Kildea*, 420 N.W.2d at 393-94 (holding that the military member's "general appearance and failure to timely object to personal jurisdiction gave the trial court the authority to divide his military pension")).

F. Express Consent to Division of Military Retirement Benefits

"Other[] [state courts] have suggested that a defendant must affirmatively state his or her 'consent' to jurisdiction." *In re Marriage of Robinson*, 33 N.E.3d at 267 (citing *In re Marriage of Akins*, 932 P.2d at 867-68; *Davis*, 284 P.3d at 26-27 (recognizing disagreement and collecting cases)); *see also* 2 Turner, *Equitable Distribution of Property* § 6:4 ("A minority of decisions holds that the service member may refuse consent to division of military retirement benefits, while still litigating other issues in the case and indeed obtaining affirmative relief upon them."). Corpus Juris Secundum provides that "state courts may not exercise authority to distribute [a] nonresident military member's retirement pay in a divorce action unless the member consents to the court's jurisdiction over his person specifically to distribute the retirement pay" and cites to a Pennsylvania Supreme Court case to support this statement. 27C C.J.S. *Divorce* § 967 (2016) (citing *Wagner*, 768 A.2d at 1119). In that case, the supreme court, on appeal from an intermediate appellate court, examined to what a military member must consent under § 1408(c)(4)(C). *Wagner*, 768 A.2d at 1117. The supreme court noted that once the intermediate court "characterized § 1408(c)(4)(C) as a personal jurisdiction provision, it assumed that the statute meant consent to the court's personal jurisdiction in a divorce proceeding for all purposes." *Id.* "The [intermediate] [c]ourt did not allow for the possibility that § 1408(c)(4)(C) is more limited[] and refers to a military serviceperson's consent to the court's authority over him to distribute his pension." *Id.* However, the supreme court determined it needed to address that possibility. *Id.*

The supreme court began its examination of Congress's intent by recognizing "that Congress views domestic relations as virtually the exclusive province of the states, and as an area in which it is reluctant to intrude." *Id.* (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). The court noted "the authority granted to state courts in the family law context in which § 1408(c)(4)(C) operates is comprehensive. In divorce actions, state courts are empowered to decide a variety of matters; they dissolve marriages, resolve property rights, and determine issues of child custody, alimony[,] and support." *Id.* at 1118. Further, the court observed that "[m]any state courts . . . have the power to determine property rights, even after a marriage has been dissolved in another forum." *Id.* The court noted "the rules that apply to the courts' authority over a person, including a military member, to render valid judgments are far-reaching. In [many states], courts may issue a divorce decree *ex*

parte, as long as the plaintiff satisfies a residency requirement and serves the complaint." *Id.* The court noted that generally, when "a defendant is subject to a state's long-arm statute and has sufficient contacts with that state, his rights in the matters ancillary to divorce may be determined by its courts." *Id.* Following a court's obtaining personal jurisdiction over a defendant in an initial divorce action, the court is often then "empowered to bind him by subsequent orders over connected matters, including the partition of marital assets." *Id.*

The court noted that in line with the federal policy to limit federal intrusion into the area of domestic relations, the Act controls the authority that state courts have over only a single item—military retirement pay. *Id.* "The Act represents 'one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations,' for the limited purpose of overriding the preemptive effect of federal law on the disposition in divorce actions of military pensions." *Id.* (quoting *Mansell*, 490 U.S. at 587). Congress did not attempt to regulate any other issue that could "arise in a military member's divorce nor did it purport to speak to a member's conduct in litigation with regard to any issue *but the retirement pay*." *Id.* (emphasis added). "Section 1408(c)(4) preempts state long-arm statutes only in connection with a court's authority to determine a military member's retirement pay, and leaves all other rules by which state courts acquire personal jurisdiction over a military member for divorce and ancillary economic issues untouched." *Id.* "By its terms, § 1408(c)(4)(C) reflects Congress'[s] narrow aim. While the reference to jurisdiction in § 1408(c)(4)(C) is unqualified, § 1408(c)(4)(C) contains a reference to § 1408(c)(1)'s specific focus on the retirement pay." *Id.* "Reading the language of § 1408(c)(4)(C) in context and consistently with the Act's scope and object, we believe that Congress intended for the consent requirement in § 1408(c)(4)(C) to relate, like the rest of the Act, specifically to a military member's pension." *Id.*

The *Wagner* court found that "determin[ing] otherwise . . . would run counter to Congress'[s] purpose [in enacting the Act]." *Id.* "The right to consent in § 1408(c)(4)(C) carries with it, of course, the right not to consent." *Id.* "Under the [intermediate] [c]ourt's construction of the statute, a military member who seeks § 1408(c)(4)(C)'s protection should withhold his consent to the trial court's personal jurisdiction in general." *Id.* However, the supreme court found this interpretation "would mean that Congress gave a military member . . . the power to veto the personal jurisdiction a court might otherwise have to dissolve a marriage or to determine" other matters that divorce actions raise, such as the division of

other marital assets, by withholding consent under the statute. *Id.* at 1118-19. "Given the federal principle that family law is preeminently a local matter and the limited focus of the Act, this simply cannot be the case." *Id.* at 1119.

The *Wagner* court further found the intermediate "[c]ourt's construction is unworkable. . . . [T]he [intermediate] [c]ourt suggested that a military member who does not consent under § 1408(c) to the trial court's authority to distribute his retirement pay should file preliminary objections to the court's personal jurisdiction." *Id.* The supreme court noted that "[t]ypically, however, [the member] will be subject to the court's personal jurisdiction, no matter what he files or states. Thus, a general assertion that withholds consent to the court's personal jurisdiction would be legally meaningless on its face." *Id.* "In this context then, the assertion that has legal meaning is one . . . that withholds consent specifically to the court's jurisdiction with respect to the retirement pay." *Id.* The supreme court determined a military member would be "ill-advised" to take any of the intermediate court's suggestions—"refuse service or make no appearance"—for how to avoid "a finding of consent under the statute." *Id.* The supreme court found these options "encourage a military member to flout process and force upon him an unreasonable choice between participating in and remaining absent from important judicial proceedings." *Id.*

The supreme court "conclude[d] that under § 1408(c)(4)(C), the Pennsylvania courts may not exercise the authority they are provided in the Act to distribute a military member's retirement pay in a divorce action, unless the member consents to the court's jurisdiction over his person specifically to distribute the retirement pay." *Id.* Based on the circumstances, the *Wagner* court determined the trial court did not have jurisdiction over the husband's retirement benefits. *Id.* at 1120. The court found "none of the actions [the husband] took constituted consent as we have defined it. [The husband's] acceptance of service, his counsel's written general appearance, his participation in discovery matters unrelated to the pay, and his attendance at a separate support proceeding do not suffice." *Id.* The court noted "[t]he *only activity on [the husband's] part which concerned his pay* was the filing of preliminary objections to the trial court's jurisdiction [over the husband] and the refusal to consent." *Id.* (emphasis added).

In *Johnson*, the Oklahoma Court of Civil Appeals followed the *Wagner* court's reasoning that "courts may not exercise the authority they are provided in the Act to distribute a military member's retirement pay in a divorce action, *unless the*

member consents to the court's jurisdiction over his person specifically to distribute the retirement pay." *Johnson*, 386 P.3d at 1054 (emphasis added by court) (quoting *Wagner*, 768 A.2d at 1119). The court found "the *Wagner* [c]ourt's interpretation of [§] 1408(c)(4)(C) to be instructive." *Johnson*, 386 P.3d at 1054 (citing *In re Marriage of Tucker*, 277 Cal. Rptr. 403, 409 (Cal. Ct. App. 1991) (holding pursuant to 1408(c)(4)(C), the service member must "consent[ ] to disposition of [the member's] military retirement" in order for the trial court to divide the military retirement benefits)). The *Johnson* court also found the *Wagner* court's interpretation to be consistent with the United States Supreme Court's guidance on the Act in *Mansell*:

> We realize that reading the [Act] literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Johnson, 386 P.3d at 1054-55 (alteration by court) (quoting *Mansell*, 490 U.S. at 594).

In the *Johnson* case, the court "not[ed] the husband had immediately and expressly contested personal jurisdiction of the court to divide his retirement in the action filed." *Broadbent*, 451 P.3d at 933 (citing *Johnson*, 386 P.3d at 1055).

California interpreted the consent required by § 1408(c)(4)(C) in a similar manner as the *Wagner* court in the case of *In re Marriage of Tucker*, 277 Cal. Rptr. at 406-08. In that case, the wife argued the husband "consented to the trial court's jurisdiction over his pension" "by consenting to the trial court's resolution of certain portions of the dissolution action—child custody, support[,] and portions of the parties' personal property." *Id.* at 406. The court noted that the wife's "position in this regard is consistent with assumptions some courts have made with respect [to] Congress's intent in enacting . . . [§] 1408(c)(4)(C)." *Id.* (citing *In re Marriage of Jacobson*, 207 Cal. Rptr. at 515; *Gowins*, 466 So. 2d at 35; *Seeley*, 690 S.W.2d at 627). The court determined the wife's argument was "consistent with considerations of judicial economy," in at least one respect—"If a member of the

military has no objection to having child custody, support[,] and some property issues resolved in a particular forum, it does not serve the interests of judicial economy to permit him to nonetheless insist that division of his military pension be decided in another forum." *Id.*

However, the court also recognized the husband's argument that the court had previously "held a spouse seeking to divide a military pension under []USFSPA must show that a member of the military had more than the minimum contacts with the forum necessary for personal jurisdiction." *Id.* (citing *In re Marriage of Hattis*, 242 Cal. Rptr. at 415). The court stated that the *Hattis* case had "found that the provisions of . . . [§] 1408(c)(4) were 'apparently included in response to concerns about "forum-shopping" spouses who might seek to divide the pension in a state with more favorable laws, but with little contact with the pensioner.'" *Id.* (quoting *In re Marriage of Hattis*, 242 Cal. Rptr. at 413). The court noted that *Hattis* "recognized that, in holding [the] []USFSPA requires the nonmilitary spouse to show more than what is required by a minimum contacts analysis, the result often will be that a court has jurisdiction over all aspects of marriage except disposition of a military pension." *Id.* (citing *In re Marriage of Hattis*, 242 Cal. Rptr. at 413-15). The *Tucker* court stated, "[A] minimum contacts approach will support California jurisdiction over [a service member] for the purposes of determining his liability for child support . . . but that same court cannot adjudicate the division of his military pension, even if California law would apply under a choice of law analysis." *Id.* at 406-07 (quoting *In re Marriage of Hattis*, 242 Cal. Rptr. at 415).

Ultimately, the *Tucker* court determined, "In light of . . . *Hattis*, [it was] not in a position to accept [the wife]'s argument that consent to jurisdiction over one portion of the dissolution proceeding can be interpreted as waiving the additional protection provided to members of the military by [the] []USFSPA." *Id.* at 407. The court stated that "after *Hattis*, the failure to object to California's jurisdiction over all aspects of a divorce cannot be interpreted as an agreement [that] the narrower requirements of [the] []USFSPA have been satisfied or need not be met." *Id.* "Rather, given *Hattis*, a member of the military . . . may both agree California has jurisdiction over nonpension issues and at the same time argue California has no power to divide his or her military pension." *Id.*

G. Timing of Objection to Jurisdiction over Military Retirement Benefits

A few courts have tried to explain the differing interpretations of the statute arising out of the concepts of implied and express consent. The Kansas Court of Appeals did so by looking at an opinion from another state that held "§ 1408(c)(4) does not require that the service member expressly consent to a trial court's jurisdiction to divide his military retirement" because "[t]he service member's consent can be implied after he has made a general appearance, which waives all personal jurisdiction objections." *Williams*, 367 P.3d at 1274 (citing *White*, 543 So. 2d at 128). The Kansas court observed "[o]ther courts . . . have followed this reasoning includ[ing] the California Court of Appeals; North Carolina Court of Appeals; the Texas Court of Appeals; the Washington Court of Appeals; the Wisconsin Court of Appeals; and the Virginia Court of Appeals." *Id.* (citing *In re Marriage of Jacobson*, 207 Cal. Rptr. at 515; *Judkins*, 441 S.E.2d at 140; *Morris*, 894 S.W.2d at 862; *In re Marriage of Parks*, 737 P.2d at 1318; *Kildea*, 420 N.W.2d at 394; *Lenhart v. Burgett*, No. 0528-94-1, 1995 WL 129140, at *2 (Va. Ct App. Mar. 28, 1995)).

The *Williams* court determined "the terminology 'express consent' and 'implied consent' [was not] useful to our analysis of what constitutes consent under § 1408(c)(4)(C). The use of this terminology in other states' decisions does not really capture the factors the courts are relying on in their analyses." 367 P.3d at 1274. Instead, the court "prefer[red] to focus on a common factual pattern represented in most of the cases." *Id.* The court recognized that "[i]n most cases, the court is hearing supplemental or ancillary proceedings to an earlier divorce proceeding. In these later proceedings[,] the issue of division of military retirement is being raised for the first time and the service member objects to the division of his or her retirement." *Id.* at 1274-75.

> Courts following the "implied consent" viewpoint hold that if objection is not made to personal jurisdiction in the first instance, the service member consents to jurisdiction for purposes of § 1408(c)(4)(C), notwithstanding that the issue of the division of the military retirement may not have been raised until years later in supplemental or ancillary proceedings.

> Courts following the "express consent" viewpoint take the position that the service member does not consent to jurisdiction for purposes of § 1408(c)(4)(C) unless the service member fails to object when the issue of division of the retirement is first raised. For these courts[,] a failure to object to jurisdiction at a time before the matter of division of retirement is raised does not constitute consent. They allow an objection to be raised to jurisdiction when the issue of division of retirement is first raised, even if earlier in the proceeding the party did not object to jurisdiction. They look to see what response the party makes after the issue of retirement is raised. If the party doesn't object, there is consent. If the party does object, there is no consent.

Id. at 1275.

Oklahoma has observed "conflicting interpretations have only arisen under [§] 1408(c)(4)(C) where the military member remained silent regarding the court's authority to divide the military retirement, and only contested that authority later." *Johnson*, 386 P.3d at 1055. States have "'conflicting interpretations . . . regarding the meaning of "consent" under subsection (c)(4)(C) of the [Act].'" *Id.* (alteration by court) (quoting *Davis*, 284 P.3d at 26). "The disagreement stems from *whether implied consent* satisfies the requirements of subsection (c)(4)(C). While some states have rejected the theory of implied consent, others have held that implied consent satisfies the requirements of the [Act] or that the protections of the [Act] may be waived through state procedural rules." *Id.* (alterations by court) (emphasis added by court) (quoting *Davis*, 284 P.3d at 26). "Among those states accepting the theory of implied consent, there also appears to be disagreement regarding whether the military spouse's participation in the underlying dissolution proceedings provides a continuing basis to exercise jurisdiction with respect to post-dissolution proceedings to divide military retirement pay." *Id.* (quoting *Davis*, 284 P.3d at 26-27). "In *Davis*, the court stated that § 1408(c)(4)(C) *does not require express consent*, and 'a state court may exercise personal jurisdiction' over a military member's retirement when that member 'makes a general appearance *without expressly contesting personal jurisdiction*.'" *Johnson*, 386 P.3d at 1055 (emphases added by court) (quoting *Davis*, 284 P.3d at 27).

The *Johnson* court distinguished its case, in which the "[h]usband promptly and expressly contested personal jurisdiction of the court with regard to his retirement pay" from *Davis*, in which the member did not contest personal jurisdiction until after the member "'had: (1) made a general appearance; (2) personally and through counsel appeared at a court hearing; (3) specifically requested a special master be appointed to address his retirement pay; and (4) sought clarification about the special master's role and payment of the special master's fees,'" and when the member in *Davis* ultimately contested jurisdiction, he did it "'only in communications with the special master.'" *Johnson*, 386 P.3d at 1055 (quoting *Davis*, 284 P.3d at 28). While "[t]he *Davis* [c]ourt concluded that '[b]y making an appearance, requesting affirmative relief from the court[,] and taking these other actions *before raising any personal jurisdiction issue*, [the service member] consented to Arizona's jurisdiction,'" the *Johnson* court noted that in its case, the "[h]usband immediately contested the court's authority and jurisdiction to divide the military retirement, and at all stages of the proceeding [the h]usband renewed his objection to the court's authority in this regard." *Johnson*, 386 P.3d at 1055 (third alteration by court) (emphasis added by court) (quoting *Davis*, 284 P.3d at 28).

The *Johnson* court determined the trial court had erred in finding the husband had consented to the court's jurisdiction to divide his military retirement by previously filing two separate domestic actions. *Id.* The *Johnso*n court found, "Although [the h]usband filed . . . two prior domestic actions[9] . . . , [he] never specifically consented to the district court's jurisdiction with respect to his military retirement." *Id.* at 1055-56. The court explained that the "[h]usband specifically objected in the present action to the court's jurisdiction with regard to his military retirement, and he did so promptly and at all stages of the proceedings." *Id.* at 1056. The court concluded "because the trial court did not have jurisdiction over [the h]usband's military retirement by reason of . . . [the h]usband's consent to the jurisdiction of

[9] The first action was "for separate maintenance[,] which was dismissed by the trial court, and the second was an action for divorce[,] which resulted in a default divorce decree. However, the second action was ultimately vacated by the trial court as a result of insufficient service of process on [the w]ife." *Johnson*, 386 P.3d at 1052. "After the second action was vacated, [the w]ife filed the . . . petition initiating the divorce proceedings at issue." *Id.*

the court to divide his military retirement, the trial court lacked authority under [§] 1408(c)(4) to do so." *Id.*

Many of the cases that concern this statute have involved prior divorce proceedings in which neither party raised an objection to jurisdiction at the time of the divorce but did so in later proceedings, often when the member actually retired. *Williams* recognized, "Most of the cases deciding jurisdictional issues under the USFSPA" "involve circumstances where some time after the decree of divorce, a party comes back to court with a post-decree motion to modify the decree to make a division of military retirement benefits." 367 P.3d at 1275; *id.* at 1274-75 ("In most cases, the court is hearing supplemental or ancillary proceedings to an earlier divorce proceeding. In these later proceedings[,] the issue of division of military retirement is being raised for the first time and the service member objects to the division of his or her retirement."). The court in *Williams* noted, "A determination of what constitutes consent under such circumstances is fundamentally different than what occurred here." *Id.* at 1275. The *Williams* court found it had jurisdiction over the husband when "the court determined jurisdiction and made the division of the retirement benefits during the initial divorce proceeding" and the husband did not object to the jurisdiction until nineteen years later when his ex-wife "was seeking to enforce the divorce decree's order regarding division of [the husband's] retirement benefits." *Id.*

H. State Law Related to Waiver and/or Implied Consent

Apart from the differing interpretations of consent for purposes of section 1408, many of the cases turn on states' own precedents on the waiver of personal jurisdiction.

In *Kildea*, the Wisconsin Court of Appeals noted that the husband "admit[ted] that the trial court had personal jurisdiction over him" but argued "that the trial court lacked the 'power' to divide the pension." 420 N.W.2d at 393. The husband "point[ed] to the statutory language that the court must have jurisdiction 'by reason of' his consent. He contend[ed] that the court's jurisdiction over him was 'by reason of' the service of summons, not 'by reason of' his consent." *Id.* "He also argue[d] that he never consented to the court's division of the pension." *Id.* "The trial court found that [the husband] had consented to jurisdiction by his admission of service, his counsel's general appearance, his own general appearance, and his response asking for affirmative relief." *Id.*

On appeal, the court determined the husband "confuse[d] consent to service of a summons with consent to personal jurisdiction. . . . To avoid 'consenting' to the jurisdiction of the court, he must merely object to jurisdiction." *Id.* The court noted that in that state, "if a litigant desires to avail himself of want of jurisdiction of his person he must keep out of court for all purposes except that of objecting to jurisdiction, or, what is the same thing, moving to dismiss on that ground." *Id.* (quoting *Stroup v. Career Acad. of Dental Tech.-Washington, D.C., Inc.*, 156 N.W.2d 358, 360 (Wis. 1968)). The court further explained, "If [the litigant] takes any step consistent with the idea that the court has jurisdiction of his person, such appearance amounts to a general appearance and gives the court jurisdiction for all purposes." *Id.* (quoting *Stroup*, 156 N.W.2d at 360).

The court noted "although service was one of the steps taken to obtain jurisdiction, [the husband] still had the opportunity to object to jurisdiction by responsive pleading or motion." *Id.* It found the husband "made no objection regarding jurisdiction over his person. In fact, he repeatedly concede[d] that personal jurisdiction was present." *Id.* It noted the husband instead relied "on nuances in the statute to build an argument that although personal jurisdiction was *generally* present, the court lacked the *specific* jurisdiction to divide the pension because he did not agree to the division." *Id.* However, the court decided "his argument was not supported by the clear language of the statute." *Id.*

In the case of *In re Marriage of Robinson*, the Illinois Court of Appeals held the husband did not consent to jurisdiction. 33 N.E.3d at 267. The court noted that in that state, "a party does not waive a challenge to a court's personal jurisdiction if the party challenges the court's jurisdiction before filing a motion or other responsive pleading." *Id.* The court stated the husband "undoubtedly challenged the trial court's personal jurisdiction prior to seeking affirmative relief from the court." *Id.* The court found the first action he took in the proceedings in that state was a motion "argu[ing] that the court lacked personal jurisdiction over him. His subsequent request for a modification to the court's award did not waive his challenge to the trial court's jurisdiction in th[e] case." *Id.* The court determined the husband "did not affirmatively state his consent to jurisdiction, either; he did the precise opposite. Thus, we find that [the husband] did not consent to the Illinois court's jurisdiction by requesting affirmative relief or in any other way." *Id.*

In *Seeley*, a Texas appellate court found that the husband had entered a general appearance by his conduct at trial. 690 S.W.2d at 627. When the case was initially called, the trial court had asked if "the parties were there on [the husband's] special appearance." *Id*. The husband's "attorney responded that although a special appearance was set for hearing, that he had no objection 'to [the wife] proceeding with the proof on the divorce itself and reserve[d] that question on military retirement pay in response to whatever evidence [the wife] puts on.'" *Id.* (second alteration in original). The court noted that the husband's "sole objection was limited to the jurisdiction of the court over the military retirement pay." *Id.* The case proceeded, and during the wife's testimony, she was questioned and she gave answers regarding the husband's military retirement benefits. *Id.* Once the husband "rested, the court allowed argument concerning the issue of [the husband's] special appearance." *Id.*

The appellate court determined the trial "court did not rule on the special appearance until the trial on the merits was concluded. An individual who challenges the court's jurisdiction by filing a special appearance must follow strictly the provisions of [the rule regarding special appearances] to avoid making a general appearance." *Id.* at 627-28. The appellate court found that because the husband "allowed the trial to proceed without first obtaining a ruling" on his special appearance motion, the husband "waived his special appearance." *Id.* at 628. "The Texas rules of civil procedure provide that only *after* a special appearance is overruled may a party thereafter appear generally without waiving his special appearance. This rule, however, applies only where the special appearance is overruled *prior to a trial on the merits*." *Id.* "By invoking the court's jurisdiction on matters other than jurisdiction, and without being compelled to do so by prior ruling of the court, the [husband] made a general appearance. This being the case, [the husband] consented to jurisdiction and satisfied the requirements of [§] 1408(c)(4)." *Id.* (citation omitted).

The Mississippi Supreme Court has held: "[T]he protections of [§] 1408(c)(4), like other limitations on a state's authority to acquire personal jurisdiction, may be waived. Other states have recognized this waiver doctrine in cases where the defendant entered a general appearance or waived the service of process upon him." *Petters*, 560 So. 2d at 726 (citations omitted) (citing *Gowins*, 466 So. 2d at 36; *In re Marriage of Parks*, 737 P.2d at 1318; *Kildea*, 420 N.W.2d at 293-94). The court held in that case, "As [the husband] has made no appearance in this matter nor done anything else which might be construed as a present waiver, there

is no basis upon [which] we might find that within the meaning of [§] 1408(c)(4)(C) . . . he has consented to the jurisdiction of the Mississippi court." *Id.* This holding was in spite of the fact that the court had jurisdiction over the husband in the wife's debt claim against him due to his desertion; the debts occurred in the state as did the husband's behavior that led to the debts. *Id.* at 726-27.

The Louisiana Supreme Court has held "§ 1408(c)(4)(C) does not require express consent. A military spouse can give implied consent to a state court's jurisdiction by making a general appearance, waiving all jurisdictional objections under [the Louisiana Code of Civil Procedure]." *Gowins*, 466 So. 2d at 36.

The Oklahoma Court of Civil Appeals found the trial court had personal jurisdiction over the husband to divide his military retirement benefits because the "[h]usband voluntarily subjected himself to the court's jurisdiction." *Broadbent*, 451 P.3d at 933. It noted, the "[h]usband filed the petition for dissolution of marriage . . . , requesting the court equitably divide the parties' real and personal property." *Id.* The "[h]usband did not object to the court's jurisdiction over his retirement for over a year. Accordingly, . . . [the h]usband consented to the court's jurisdiction by initiating the dissolution proceeding and failing to timely contest the court's jurisdiction." *Id.*

In *Blackson*, 579 S.E.2d at 712, the Virginia Court of Appeals observed: "[The h]usband initially made a special appearance to contest the court's subject matter and personal jurisdiction." "[T]he [trial] court ruled it had both subject matter and personal jurisdiction . . . ." *Id.* The husband continued to maintain his objection to the jurisdictional rulings but also "filed a [counterclaim] invoking the court's jurisdiction to grant a divorce to him on multiple grounds, to award him child custody and child support, to make equitable distribution, and to award him attorney's fees and costs." *Id.* The appellate court determined that "[b]y invoking the jurisdiction of the court to grant him affirmative relief, [the] husband consented to the trial court's jurisdiction and satisfied the consent requirements of . . . § 1408(c)(4)." *Id*.

The *Blackson* court found: "[The h]usband took some actions that were similar to those of [the husband in *Wagner*]. For example, he had his attorney enter a special appearance in the trial court to contest both subject matter jurisdiction over the divorce and personal jurisdiction over him." *Id.* "However, unlike Mr. Wagner,

[the] husband specifically invoked the court's jurisdiction over him when he voluntarily sought affirmative relief through his [counterclaim]. The [counterclaim] requested, among other things, equitable distribution of the parties' marital estate which includes his retirement benefits." *Id.* The court noted that in that state, "the filing of a [counterclaim] constitutes a general appearance and an invocation of the court's jurisdiction." *Id.* at 713-14 (citing *Ceyte v. Ceyte*, 278 S.E.2d 791, 792 (Va. 1981) (finding any action taken by a litigant that recognizes the case as before the court amounts to a general appearance unless such action's *sole* purpose is to contest jurisdiction)). The court determined the "[h]usband could not invoke and consent to the jurisdiction of the court for equitable distribution and arbitrarily exclude his retirement pay from the trial court's jurisdiction." *Id.* at 714. "Having invoked the jurisdiction of the court to equitably distribute all of the parties' property, [the] husband cannot object to the court's exercise of its authority that he voluntarily invoked." *Id.*

In *Pender*, the Arkansas Court of Appeals examined whether the husband "'consented' to jurisdiction in the Arkansas . . . court when he filed a motion to set aside the divorce decree based on fraud and improper service of process." 945 S.W.2d at 397. The court found the wife's argument that the husband "cannot use a 'shotgun approach' in 'consenting' to the divorce but not to the division of the marital pension" to be without merit. *Id.* The court observed that "[u]nder the doctrine of divisible divorce, [the wife] could have obtained a dissolution of the marriage without [the husband]'s consent." *Id.* The court found the husband did not acquiesce to the court's jurisdiction by filing a motion to set aside the divorce decree. *Id.* The court determined the husband's "actions in requesting a hearing on the motion were not inconsistent with his position that there was improper service." *Id.*

In a Washington Court of Appeals case, *In re Marriage of Peck*, the wife argued the husband had consented to jurisdiction when he filed an answer to her petition for divorce because his answer requested affirmative relief by asking the court to set child support. 920 P.2d at 238. "The trial court accepted this argument in denying [the husband]'s motion for reconsideration, reasoning that [the husband] had seemed to 'contest jurisdiction on some points and admit jurisdiction on others.'" *Id.* The husband had "checked various lines for 'admitted' and 'denied' on a form" in his answer. *Id.* He had checked "admitted" in response to the paragraph in the wife's petition alleging child support should be set, then noted on the form's next page that he denied certain provisions "because: 'This court has no jurisdiction

over [the husband] because [the husband] has never been physically present in the state . . . . [The husband] does not choose to consent to the jurisdiction of this court either.'" *Id.* The appellate court observed the husband "continued to contest jurisdiction in later pleadings, including a motion to dismiss, a motion to revise the . . . denial of that motion, and an amended answer to the petition." *Id.*

The appellate court recognized, "Consent to jurisdiction may be implied by the service member's general appearance in court . . . ." *Id.* However, the court further observed "even where the member has objected to personal jurisdiction . . . , as [the husband] did, 'he may waive the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court.'" *Id.* at 238-39 (quoting *In re Marriage of Parks*, 737 P.2d at 1318) (citing *Deal v. Deal*, 496 So. 2d 1175 (La. Ct. App. 1986)). The court ultimately found that in that case, the husband had not "consented to jurisdiction or waived his jurisdictional challenge. By agreeing with [the wife]'s assertion that the parties have children for whom support should be set according to the standard schedule, he did not seek affirmative relief." *Id.* at 239.

The appellate court in *Peck* distinguished the cases the wife cited: "The husband in *Parks* did not contest jurisdiction initially, but prayed for a division of marital property and for resolution of child custody and maintenance issues," and "the husband in *Deal* requested child custody, a reduction in support, and a finding that the military pension was solely his own property." *Id.* (citing *Parks*, 737 P.2d at 1318; *Deal*, 496 So. 2d at 1176). The court held that in those cases, the "husbands were seeking affirmative relief, thereby submitting themselves to the jurisdiction of the court." *Id.* (citing *Livingston v. Livingston*, 719 P.2d 166 (Wash. Ct. App. 1986) (finding party who asks court to enforce visitation seeks affirmative relief)). Whereas the *Peck* court found the husband "merely acknowledged his responsibility to provide for the children, as [the wife] proposed. He did not seek affirmative relief, and therefore did not waive his challenge to the court's jurisdiction. Nor did [the husband] consent to jurisdiction by asking the court to award him attorney's fees." *Id.* Accordingly, the appellate court concluded "the trial court lacked the necessary personal jurisdiction over [the husband] to divide his [military] pension under the USFSPA." *Id.*

In the case of *In re Marriage of Akins*, the husband continually objected to the trial court's jurisdiction over his military pension. 932 P.2d at 868. The court found: "[T]he question of consent under § 1408(c)(4) is not whether the military member

simply waived his right to contest personal jurisdiction under state procedural rules. Rather, the statutory language requires some form of affirmative conduct demonstrating express or implied consent to general in-personam jurisdiction." *Id.* at 867-68.

In *Judkins*, the North Carolina Court of Appeals found the trial court had personal jurisdiction of the husband under § 1408(c)(4). 441 S.E.2d at 140. In that case, the wife filed an "action seeking a divorce . . . , child custody, child support, alimony, and equitable distribution," and the husband "filed an answer containing counterclaims for child custody and support and equitable distribution." *Id.* The court determined the husband "made a general appearance thereby consenting to personal jurisdiction by seeking affirmative relief in his answer *without contesting personal jurisdiction*." *Id.* (emphasis added).

In the present case, the only case the family court cited in its order denying Husband's motion to dismiss for lack of jurisdiction was a United States Court of Federal Claims case, *Baka v. United States*, 74 Fed. Cl. 692 (2006). The facts and procedural history in that case are different from those in the present case. In that case, the husband retired from the military in 1977, thus becoming eligible for retirement pay. *Id.* at 693. The husband and wife divorced in 1986 in California. *Id.* The California court incorporated into the final judgment a stipulation by both parties giving the wife part of the husband's retirement pay. *Id.* Shortly thereafter, the wife applied for and began receiving her share of the retirement pay. *Id.* Twenty years later, the husband filed a complaint in the federal claims court asserting "the wrongful and unlawful taking of a portion of" his military retired pay. *Id.* The federal claims court determined, "Although [the husband] claims that he is a resident of Pennsylvania and that the California court lacked personal jurisdiction over him, a person 'consents' to the personal jurisdiction of a court by participating in a proceeding." *Id.* at 698.

We also must look at South Carolina case law regarding what is required to maintain an objection to the court's jurisdiction over a party. The Fourth Circuit Court of Appeals has observed, "The adoption of the present South Carolina Rules of Civil Procedure abolished the special appearance, but retained the voluntary appearance." *Maybin v. Northside Corr. Ctr.*, 891 F.2d 72, 74 (4th Cir. 1989). "Therefore, a general appearance is the only appearance a party can make under existing procedure." *Id.* (quoting *Dunbar*, 295 S.C. at 495, 369 S.E.2d at 151). "At the same time, [Rule] 12(b)(2)[, SCRCP,] states that the defense of 'lack of

jurisdiction over the person' may be made by motion or by responsive pleading." *Id.* The court stated, "Therein lies a paradox in the South Carolina rules. If a defendant can only make a general appearance, how can he assert his objection to personal jurisdiction under Rule 12(b) without simultaneously waiving his objection under Rule 4(d)[, SCRCP]?" *Id.*

The court found, "Rules of civil procedure must be considered in relation to one another and construed together. It is clear from Rule 12(b) that a party should be able to raise an objection to personal jurisdiction without simultaneously waiving it under Rule 4(d)." *Id.* (citation omitted). The court observed that this court in *Dunbar v. Vandermore*, had "attempt[ed] to solve the riddle caused by the elimination of the term 'special appearance' from the language of the present rule." *Id.* (citing *Dunbar*, 295 S.C. at 495-97, 369 S.E.2d at 151-52). The court stated that the defendant in *Dunbar* "obtained an extension of time from the plaintiff to file responsive pleadings" and later "moved for an order dismissing the suit on the grounds that the state court lacked personal jurisdiction over him and subject matter jurisdiction over the action, and that there was insufficient process and service of process." *Id.* (citing *Dunbar*, 295 S.C. at 494, 369 S.E.2d at 151). The court explained that this court "noted that 'it is possible under the Rules for a party to waive the right to question jurisdiction over the person. Rule 12(h)(1)[, SCRCP,] expressly provides that this right is waived under two circumstances.'" *Id.* (quoting *Dunbar*, 295 S.C. at 496, 369 S.E.2d at 152). The *Dunbar* "court held that the defendant had not waived his right to assert jurisdictional defenses merely by requesting an extension of time." *Id.* (citing *Dunbar*, 295 S.C. at 497, 369 S.E.2d at 152-53).

The Fourth Circuit then contrasted *Dunbar* with another case from this court, *Smalls v. Weed*, 291 S.C. 258, 353 S.E.2d 154 (Ct. App. 1987). *Maybin*, 891 F.2d at 74. In *Smalls*, this court held that when a defendant had "appeared and asserted two claims which went to the merits, in addition to his jurisdictional objection, the defendant had waived personal jurisdiction." *Id.* (citing *Smalls*, 291 S.C. at 260-61, 353 S.E.2d at 155-56). The Fourth Circuit deduced that "although the term 'special appearance' has been eliminated, the procedure described by that term has not entirely been discarded." *Id.* "*Smalls* and *Dunbar* teach that if a defendant appears before the court to contest jurisdiction over his person, and does not simultaneously address the merits, he has not waived his objection under Rule 4(d)." *Id.* at 74-75.

In *Maybin*, the plaintiff "allege[d] that the defendants waived their right to assert a lack of personal jurisdiction because they simultaneously included arguments regarding the timeliness of plaintiff's action, the eleventh amendment, and sovereign immunity" but the Fourth Circuit noted that those issues were all jurisdictional issues. *Id.* at 75. The Fourth Circuit determined "[t]he defendants' objection to personal jurisdiction was not accompanied by any plea to the merits which implicitly acknowledged jurisdiction of the court. A defendant cannot be said to have waived personal jurisdiction merely because he alerts the court to other types of jurisdictional defects." *Id.*

"[J]urisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based." *Boan v. Jacobs*, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988).

> A defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g)[10] or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted . . . to be made as a matter of course.

Rule 12(h)(1), SCRCP.

In a South Carolina federal district court case, the court examined whether the defendant had "submitted itself to the jurisdiction of the [c]ourt and forfeited any objection to personal jurisdiction" "by seeking relief under" the federal rule that provides relief from judgment for fraud, misrepresentation, or misconduct by an opposing party. *Revman Int'l, Inc. v. SEL Mfg. Co.*, No. 7:17-CV-01944-BHH,

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[10] Subdivision (g) provides: "A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated." Rule 12(g), SCRCP.

2019 WL 10893956, at *8 (D.S.C. Mar. 26, 2019). The court noted the defendant's "filings purport[ed] to reserve the issue of personal jurisdiction for an appropriate motion to dismiss." *Id.* "The [c]ourt agree[d] that, before [the defendant] filed its motion to vacate the default judgment, [it] had not waived its personal jurisdiction defense through litigation activity." *Id.* The court observed that nonetheless, "a court obtains personal jurisdiction over a defendant if the actions of the defendant during litigation amount to a legal submission to the jurisdiction of the court." *Id.* (citing *Ins. Corp. of Ireland*, 456 U.S. at 704). The court stated that when "a party seeks affirmative relief from a court, it normally submits itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter." *Id.* (citing *Adam v. Saenger*, 303 U.S. 59 (1938)). The court determined the defendant "submitted itself to the jurisdiction of the [c]ourt" when it "moved for relief on jurisdictional grounds, but it also sought relief on the grounds of fraud or misconduct." *Id.*

The court held that "[w]hile the practice of making special and general appearances has long since been abandoned in federal courts, [the defendant's] conduct in seeking relief under [the federal rule for relief from judgment] is the type of conduct which would have constituted a general appearance under prior law." *Id.* The court determined that in that case, the defendant's "motion [for relief from judgment] was a request for affirmative relief from the [c]ourt on a non-jurisdictional ground. [The defendant] did not appear solely to conte[s]t jurisdiction." *Id.* The court held the defendant had "submitted itself to the jurisdiction of the [c]ourt" by requesting relief under the federal rule. *Id.*

I. Defense Finance and Accounting Service Publication and the Family Court's Order

In the present case, in the family court's order denying Husband's motion to dismiss for lack of jurisdiction, it quoted language from a Defense Finance and Accounting Service (DFAS) publication entitled "Guidance on Dividing Military Retired Pay" (the DFAS Document). DFAS is "the agency charged with administering and distributing military retired pay." *Snodgrass v. Snodgrass*, 297 S.W.3d 878, 882 (Ky. Ct. App. 2009). "Additionally, it is responsible for directing eligible payments to spouses pursuant to the USFSPA. Accordingly, DFAS procedures are particularly relevant when interpreting award language intended to result in direct payments to spouses." *Crayk v. Glover*, 176 P.3d 645, 647 n.2 (Wyo. 2008).

The family court order quoted Section III(B)(2), *Requirements for Enforceablity Under USFSPA*, of the DFAS Document[11] as stating, "[T]he member indicates his or her consent to the court's jurisdiction by taking some affirmative action with regard to the legal proceeding, such as filing any pleading in the case." (emphasis added by family court) (alteration by family court). A few versions of the DFAS Document appear online[12] and the heading of the DFAS Document contains a website address[13] leading to DFAS's website. However, no version of the DFAS

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[11] At the hearing on Husband's motion to dismiss, Wife's attorney referenced a document she had presented—which appears to be the DFAS Document—and stated:

> [U]nder the [USFSPA], and it's actually the attorney's instruction, that it says one way for a member to consent to the jurisdiction of the court: "The member indicates his or her consent to the court's jurisdiction by taking some affirmative action." The example that they give is, "such as, filing any responsive pleading in the case."

The document does not appear in the record on appeal.

[12] The version that appears to be the one cited by the family court is Garnishment Operations Directorate, Defense Finance and Accounting Service, Cleveland Center, *Guidance on Dividing Military Retired Pay*, available at http://www.increa.com/articles/division-military-retirement-dual-coverture/AttorneyGuidance-03-07-2014.pdf (rev. Jan. 29, 2012) (last visited Apr. 29, 2022). This version states at the top: "Disclaimer- this publication is intended to provide guidance only, and is not legally binding. Legal authority may be found at Title 10, United States Code, Section 1408, and the DoD Financial Management Regulation, Volume 7B, Chapter 29, available at http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/Volume_07b.pdf." Other versions also appear online. *See, e.g.*, from a committee of the North Carolina Bar Association: https://ms.ng.mil/resources/specialstaff/sja/Documents/Divorce/Dividing_Military_Retired_Pay.pdf (rev. Feb. 1, 2005) (last visited Apr. 29, 2022); from the Augusta Bar Association of Augusta, Georgia: https://augustabar.org/Resources/846.pdf (rev. Jan. 4, 2010) (last visited Apr. 29, 2022).

[13] https://www.dfas.mil/garnishment/retiredmilitary/html

Document currently appears on that website.[14] Instead, the website states on the subject of the USFSPA, under the heading of "**State Jurisdiction**":

> [T]o enforce orders dividing retired pay as property, the state court must have had jurisdiction over the member by reason of
>
> > 1) the member's residence in the territorial jurisdiction of the court (other than because of military assignment),
> > 2) the member's domicile in the territorial jurisdiction of the court, or
> > 3) the member's consent to the jurisdiction of the court.
> > 4) the member indicates his or her consent to the court's jurisdiction by taking some affirmative action in the legal proceeding.

Defense Finance and Accounting Service, https://www.dfas.mil/Garnishment/usfspa/legal/ (last updated Mar. 19, 2019).

In the versions of the DFAS Document found online, immediately following the language quoted by the family court, a footnote provides a citation to *Baka*, 74 Fed. Cl. at 698, and also DoDFMR, vol. 7B, subparagraph 290604.A.3. DFAS Document n.15. The subparagraph[15] of the Department of Defense Financial

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[14] An "info-letter" prepared for the North Carolina State Bar's Standing Committee on Legal Assistance for Military Personnel states "the information paper, 'Guidance on Dividing Military Retired Pay' (3/17/14 version) that was originally published by the Defense Finance and Accounting Service . . . was removed from publication in 2015." Mark E. Sullivan, *SILENT PARTNER: Guidance for Lawyers: Military Pension Division*, https://www.nclamp.gov/media/425645/s-mp-guidance.pdf (last visited Apr. 29, 2022).

[15] The numbering of the subparagraph cited by the DFAS Document has changed from 290604.A.3. to 6.4.1.3 in the current version. *See* DoD 7000.14-R, Department of Defense Financial Management Regulation, Volume 7B, Chapter 29: Former Spouse Payments from Retired Pay,

Management Regulation referenced in the footnote, to which the family court also cites, provides:

> In the case of a retired pay award, the designated agent must be able to determine from the court order that the court dividing military retired pay had jurisdiction over the member in one of the following ways: . . . The member consented to the jurisdiction of the court. If the court order does not "explicitly" state that the member consented to the court's jurisdiction, the designated agent will regard the member's participation in the legal proceeding, other than to contest the court's jurisdiction, as evidence of the member's consent to the court's jurisdiction in the proceeding dividing the member's military retired pay.

DoD 7000.14-R, Department of Defense Financial Management Regulation, Volume 7B, Chapter 29: Former Spouse Payments from Retired Pay, https://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/07b_29.pdf (rev. June 2021).

The *Baka* court noted, "The DFAS website specifically explains th[e] principle [that a person consents to the personal jurisdiction of a court by participating in a proceeding] to service members in a 'Uniformed Services Former Spouses' Protection Act Bulletin Fact Sheet,'" which states, "[T]o enforce orders dividing retired pay as property, *the state court must have had jurisdiction over the member by reason of* . . . (3) *the member's consent to the jurisdiction of the court, as indicated by the member's taking some affirmative action in the legal proceeding.*" 74 Fed. Cl. at 698-99 (quoting DFAS website, *available at* http://www.dod.mil/dfas/militarypay/garnishment/fsfact.html (last visited November 28, 2006)) (emphases added by court) (last alteration by court).

The matters involved in this case at the family court, apart from the military retirement benefits, included divorce, custody, alimony, equitable apportionment, and attorney's fees. The couple last resided together in North Carolina but Wife

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https://comptroller.defense.gov/Portals/45/documents/fmr/archive/07barch/07b_29_Sep15.pdf (rev. Sept. 2015).

and the children have resided in South Carolina since 2008. Husband conceded that because he was served while in South Carolina, the family court had jurisdiction over him for all matters except for the military retirement.[16]

J. Application of Law to this Case

Here, Husband never explicitly consented to the family court's jurisdiction over his military retirement benefits. Therefore, the decision in this case turns on whether South Carolina would follow the reasoning that consent for purposes of section 1408(c)(4) must be specifically to jurisdiction over military retirement benefits rather than to the jurisdiction of the court in general. If the statute means consent to jurisdiction in general, then Husband did so by conceding the family court had jurisdiction over him for the matters that did not relate to his military retirement benefits. However, Husband was clear at all times that he objected to jurisdiction over his military benefits. South Carolina has not specified which definition of consent it follows in the context of this statute, and as we discussed above, other states are divided.

We recognize nothing in the record here indicates that Wife engaged in forum shopping to find a jurisdiction more beneficial to her. Wife and the children live in South Carolina and that is where she sought a divorce and custody. However, we note Husband also did not change his domicile or residence in an attempt to avoid jurisdiction; he continued living in North Carolina in the same house he, Wife, and their children had lived in together.

Although South Carolina case law does not necessarily provide a clear direction we might follow, we agree with Husband the consent required by section 1408 is to

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[16] "The family court has exclusive jurisdiction to hear and determine actions for divorce. Before the family court can exercise subject matter jurisdiction over a marriage and grant a divorce, the plaintiff or defendant must have been a domiciliary of South Carolina." *Roesler v. Roesler*, 396 S.C. 100, 106, 719 S.E.2d 275, 279 (Ct. App. 2011) (citation omitted) (citing S.C. Code Ann. § 20-3-30 (Supp. 2010)); *see also* Roy T. Stuckey, *Marital Litigation in South Carolina* § 1.C. (5th ed. 2020) ("In rem jurisdiction refers to the court's power over the subject of the litigation, for example, the marriage . . . . The family court acquires jurisdiction over the marriage, and the power to grant a divorce, when one or both parties meet the statutory requirements to become residents of South Carolina.").

the court's jurisdiction over the military retirement benefits specifically.[17] While we recognize that many states have found a member only has to consent to the court's jurisdiction in general (and even this can be inferred by the member not objecting to jurisdiction), we find the reasoning explained by the *Wagner* court more persuasive: "While the reference to jurisdiction in § 1408(c)(4)(C) is unqualified, § 1408(c)(4)(C) contains a reference to § 1408(c)(1)'s specific focus on the retirement pay." 768 A.2d at 1118. "Reading the language of § 1408(c)(4)(C) in context and consistently with the Act's scope and object, we believe that Congress intended for the consent requirement in § 1408(c)(4)(C) to relate, like the rest of the Act, specifically to a military member's pension." *Id.* "The cardinal rule of statutory construction is for the [c]ourt to ascertain and effectuate the intent of the Legislature." *Gilfillin v. Gilfillin*, 344 S.C. 407, 413, 544 S.E.2d 829, 831 (2001). "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." *Strickland v. Strickland*, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007). "The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation." *Id.* at 88-89, 650 S.E.2d at 472.

Husband objected to the court's jurisdiction over the retirement benefits at his earliest opportunity and before he took any further action, such as filing his answer and counterclaim. He reasserted his objection at every stage of the proceeding, including in his answer and counterclaim. Therefore, we find he did not explicitly consent to have his military retirements benefits decided in South Carolina.

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[17] Husband asserts the family court used the long-arm statute to determine it had jurisdiction over him in order to divide his military retirement benefits. *See* S.C. Code Ann. § 36-2-803(A) (Supp. 2021) (providing South Carolina's long-arm statute and setting forth the conditions in which it applies); *id.* (authorizing South Carolina courts to exercise personal jurisdiction over nonresidents based on acts in the State of South Carolina by those nonresidents including conducting business, entering into a contract, committing a tort, or "having an interest in, using, or possessing real property in this [s]tate"). However, the family court did not use the long-arm statute; it used the provision of section 1408(c)(4)(C), which requires consent, and found Husband consented. Husband and the family court simply disagreed over what section 1408(c)(4)(C) requires for consent.

Accordingly, the family court's decision to divide his military retirement benefits is reversed.[18]

CONCLUSION

Accordingly, the family court erred in not first deciding Husband's motion to dismiss for lack of jurisdiction and not granting him a continuance so that motion could be decided first. Additionally, the family court erred in finding he consented to the court's jurisdiction to divide his military retirement benefits. Therefore, the family court's decision is

REVERSED.

GEATHERS and MCDONALD, JJ., concur.

[18] We reverse only as to the family court's division of the military retirement benefits. Husband conceded the family court had jurisdiction over all other matters before it including child custody, child support, and equitable division of property other than the military retirement benefits, and he does not appeal any of those determinations.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, Appellants,

v.

South Carolina Department of Health and Environmental Control, and David Coggins Broilers, Respondents,

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, Appellants,

v.

South Carolina Department of Health and Environmental Control, and Heath Coggins Broilers, Respondents,

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, Appellants,

v.

South Carolina Department of Health and Environmental Control, and Jim Young Broilers, Respondents.

Appellate Case No. 2017-002598

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

Opinion No. 5911
Heard December 9, 2020 – Filed May 25, 2022

REVERSED AND REMANDED

Robert Guild, of Robert Guild, Attorney at Law, of Columbia, for Appellants.

Mitchell Willoughby and Tracey Colton Green, both of Willoughby & Hoefer, PA, of Columbia, for Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers.

Sara Volk Martinez and Stephen Philip Hightower, both of the South Carolina Department of Health and Environmental Control, of Columbia; both for Respondent South Carolina Department of Health and Environmental Control.

LOCKEMY, A.J.: In this contested case, Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices (collectively, Appellants) appeal the order of the Administrative Law Court (the ALC) affirming the South Carolina Department of Health and Environmental Control's (the Department's) issuance of agricultural permits to David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers (collectively, Broilers). Appellants argue the ALC erred in (1) deferring to the Department's interpretation of regulations 61-9.122 and 61-43 Part 200 of the South Carolina Code[1] and concluding that, as a matter of law, Broilers were not required to apply for a separate National Pollutant Discharge Elimination System (NPDES) permit or obtain an exemption from the Department; (2) deferring to the Department's interpretation of regulation 61-43 that allowed it to avoid mandated aspects of permit evaluation and precluded a meaningful review of the permit application; and (3) requiring Appellants to establish actual discharges of pollutants by existing permittees. We reverse and remand to the Department.

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[1] S.C. Code Ann. Regs. 61-9.122 to 61-9.125 (2011 & Supp. 2021) (implementing the National Pollutant Discharge Elimination System (NPDES) program); S.C. Code Ann. Regs. 61-43.200.10 to 200.200 (2011 & Supp. 2021) (setting forth the standards for permitting of agricultural facilities other than swine).

FACTS AND PROCEDURAL HISTORY

In 2016, Broilers each submitted an application to the Department for new agricultural animal facilities permits to construct and operate their proposed broiler facilities. Broilers collectively proposed to construct eighteen broiler houses on a 255-acre tract located in the Little River watershed in the Mountville area of Laurens County. David Coggins Broilers' facility proposed to house 162,000 broilers, and Heath Coggins Broilers and Jim Young Broilers each proposed to house 237,600 broilers in their respective facilities.

As part of the application process, public notices were sent to neighboring property owners notifying them of Broilers' intent to apply for agricultural permitting. At the request of several Mountville citizens, the Department held public meetings in September and October of 2016. Blackmon and several other property owners in the Mountville area, including Margaret Sparrow, Mary Basel, Kathy Lowman, and Eugene Ross Stewart, formed an unincorporated association called "South Carolinians for Responsible Agricultural Practices" to challenge Broilers' proposed facilities.

After reviewing the applications and completing "Agricultural Permitting Review Checklists," the Department issued Bureau of Water Agricultural Permits to all Broilers in November and December of 2016. Each permit provided for the operation of "no-discharge" facilities and contained a special condition that required Broilers to "[o]perate and maintain [a] waste management system in accordance with State and Federal law so as to prevent discharges to the environment." Public notices were circulated in a local publication after the Department issued the permits.

After the Department declined Appellants' requests to hold a final review conference as to Broilers' permits, Appellants filed a request for a contested case hearing with the ALC as to each permit.[2] The ALC granted the parties' request to consolidate the three cases for purposes of the contested case hearing.

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[2] Appellants challenged each of the permits on five grounds. The only ground raised on appeal concerns the discharge of pollutants into waters of the state.

Broilers moved for partial summary judgment, arguing they were not required to seek NPDES permits for the facilities because the agricultural permits the Department issued to them prohibited the discharge of pollutants into the waters of the state. Broilers asserted the Department was therefore not required to follow the procedure set forth in regulation 61-9.122.23(d)(2)[3] for determining whether the facilities had "no potential to discharge."

The ALC held a merits hearing. Appellants presented the testimony of several witnesses, including Dr. David Hargett, who testified as an expert in soil and water resource management; William Chaplin, an employee of the Department, who testified he reviewed Broilers' permit applications; and Christopher Mosley, a staff member of Agri-Waste Technology, Inc., who testified he prepared the Comprehensive Nutrient Management Plans (CNMPs) for each of the three applications. Mosley explained that in drafting each of the CNMPs, his team used soil maps, topographical maps, and satellite imagery, and conducted site visits. The CNMPs provided the number of broilers to be housed at the facilities, the amount of litter that would be produced, Broilers' plan for disposing of that litter, and the setback distances for the facilities.

The ALC accepted proposed orders from Appellants, Broilers, and the Department. The ALC granted partial summary judgment in favor of Broilers and the Department (collectively, Respondents), concluding an NPDES permit was not required and the Department was not required to determine whether the facilities had no potential to discharge.

Although the ALC found "the plain language of [regulation] 61-9.122.23 define[d]" Broilers as concentrated animal feeding operations (CAFOs), it concluded "the Department's application of [regulation] 61-43 part 200 in keeping with the regulation of CAFOs under the NPDES provisions [wa]s entitled to deference." Specifically, the ALC deferred to the Department's interpretation of regulations 61-43.200 and 61-9.122.23 that by issuing an agricultural permit

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[3] Regs. 61-9.122.23(d)(2) (providing "[a]n owner or operator of a Large [concentrated animal feeding operation (CAFO)] need not seek coverage under an NPDES permit otherwise required by this section once the owner or operator has received from the Department notification of a determination under paragraph (f) of this section that the CAFO has 'no potential to discharge' manure, litter, or process wastewater").

pursuant to regulation 61-43.200, the Department also determined the facility had no potential to discharge into the waters of the state under regulation 61-9.122.23. The ALC reasoned that because permits issued pursuant to regulation 61-43.200 were "no-discharge" permits—and as such did not allow the facilities to discharge pollutants—there was an inherent determination the facilities had "no potential to discharge." *See* Regs. 61-43.200.20(B) ("Permits issued under this regulation are no-discharge permits."). The ALC thus concluded the permits prohibited Broilers from discharging pollutants into waters of the state and because Broilers did not seek to discharge pollutants into waters of the state, they were not required to apply for or obtain an NPDES permit as a matter of law. Additionally, the ALC opined, "Even if facts later reflect that [Broilers] are obligated to seek or obtain an NPDES permit because they are 'new source' CAFOs, that obligation would not occur until 'at least 180 days prior to the time that the CAFO[s] commence[d] operation'" and therefore, this issue was not ripe for consideration. The ALC considered Appellants' remaining arguments and affirmed the Department's issuance of the permits. The ALC found the Department complied with the regulatory requirements in reviewing and issuing the permits. However, the ALC increased the setbacks of the facilities to move them farther from the Little River.[4] Finally, the ALC added a condition to the permits that provided, "The Permits shall be conditioned upon each of the permittees obtaining a stormwater permit that addresses whether the setback limitation should exceed the minimum requirements." This appeal followed.

ISSUES ON APPEAL

1. Did the ALC err in deferring to the Department's interpretation of regulations 61-9 and 61-43 in concluding Broilers were not required either to obtain an NPDES permit or request a determination by the Department that their operations had "no potential to discharge"?

[4] To address the complaints Basel—one of the property owners—raised during the public comment period, Chaplin required David Coggins and Jim Young to move their proposed facilities farther from Basel's property, which would have resulted in the facilities being closer to the Little River. The ALC's ruling reversed this accommodation and required the facilities to be moved back to their originally proposed location, farther from the Little River.

2. Did the ALC err in deferring to the Department's interpretation of regulation 61-43 that allowed the Department to avoid mandated aspects of permit evaluation, thus precluding meaningful review of agricultural permit applications?

3. Did the ALC err in imposing a burden upon Appellants to prove actual discharges of pollutants into waters of the state by existing agricultural permittees?

STANDARD OF REVIEW

This court may reverse a decision of the ALC "if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . affected by [an] error of law . . . [or is] arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-610(B)(d),(f) (Supp. 2021). This court reviews questions of law de novo. *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012). "The construction of a regulation is a question of law . . . ." *Id.* (quoting 2 Am. Jur. 2d *Administrative Law* § 245). "[W]e will reject [an] agency's interpretation if it is contrary to the regulation's plain language." *Id.* at 261, 725 S.E.2d at 483.

LAW AND ANALYSIS

I. NPDES Permits

Regulation 61-9.122.1(b)(1) defines the scope of the NPDES permit requirement and provides it "requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the State.'" Regs. 61-9.122.1(b)(1). Paragraph (b)(4) provides that a "concentrated animal feeding operation [(CAFO)] as defined in section 122.23" is a "point source[]" that requires an NPDES permit "for discharges." Regs. 61-9.122.1(b)(4)(i). Regulation 61-9.122.23(a) provides CAFOs, as defined in regulation 61-9.122.23(b), are point sources "that require NPDES permits for discharges *or potential discharges*," and regulation 61-9.122.21(a)(1) states, "All [CAFOs] . . . have a duty to seek coverage under an NPDES permit, as described in section 122.23(d)." (emphasis added); *see also* Regs. 61-9.122.2(b) (stating a "[d]ischarge of a pollutant" means "[a]ny addition of any pollutant or combination of pollutants to waters of the State from any point source"); *id.* (providing a "point source" includes "any . . . [CAFO] from which pollutants are *or may be discharged*" (emphasis added)); *id.* ("'Point source

discharge' means a discharge [that] is released to the waters of the State by a discernible, confined and discrete conveyance, including but not limited to a . . . [CAFO] . . . from which waste is or may be discharged.").

Paragraph (d) of this regulation states a CAFO owner or operator "must seek coverage under an NPDES permit" unless it has "received from the Department notification of a determination under paragraph (f)" that it "has 'no potential to discharge' manure, litter, or process wastewater." Regs. 61-9.122.23(d)(1)-(2).

Paragraph (f)(1) provides,

> The Department, *upon request*, may make *a case-specific determination* that a Large CAFO has "no potential to discharge" pollutants to waters of the State. In making this determination, *the Department must consider the potential for discharges* from both the production area and any land application areas. . . . For purposes of this section, the term "no potential to discharge" means that there is *no potential* for any CAFO manure, litter, or process wastewater to be added to waters of the State *under any circumstance or climatic condition*. A determination that there is "no potential to discharge" for purposes of this section only relates to discharges of manure, litter, and process wastewater covered by this section.

Regs. 61-9.122.23(f)(1) (emphases added).

The CAFO owner or operator must seek coverage under an NPDES permit at least 180 days before commencing operations and must include the information specified in regulations 61-9.122.21(f) and 61-9.122.21(i)(1)(i) to (ix) with its request. *See* Regs. 61-9.122.23(f)(2), (g)(4); Regs. 61-9.122.21(f),(i). Regulation 61-9.122.21(f) requires basic information concerning the CAFO's geographical location, its contact information, its business activities, its principal products or services, and any permits or construction approvals it has received or for which it has applied. Regulation 61-9.122.21(i)(1)(i) to (ix) requires that a CAFO provide the following in addition to basic contact information:

> (iii) Latitude and longitude of the production area (entrance to production area);
>
> (iv) A topographic map of the geographic area in which the CAFO is located showing the specific location of the production area . . . ;
>
> (v) Specific information about the number and type of animals, whether in open confinement or housed under roof . . . ;
>
> (vi) The type of containment and storage . . . and total capacity for manure, litter, and process wastewater storage . . . ;
>
> (vii) The total number of acres under control of the applicant available for land application of manure, litter, or process wastewater;
>
> (viii) Estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons); [and]
>
> (ix) Estimated amounts of manure, litter, and process wastewater transferred to other persons per year (tons/gallons) . . . .

The NPDES permitting requirements also specify that a "'no potential to discharge' determination does not relieve the CAFO from the consequences of an actual discharge." Regs. 61-9.122.23(f)(5). Further, the Department retains the authority to subsequently require an NPDES permit if circumstances at the facility change. *See* Regs. 61-9.122.23(f)(6).

Part 200 of Regulation 61-43 governs the permitting of animal facilities. "Permits issued under this regulation are no-discharge permits." Regs. 61-43.200.20(B). In making permitting decisions, "The Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the [s]tate from any new or enlarged sources." Regs. 61-43.200.70(E).

Appellants contend the ALC erred by deferring to the Department's interpretation that its issuance of a "no-discharge" permit pursuant to part 200 of regulation 61-43 constituted "an inherent determination that the facilities ha[d] no 'potential to discharge'" in keeping with regulation 61-9.122.23(f). Appellants argue that because the plain language of regulations 61-9 and part 200 of 61-43 are contrary to the Department's interpretation, this court should reverse the ALC's decision. They assert that, by definition, large CAFOs have a potential to discharge and the Department's interpretation that Broilers were not large CAFOs was contrary to the plain language of regulation 61-9. In addition, Appellants argue the ALC erred by finding as an additional sustaining ground that the issue was not ripe for judicial determination. We agree.

"[O]ur deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (quoting *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)). "We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 34-35, 766 S.E.2d at 718 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837, 844 (1984)); *see also Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 640-41, 723 S.E.2d 191, 195 (2012) (deferring to the Department's "construction and application" of a regulation when it was "both reasonable and consistent with the plain language of the regulation"). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 345 (Ct. App. 2002) (quoting *Deese v. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985)).

"Regulations are interpreted using the same rules of construction as statutes." *Murphy*, 396 S.C. at 639, 723 S.E.2d at 195. "When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation." *Id.* at 639-40, 723 S.E.2d at 195 (quoting *Converse Power Corp.*, 350 S.C. at 47, 564 S.E.2d at 346)). "Whe[n] the language of a regulation is plain,

unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper." *Kiawah Dev. Partners, II*, 411 S.C. at 39, 766 S.E.2d at 720-21. "However, if applying the regulation's plain language would lead to an absurd result, we will interpret the regulation in a manner which avoids the absurdity." *Blue Moon of Newberry, Inc.*, 397 S.C. at 261, 725 S.E.2d at 483.

As an initial matter, we address Respondents' procedural arguments. We reject Respondents' assertions that Appellants failed to preserve the arguments they raise on appeal and that the issues are not ripe for judicial determination. As to preservation, Appellants advanced their arguments to the ALC that Broilers were required to either seek an NPDES permit or obtain an exception from the Department and that the Department improperly interpreted its regulations and failed to conduct a site-specific evaluation to determine whether Broilers had a potential to discharge and thus contribute to the pollution of waters of the state. The ALC ruled on these issues. We therefore conclude Appellants' arguments are preserved for our review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("[I]ssue preservation requires that an issue be raised to and ruled upon by the trial judge."). As to ripeness, the regulations require CAFOs to apply for an NPDES permit at least 180 days before the CAFO begins operation; however, nothing prevents a party from applying sooner. *See* Regs. 61-9.122.23(g). Further, Respondents contend Broilers were not required to apply for such permit, regardless of timing. Thus, we find the issue is ripe for judicial determination. *See Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." (quoting *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

On the merits, we find the ALC erred in deferring to the Department's interpretation of regulation 61-9.122 and part 200 of regulation 61-43 and in concluding Broilers were not required to apply for an NPDES permit or obtain an exemption. *See* § 1-23-610(B) (providing this court may reverse the decision of the ALC when the decision is affected by an error of law). The Department determined that because it issued Broilers a no-discharge permit—which prohibits Broilers from discharging pollutants into the waters of the state—Broilers were neither required to apply for an NPDES permit nor request a determination that

they had no potential to discharge. According to the plain language of the regulations, Broilers are large CAFOs by definition because they proposed to house between 162,000 and 237,000 broiler chickens, using a dry manure handling system. *See* Regs. 61-9.122.23(b)(2) (stating a CAFO means an animal feeding operation (AFO) "that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph," or that the Department designates as a CAFO); Regs. 61-9.122.23(b)(4)(x) (providing a large CAFO is an AFO that stables or confines 125,000 chickens or more and uses other than a liquid manure handling system). Regulation 61-9.122.2 states a CAFO comprises a point source and thus requires an NPDES permit for discharges. *See* Regs. 61-9.122.1(b)(4)(i). Under regulation 61-9.122.23(d), large CAFOs are required to apply for an NPDES permit unless they obtain a determination from the Department pursuant to regulation 61-9.122.23(f) that they have "no potential to discharge." *See* Regs. 61-9.122.23(d)-(f). Paragraph (f) provides "the term 'no potential to discharge' means that there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the State *under any circumstance or climactic condition*." Regs. 61-9.122.23(f)(1) (emphasis added). The Department's conclusion that a "no discharge" permit—which prohibits a facility from discharging pollutants into the waters of the state—is the equivalent of a determination under regulation 61-9.122.23(f) that the facility has "no potential to discharge" is manifestly contrary to the language of the regulation, which requires the Department to make a case-specific evaluation. *See* Regs. 61-9.122.23(f)(1). The Department's issuance of a no-discharge permit did not satisfy this requirement because the Department did not specifically consider whether there was no potential for any CAFO manure, litter, or process wastewater from Broilers' proposed facilities to be added to the waters of the State "under any circumstance or climactic condition." *See id.* Simply because the no-discharge permit prohibited Broilers from discharging pollutants into the waters of the state did not mean they had no *potential* to discharge pollutants within the meaning of regulation 61-9. Rather, the Department was required to evaluate Broilers' proposed facilities to determine whether there was any potential to discharge. Thus, we conclude the ALC erred in deferring to the Department's interpretation of regulation 61-9 and in finding Broilers had "no potential to discharge" because the Department issued them no-discharge permits.

Further, we reject the Department's argument that as a result of the *Waterkeeper* decision, it no longer has authority under regulation 61-9.122.23 to require a large CAFO to obtain an NPDES permit and that such CAFOs have no obligation to

seek the Department's determination that the CAFO has no potential to discharge. *See Waterkeeper All., Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486 (2d Cir. 2005). In *Waterkeeper*, the Second Circuit Court of Appeals concluded that, with respect to CAFOs, "unless there is a 'discharge of any pollutant,' there is no violation of the [Clean Water] Act, and point sources are, accordingly, . . . [not] statutorily obligated to seek or obtain an NPDES permit." *Id.* at 504. The court explained that "in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, . . . and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." *Id.* at 505. The South Carolina regulations at issue are based not only on the federal NPDES regulations but also upon the South Carolina Pollution Control Act, which specifically authorizes the Department to "prevent pollution." *See* Regs. 61-9.122.1(a)(1) (stating "[t]he regulatory provisions contained in [regulations] 61-9.122 and 124 implement the . . . []NPDES[] Program under . . . the Clean Water Act . . . and the South Carolina Pollution Control Act"); *see also* S.C. Code Ann. §§ 48-1-10 to -350 (2008 & Supp. 2021) (setting forth South Carolina's Pollution Control Act); § 48-1-20 (declaring it is "the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State" and authorizing the Department to "abate, control[,] *and prevent* pollution" (emphasis added)). We acknowledge the CAFO regulation in the federal NPDES section of the Clean Water Act has since been amended and now provides that a CAFO must seek an NPDES permit only if it either discharges or proposes to discharge a pollutant. 40 C.F.R. § 122.23 (2008). Here, the ALC determined *Waterkeeper* was not controlling, and as Broilers acknowledge, neither the Department nor the state has taken any action since the 2005 *Waterkeeper* decision to repeal or amend our state regulatory scheme with respect to CAFOs. South Carolina's NPDES regulations therefore remain in effect and *Waterkeeper* and the subsequent revisions to the federal regulations did not abrogate or otherwise repeal them.[5]

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[5] As to the Department's contention the regulations contained in regulation 61-9.122 are unenforceable because they were enacted without legislative approval, the Department raises this argument for the first time on appeal. Therefore, we decline to consider this argument as an additional sustaining ground. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("[A] respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.").

We acknowledge regulation 61-9.122.23 provides that even when the Department determines there is no potential to discharge, Broilers would still be in violation of the regulation if they in fact contributed pollutants to the waters of the state. Regulation 61-43 likewise prohibits discharges and provides the Department authority to enforce compliance with the no-discharge permit. The Pollution Control Act provides for criminal and civil penalties when a person "throw[s], drain[s], run[s], or allow[s] to seep, or otherwise discharges organic or inorganic matter into the waters of the [s]tate" unless that discharge is "in compliance with a permit issued by the [D]epartment." *See* § 48-1-90. Nevertheless, none of these measures equal a finding by the Department that Broilers had no potential to discharge, which our regulations require to excuse a CAFO from obtaining an NPDES permit.

Based on the foregoing, we find the ALC erred in deferring to the Department's interpretation of the regulations and in concluding Broilers were not required to apply for an NPDES permit because the issuance of a no-discharge permit constituted a determination by the Department that Broilers had no potential to discharge. We therefore reverse as to this issue and remand to the Department for further evaluation pursuant to regulation 61-9.

II. Permit Evaluation

Appellants next contend the ALC erred by accepting DHEC's interpretation of certain provisions within part 200 of regulation 61-43 and requiring Appellants to show actual discharges from other facilities. Appellants assert that in 2004, the Department issued a "Total Maximum Daily Load" (TMDL) for the Little River because its watershed had impaired water quality due to excessive levels of fecal bacteria and it identified poultry facilities as possible contributors to the impairment. Appellants argue the Department unreasonably interpreted regulation 61-43.200.70(F) and 61-43.200.140(B) to (C) when it concluded no additional requirements or setbacks were needed because "ag[riculatural] facilities are not considered as contributors to TMDL." Appellants contend the Department therefore failed to meaningfully evaluate the factors set forth in regulations 61-43.200.70(E) to (F) and 61-43.200.140(C) in issuing permits to Broilers and that the ALC erred by deferring to the Department's interpretation of the regulations. We agree.

Part 200 of regulation 61-43 governs the permitting of animal facilities. Regulation 61-43.200.70(F) provided,[6]

> The setback limits given in this part are minimum siting requirements . . . On a case-by-case basis the Department may require additional separation distances applicable to animal facilities . . . The Department shall evaluate the proposed site including, but not limited to, the following factors when determining if additional distances are necessary:
>
> 1. Proximity to 100-year floodplain;
>
> 2. Geography and soil types on the site;
>
> 3. Location in a watershed;
>
> 4. Classification or impairment of adjacent waters;
>
> 5. Proximity to a State Designated Focus Area; Outstanding Resource Water; Heritage Corridor; Historic Preservation District; State Approved Source Water Protection Area; state or national

[6] In May 2021, part 200.70(F) was revised and now provides:

> The setback limits given in Part 200 are siting requirements. The Department shall evaluate the following factors to determine if any special conditions are necessary:
>
> 1. Latitude and Longitude;
>
> 2. Down-wind receptors; and
>
> 3. Nutrient Management Plan.

S.C. Code Ann. Regs. 61-43.200.70(F) (Supp. 2021).

park or forest; state or federal research area; and privately-owned wildlife refuge, park, or trust property;

6. Proximity to other known point source discharges and potential nonpoint sources;

7. Slope of the land;

8. Animal manure application method and aerosols;

9. Runoff prevention;

10. Adjacent groundwater usage;

11. Down-wind receptors; and

12. Aquifer vulnerability.

Regulation 61-43.200.140 provides:

A. There shall be no discharge of pollutants from the operation into surface [w]aters of the [s]tate (including ephemeral and intermittent streams). . . .

B. *On a case-by-case basis, the Department may impose additional or more stringent requirements for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products.*

C. The following cases *shall be evaluated* for additional or more stringent requirements:

1. Source water protection. Facilities and manure utilization areas located within a state approved source water protection area.

> 2. 303(d) Impaired Waterbodies List. Facilities and manure utilization areas located upstream of an impaired waterbody.
>
> . . . .

(emphases added); *see also* Regs. 61-43.200.70(E) (providing that, in making permitting decisions, "[t]he Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from any new or enlarged sources").

Chaplin, the Department's permit reviewer, testified regarding his review of the proposed facilities. The record contains the checklist summaries he completed. Chaplin testified, and the checklist summaries reflect, that in making the permitting decision, the Department considered the proximity of the projects to the Little River—an impaired waterbody located downstream from the proposed facilities. Chaplin testified, however, that agricultural facilities were not considered to contribute to the TMDL and therefore he determined no additional requirements or setbacks were needed because Broilers' facilities would not increase pollution of the waters of the state. As the ALC recognized, the regulations require the Department to evaluate sensitive areas, including areas on the impaired water bodies list, to determine if more stringent requirements or setbacks are needed. *See* Regs. 61-43.200.140(C)(2). The Department bypassed this case-specific evaluation by concluding agricultural facilities are not considered to contribute to the TMDL. This interpretation was arbitrary because the regulations required the Department to evaluate specific factors to determine whether additional setbacks were required or additional or more stringent requirements were needed. We therefore find the ALC erred in deferring to the Department's interpretation. The Department should have evaluated the factors set forth in regulations 61-43.200.70(F) and 61-43.200.140(C). *See* Regs. 61-43.200.70(E) ("The Department shall act on all permits to prevent, so far as reasonably possible, . . . an increase in pollution of the waters and air of the State from any new or enlarged

sources.").[7] Thus, we conclude the ALC erred in finding the Department complied with the regulatory requirements in issuing the permits.[8]

Based on the foregoing, we conclude the ALC erred in affirming the Department's issuance of the agricultural permits when it failed to consider all factors set forth in part 200 of regulation 61-43 in evaluating Broilers' permit applications. We therefore reverse and remand to the Department for further evaluation pursuant to regulation 61-43.

CONCLUSION

For the foregoing reasons, we reverse the ALC's decision to uphold the Department's issuance of the permits to Broilers and remand to the Department for further evaluation pursuant to regulations 61-9 and 61-43.

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.

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[7] We acknowledge Broilers' facilities, as proposed, comply with the minimum setback requirements. Thus, we question whether Appellants' arguments concerning additional setbacks are now moot under the current regulatory scheme. This amendment, however, did not affect Appellants' arguments concerning whether additional or more stringent requirements were needed under regulation 61-43.200.140(C).

[8] We decline to address Appellants' remaining argument the ALC erred in requiring "evidence proving that existing permitted facilities actually increased pollution to waters of the State" because our decisions as to the prior issues are dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating the court need not address the appellant's remaining issues when the disposition of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lance Antonio Brewton, Appellant.

Appellate Case No. 2018-001572

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5912
Heard November 10, 2021 – Filed May 25, 2022

AFFIRMED

Appellate Defender Adam Sinclair Ruffin, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Barry J. Barnette, of Spartanburg, all for Respondent.

KONDUROS, J.: Lance Antonio Brewton appeals his convictions for murder and possession of a firearm during the commission of a violent crime. Brewton contends the trial court erred by (1) failing to instruct the jury on the lesser included offense of involuntary manslaughter and the defense of accident; (2) prohibiting his testimony regarding witchcraft and hearing voices in his head; and (3) allowing the State to impeach him with his 1999 robbery conviction. We affirm.

FACTS

On the morning of September 25, 2017, Brewton arrived at Natalie Niemitalo's house. Brewton and Niemitalo had been in an on-again, off-again relationship for two years. After their friend Kevin Schuerman arrived, the three decided to go purchase cigarettes and drinks. Niemitalo got into the driver's seat of her mother's black, two-door Honda Civic, Brewton got into the back seat on the passenger side, and Schuerman got into the passenger seat.

Once in the car, Niemitalo began putting on makeup. After about five minutes, Brewton exited the car, walked around to the driver's side, and began arguing with Niemitalo because he wanted to drive. Shortly after the argument began, Schuerman heard a gunshot. Schuerman exited the car and ran towards Niemitalo's garage because he thought he had been shot. After Schuerman realized he had not been shot, he returned to the driveway and watched Brewton pull Niemitalo out of the car, get into the driver's seat, and drive away.

Schuerman approached Niemitalo and saw she was gasping for air and in pain. Schuerman called 9-1-1 and held a towel on Niemitalo's wound until first responders arrived. While first responders were treating Niemitalo, Brewton drove by her house in the Honda Civic. Brewton drove by Niemitalo's house a second time, and an officer initiated a traffic stop by turning on his blue lights; however, Brewton continued driving for twenty-three miles. Officers apprehended Brewton after he collided with a vehicle in the driveway of his home.

First responders airlifted Niemitalo to a hospital, but she died from a single gunshot wound. The doctor that performed Niemitalo's autopsy determined she bled to death after a bullet entered her upper-left torso and exited nine-and-a-half inches lower on the right side of her back. Police collected physical evidence associated with the shooting including the Honda Civic, Brewton's gun, a fired bullet, and a spent shell casing. Brewton was indicted for murder, possession of a firearm during the commission of a violent crime, escape, driving under suspension, and failure to stop when signaled by an officer using a blue light.

A forensic psychologist evaluated Brewton and determined he was competent to stand trial for an unrelated federal weapons charge.[1] In a pretrial motions hearing, the State presented Brewton's mental evaluation and moved to prevent him from

[1] The incident leading to Brewton's federal conviction for "Possession of a Firearm by a Convicted Felon" occurred nine days before Niemitalo's death.

presenting any evidence regarding mental illness or hearing voices. The State argued any testimony about mental illness or hearing voices would not be relevant because the forensic psychologist concluded Brewton did not have a mental illness and was competent to stand trial. Alternatively, the State contended that if the testimony was relevant, it would be highly prejudicial.

Brewton argued he was not presenting the testimony about hearing voices as a defense for his actions; rather, Brewton argued he should be allowed to present the testimony as an alternative explanation to the State's assertion that he fled due to a guilty mind. Initially, the trial court indicated the testimony would not be relevant and would confuse the jury because Brewton did not suffer from a mental illness; however, the trial court delayed making a final determination until after Brewton proffered the testimony.

Additionally, the State disclosed it planned to introduce Brewton's federal weapons conviction and two common law robbery convictions from 1999 and 2008. Brewton argued the federal weapons conviction was not relevant, but the State maintained it would preclude an accident jury instruction because Brewton was not allowed to possess a weapon. Brewton also moved to prevent the State from using any remote convictions; again, the trial court delayed making a final determination.

Brewton proceeded to trial for murder and possession of a weapon during the commission of a violent crime after he pled guilty to escape, driving under suspension, and failing to stop when signaled by an officer. Schuerman testified that Brewton was "acting erratic" and "on edge" when he got to Niemitalo's house but recalled Brewton's behavior had not concerned him. Schuerman stated the argument between Brewton and Niemitalo was not out of the ordinary and elaborated he had seen Brewton and Niemitalo in worse arguments; however, Schuerman clarified he had never seen any violence during their arguments. Schuerman also testified he did not see Brewton with a gun the morning of Niemitalo's death.

An expert in firearm examination, Chad Smith, testified the gun involved did not have an external safety mechanism, which is typically thought of as a button that would prevent the gun from firing. Smith explained the gun would fire once five-and-a-half pounds of pressure was applied to its trigger, even if the pressure was applied unintentionally. Smith opined:

> The trigger guard is here . . . to guard that trigger from any kind of unintentional pressure against the trigger.

> But I suppose . . . something . . . could enter into the trigger guard . . . and if the firearm was pushed against that object and enough pressure . . . [was] exerted on that trigger, then it could fire.

Still, Smith explained the gun would not fire unless its slide had been pulled back while it was loaded with ammunition. Smith testified he performed several tests on the weapon and concluded the recovered bullet and spent shell casing both came from Brewton's gun.

At the conclusion of the State's case-in-chief, Brewton proffered his testimony regarding witchcraft and hearing voices in his head. Brewton testified he believed Niemitalo's mother and her friend Aaron[2] practiced witchcraft and one of them had cast a spell on him that caused him to hear the voices. Brewton admitted Niemitalo's mother denied practicing witchcraft and Niemitalo never told him her mother practiced witchcraft; nevertheless, Brewton believed Niemitalo's mother practiced witchcraft because he believed she had also cast a spell on Aaron and Niemitalo told him she knew about the voices. Brewton estimated he had intermittently been under a spell for eight or ten months.

Brewton described "experiencing paranoia" at Niemitalo's house on the morning of her death because the voices were telling him his family was being murdered. Brewton explained he got in the car's back seat because the voices were telling him people were trying to kill him. Brewton testified that while the group was sitting in the car, he observed a cement truck drive past Niemitalo's house, and the voices told him it was going to bury his family alive.

Brewton recalled he wanted to drive so he could follow the cement truck, and he felt that Niemitalo was not putting on her makeup "fast enough." Brewton stated he left Niemitalo's house to find the cement truck. Brewton explained he did not stop to check on Niemitalo the first time he drove by her house because paramedics were already there and he wanted to keep looking for the cement truck. Brewton testified he drove by Niemitalo's house a second time because he could not find the cement truck and the voices had stopped speaking to him. Brewton admitted he did not stop the second time because police officers were there and he had drugs in the car.

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[2] The record does not contain Aaron's surname.

The State objected to Brewton's proffer at its conclusion and argued it was filled with hearsay, not relevant, and highly prejudicial if relevant. Brewton responded he had the absolute right to testify, the hearsay would be omitted in front of the jury, and the probative value of his testimony would not be substantially outweighed by unfair prejudice. Brewton insisted he should be allowed to give an alternative reason for leaving the scene other than a guilty mind.

The trial court ruled Brewton could not testify about witchcraft or hearing voices. The trial court found Brewton's proffer was largely based on hearsay and the danger of unfair prejudice substantially outweighed any probative value because it seemed to give rise to an unasserted mental illness defense. Additionally, the trial court determined Brewton's right to testify was not violated because he was not entirely prevented from testifying. The trial court explained Brewton could testify he was fearful and felt like he needed to leave Niemitalo's house.

After Brewton elected to testify,[3] the trial court ruled both of his robbery convictions were admissible because they were part of a "continuous course of conduct." The trial court also ruled that if the convictions were remote, their probative value substantially outweighed any danger of unfair prejudice. Brewton argued his 1999 conviction was remote because it was a separate charge from his 2008 conviction. The trial court reiterated Brewton's convictions were a continuous criminal history because they were similar offenses that all occurred without a passage of ten years. Brewton maintained his 1999 conviction was remote because he finished serving that sentence in 2004 and he would be testifying in 2018. Brewton also asserted the probative value of that conviction was outweighed by unfair prejudice because there was limited value in attacking his credibility.

However, Brewton asked the trial court if his convictions would be referred to as common law robbery convictions or as crimes involving dishonesty. The State responded it was willing to refer to the convictions as crimes of dishonesty, and the trial court concluded the convictions would be referred to as crimes of dishonesty. Brewton did not object.

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[3] The record indicates Brewton stated "I will not testify" after the trial court prohibited him from testifying about witchcraft and the voices. However, this appears to be a scrivener's error because Brewton went on to testify and it was not mentioned on appeal.

Brewton's testimony was mostly consistent with Schuerman's, but Brewton admitted he was not legally allowed to possess a weapon, he had been on a drug binge that made him unable to sleep for the three days preceding Niemitalo's death, and he had used drugs the morning of Niemitalo's death. Brewton also testified that his gun fell out of his pocket as he got out of the car. Brewton explained he kept the gun in his hand after he picked it up because he assumed Niemitalo was going to let him drive and he preferred to keep it in the car's center console while driving.

Brewton maintained he did not intentionally kill Niemitalo and claimed "the gun went off" when Niemitalo pushed his hand back as he reached into the car to grab its keys. Brewton testified he did not stop when signaled by officers because he had drugs in the car. Brewton explained he drove all the way to his house because he was afraid officers would shoot him. At the end of his direct examination, Brewton admitted he had been convicted of two crimes of dishonesty. The State did not mention crimes of dishonesty during its cross-examination of Brewton.

After the defense rested, Brewton requested the trial court instruct the jury on involuntary manslaughter and accident. The State objected and asserted (1) an involuntary manslaughter instruction was improper because Brewton was not armed in self-defense and (2) an accident instruction was improper because Brewton was not legally able to possess a weapon. Brewton argued that even though his possession of the gun was unlawful, it was not the proximate cause of Niemitalo's death.

The trial court declined to instruct the jury on either involuntary manslaughter or accident. The trial court reasoned Brewton was acting unlawfully by possessing the gun and trying to take the car from Niemitalo. Additionally, the trial court concluded Brewton was not exercising reasonable care in handling the gun. Following jury deliberations, Brewton was convicted of murder and possession of a firearm during the commission of a violent crime. The trial court sentenced Brewton to life in prison without the possibility of parole. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "An abuse of discretion occurs when a

trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.*

LAW/ANALYSIS

I. Jury Instructions

Brewton argues the trial court erred by failing to give an involuntary manslaughter jury instruction because Brewton testified the shooting was unintentional and the record contained sufficient evidence Brewton acted recklessly in handling the gun. Brewton contends the trial court erred by failing to give an accident jury instruction because he testified the shooting was unintentional and the record contained sufficient evidence he used due care in handling the gun. Brewton maintains his illegal possession of a firearm did not preclude either jury instruction because his illegal possession did not proximately cause Niemitalo's death. We disagree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *State v. Brandt,* 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Brown*, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004) (quoting *State v. Hill,* 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "If there is any evidence to support a jury charge, the trial [court] should grant the request." *Id.* at 262, 607 S.E.2d at 95. "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.*

> Involuntary manslaughter is a lesser-included offense of murder, and "is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others."

State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (quoting *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014)).

"If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given." *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). "In determining whether to charge the lesser included offense of manslaughter[,] the court must view the evidence in the light most favorable to the defendant." *State v. Gibson*, 390 S.C. 347, 356, 701 S.E.2d 766, 770 (Ct. App. 2010). "Declining to charge the lesser included offense is warranted when it 'very clearly appear[s] that . . . *no evidence whatsoever* [exists] tending to reduce the crime from murder to manslaughter.'" *Id.* (alterations in original) (quoting *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010)).

Additionally, "[f]or a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *Wharton*, 381 S.C. at 216, 672 S.E.2d at 789. "Evidence of an accidental discharge of a gun will support a charge of accident where the defendant lawfully arms himself in self-defense." *Id.*

"[U]nlawful possession of a firearm can . . . constitute an unlawful activity . . . [that] preclude[s] an accident defense if it is the proximate cause of the killing." *State v. Burriss*, 334 S.C. 256, 262 n.5, 513 S.E.2d 104, 107 n.5 (1999). "[I]t would be incongruous not to apply this same reasoning in the context of involuntary manslaughter." *Id.* at 265, 513 S.E.2d at 109. "[T]he State [must] prove beyond a reasonable doubt that the unlawful act in which the [defendant] was engaged was at least the proximate cause of the homicide." *Id.* at 262, 513 S.E.2d at 107 (quoting *State v. Goodson*, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994)).

The issue of whether a defendant is entitled to involuntary manslaughter and accident jury instructions despite unlawfully possessing a firearm was developed in *Goodson* and *Burriss*. In *Goodson*, our supreme court determined the illegally armed defendant was not entitled to an accident jury instruction. 312 S.C. at 281, 440 S.E.2d at 372. In that case, the defendant was drinking while playing pool at a bar and got into an argument with another player over a bet. *Id.* at 279, 440 S.E.2d at 371. The other player threatened the defendant with a pool stick, and the defendant responded by drawing a gun from his pocket. *Id.* The bar's owner intervened and escorted the defendant outside. *Id.* While outside, the defendant shot and killed the owner. *Id.* at 279, 440 S.E.2d at 371-72. The defendant claimed the gun "just went off" as the owner approached him. *Id.* at 279, 440 S.E.2d at 372.

The *Goodson* court rejected the State's proposition that unlawful possession of a firearm always precluded an accident jury instruction. *Id.* at 280 n.1, 440 S.E.2d at 372 n.1. The *Goodson* court noted the State must prove beyond a reasonable doubt the defendant's unlawful act proximately caused the homicide. *Id.* However, the *Goodson* court reasoned the defendant was not entitled to an accident jury instruction because he did not present any evidence that he was lawfully acting in self-defense. *Id.* at 281, 440 S.E.2d at 372.

In a concurring opinion, Justice Toal stated she would have held the defendant was not entitled to an accident jury instruction because he was not lawfully armed when he shot the victim. *Id.* at 281, 440 S.E.2d at 372-73 (Toal, J., concurring). Justice Toal reasoned any right the defendant had to be armed due to the dispute with the other pool player ended when the owner removed him from that situation. *Id.* at 282, 440 S.E.2d at 373 (Toal, J. concurring). Still, Justice Toal agreed with the majority that the defendant's unlawful possession must have proximately caused the victim's injury to preclude an accident jury instruction. *Id.* (Toal, J., concurring). Justice Toal concluded "where, as here, the defendant unlawfully possesses a firearm, has been drinking heavily all day, and kills the [victim] with the unlawful firearm, the unlawful possession of the firearm is a proximate cause of the injury." *Id.* (Toal, J., concurring).

In *Burriss*, our supreme court held the illegally armed defendant was entitled to involuntary manslaughter and accident jury instructions. 334 S.C. at 264-65, 513 S.E.2d at 109. In that case, two men attempted to rob the defendant. *Id.* at 258, 513 S.E.2d at 106. After the attackers threw the defendant to the ground, the defendant drew a gun from his pocket and fired two shots into the ground. *Id.* at 258-59, 513 S.E.2d 106. The attackers initially backed away, but one of the attackers advanced again as the defendant was getting up. *Id.* at 259, 513 S.E.2d 106. When the defendant picked up his gun, it fired a shot that killed the advancing attacker. *Id.*

The *Burriss* court agreed with Justice Toal's analysis in her *Goodson* concurrence and clarified *Goodson* as holding "unlawful possession of a firearm can . . . constitute an unlawful activity . . . [that] preclude[s] an accident defense if it is the proximate cause of the killing." *Id.* at 262 n.5, 513 S.E.2d at 107 n.5. The *Burriss* court reasoned "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." *Id.* at 262, 513 S.E.2d at 108. Further, the *Burriss* court determined "it would be incongruous not to apply this same reasoning in the context of involuntary manslaughter." *Id.* at 265, 513 S.E.2d at 109. The *Burriss*

court concluded the defendant was entitled to both accident and involuntary manslaughter jury instructions because evidence in the record supported his claim that he was lawfully armed in self-defense when the shooting occurred. *Id.* at 262-63, 265, 513 S.E.2d at 108-09.

Here, the trial court did not err by refusing to give involuntary manslaughter or accident jury instructions. Brewton directs this court to *State v. Slater*[4] and *State v. Williams*[5] as support for his proposition that his illegal possession of a weapon did not preclude involuntary manslaughter or accident jury instructions. However, we find those cases inapplicable because they revolved around whether the defendants were lawfully armed in self-defense. *See Slater*, 373 S.C. at 71, 644 S.E.2d at 53 (noting "where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense"); *Williams*, 427 S.C. at 254 n.4, 830 S.E.2d at 908 n.4 (clarifying "the question is whether [the weapon] is the proximate cause of the 'difficulty' or 'occasion' that led to the killing" in determining whether a defendant is precluded from a self-defense jury instruction).

In stark contrast to the defendants' arguments in *Goodson*, *Burriss*, *Slater*, and *Williams*, Brewton does not argue he was lawfully armed in self-defense. Indeed, this record contains no evidence Brewton was defending himself at the time of the shooting. Brewton and Schuerman both testified Brewton and Niemitalo were arguing but not physically fighting. Further, Brewton testified the gun fired when Niemitalo pushed his hand back as he reached for the car keys; Brewton did not testify that Niemitalo attempted to take or control the gun. Consequently, like the defendant in *Goodson*, Brewton presented no evidence he was lawfully armed in self-defense.

Therefore, the dispositive question of this issue is whether Brewton's illegal possession proximately caused Niemitalo's death; we determine it did. Like the defendant in *Goodson*, Brewton admitted he was unlawfully handling a loaded firearm while intoxicated. Brewton testified he had been on an illegal drug binge that prevented him from sleeping the three days preceding Niemitalo's death; Brewton also admitted he used illegal drugs the morning of Niemitalo's death.[6] Additionally, Brewton testified the gun fell out of his pocket as he got out of the

[4] 373 S.C. 66, 644 S.E.2d 50 (2007).
[5] 427 S.C. 246, 830 S.E.2d 904 (2019).
[6] The record indicates the shooting also occurred during the morning hours.

car, he held the gun in his hand while arguing with Niemitalo, and he still held the gun in his hand when he reached into the car to take its keys. Further, Brewton held a gun that would fire once it had five-and-a-half pounds of pressure applied to its trigger, even if that pressure was unintentional. Finally, like the defendant in *Goodson*, Brewton's illegally possessed gun fired the shot that killed Niemitalo. Therefore, Brewton's unlawful possession proximately caused Niemitalo's death. Accordingly, we affirm the trial court's decision to refuse to instruct the jury on involuntary manslaughter and accident.[7]

II. Brewton's Proffered Testimony

Brewton asserts the trial court erred by prohibiting him from testifying about witchcraft and hearing voices. Brewton contends he should have been able to testify the voices caused him to flee the scene after the shooting. Brewton argues that testimony was relevant to rebut the State's assertion that he fled the scene due to a guilty conscience, which allowed the jury to infer malice. Brewton insists his inability to explain the cause of his flight to the jury in his own words violated his fundamental right to testify in his own defense. We disagree.

"[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief." *State v. Black*, 319 S.C. 515, 518 n.2, 462 S.E.2d 311, 313 n.2 (Ct. App. 1995). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)). "[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); *see also State v. Williams*, 427 S.C. 148, 157, 829 S.E.2d 702, 706-07 (2019) (explaining an unappealed jury instruction became the law of the case).

Here, the trial court limited the scope of Brewton's testimony to prohibit the jury from hearing about witchcraft and hearing voices because it determined his testimony (1) was largely based on hearsay and (2) would result in unfair prejudice by confusing the jury. The trial court also determined prohibiting Brewton from

[7] Additionally, Brewton was precluded from an accident jury instruction because he was not exercising due care in handling the weapon. *See Wharton*, 381 S.C. at 216, 672 S.E.2d at 789 (stating a defendant must have been exercising due care in handling the weapon for a homicide to be excusable by accident).

testifying about witchcraft and hearing voices did not violate his right to testify because Brewton was not entirely prohibited from testifying; indeed, Brewton testified in his own defense.

While Brewton objected to the trial court's ruling on all grounds, he only argues on appeal that his right to testify was violated. Brewton's brief provides no authority regarding the trial court's ruling that Brewton's proffered testimony was largely based on hearsay and would result in unfair prejudice. Consequently, Brewton abandoned his arguments that his proffered testimony was not hearsay and would not result in unfair prejudice. As a result, the trial court's ruling that Brewton's proffered testimony was hearsay and unfairly prejudicial became the law of the case. Accordingly, we affirm the trial court's decision to prohibit Brewton from testifying about witchcraft and hearing voices.

III. Impeachment

Brewton asserts the trial court erred by allowing the State to impeach him with his 1999 common law robbery conviction. Brewton contends that conviction was remote because his sentence expired in 2004 and he testified in 2018. Additionally, Brewton argues the trial court did not conduct the required *State v. Colf* [8] analysis. We disagree.

"To preserve an issue for review[,] there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). An appellant is barred from arguing an issue on appeal if trial "counsel acquiesced [to a ruling] . . . and made no other objections regarding [that ruling] . . . ." *State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998); *see also State v. McKinney*, 258 S.C. 570, 190 S.E.2d 30 (1972) (finding the appellant waived his objection to certain testimony by cross-examining a witness regarding that testimony without reserving his previous objection).

Brewton ultimately waived for appellate review his contention the trial court erred by allowing the State to impeach him with his 1999 common law robbery conviction. Brewton initially objected to the trial court's ruling that the State could impeach him with his 1999 conviction and argued it was remote. However, Brewton asked if his convictions would be referred to by their name or as crimes of dishonesty. The State agreed to refer to both convictions as crimes of dishonesty,

[8] 337 S.C. 622, 525 S.E.2d 246 (2000).

and the trial court allowed both convictions to be referred to as crimes of dishonesty. Critically, Brewton did not object or reserve his previous objection.

Brewton testified on direct examination he had been convicted of two crimes of dishonesty. Before the parties presented their closing arguments, Brewton renewed all of his objections; however, the record indicates the trial court did not respond. In its closing argument, the State referred to Brewton's convictions as crimes of dishonesty. Again, Brewton did not object. Consequently, Brewton waived his objection that his 1999 conviction was remote because he acquiesced to referring to it as a crime of dishonesty.

CONCLUSION

In short, the trial court properly refused to instruct the jury on involuntary manslaughter and accident. Additionally, the trial court's decision to prohibit Brewton's proffered testimony became the law of the case. Finally, Brewton failed to preserve for appellate review the trial court's decision to allow the State to impeach him with his 1999 conviction. Accordingly, Brewton's convictions for murder and possession of a firearm during the commission of a violent crime are

AFFIRMED.

HILL and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joshua Hawkins and Floyd S. Mills, III, Appellants,

v.

Secretary of State Mark Hammond, South Carolina Secretary of State's Office, Respondents,

and

Thomas Alexander, in his official capacity as President of the South Carolina Senate, and Murrell Smith, in his official capacity as the Speaker of the South Carolina House of Representatives, Respondents.

Appellate Case No. 2019-000330

Appeal From Anderson County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5913
Heard April 5, 2022 – Filed May 25, 2022

AFFIRMED

Drew Bradshaw, Druanne D. White, Kyle J. White, and Trevor B. White, all of White, Davis & White Law Firm, of Anderson, and Joshua T. Hawkins and Helena L. Jedziniak, both of Hawkins & Jedziniak, LLC, of Greenville, all for Appellants.

A. Mattison Bogan and Matthew A. Abee, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondents Thomas Alexander, in his official capacity as President of the South Carolina Senate, and Murrell Smith, in his official capacity as the Speaker of the South Carolina House of Representatives.

Karl Smith Bowers, Jr., of Bowers Law Office, of Columbia, for Respondents Mark Hammond and the South Carolina Secretary of State's Office.

THOMAS, J.: Joshua Hawkins and Floyd S. Mills, III (Appellants) filed this action against Secretary of State Mark Hammond, the South Carolina Secretary of State's Office, the Honorable Thomas Alexander, in his official capacity as President of the South Carolina Senate, and the Honorable Murrell Smith, in his official capacity as the Speaker of the South Carolina House of Representatives (collectively, Respondents), seeking to invalidate two tort reform laws as unconstitutional.[1] Appellants appeal the circuit court's dismissal of the action, arguing (1) their claims are not barred by res judicata; (2) they have standing to challenge the tort reform laws; (3) the Secretary of State failed to comply with constitutional prerequisites to validity; and (4) their claims were timely. We affirm.

FACTS

Appellants filed this declaratory judgment action alleging they are practicing attorneys in South Carolina whose finances are directly impacted by the enactment of the South Carolina Noneconomic Damages Award Act of 2005[2] (the 2005 Act)

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[1] Pursuant to Rule 25, SCRCP, the circuit court substituted the Honorable Harvey S. Peeler, Jr., in his capacity as President of the South Carolina Senate for the Honorable Hugh K. Leatherman, Sr. We now substitute the Honorable Thomas Alexander, in his official capacity as President of the South Carolina Senate and the Honorable Murrell Smith, in his official capacity as the Speaker of the South Carolina House of Representatives. *See* Rule 25(d)(1), SCRCP (establishing automatic substitution of state officials).

[2] 2005 Act No. 32, eff. July 1, 2005.

and the South Carolina Fairness in Civil Justice Act[3] (the 2011 Act).[4] Appellants allege the Acts, which established damages caps in civil litigation and made various other changes, effectively reduced recovery for them in civil lawsuits. Appellants allege the Acts are invalid and unconstitutional because they were passed without the Great Seal, as required by Article 3, Section 18 of the South Carolina Constitution, and because they were not transferred to the South Carolina Department of Archives and History within five years of passage, as required by the Secretary of State. According to Appellants, the Acts were never valid, and to the extent they now have the Great Seal affixed, they are still invalid and unenforceable. Appellants sought a declaration of the unconstitutionality and invalidity of the Acts, injunctive relief, attorneys' fees and costs, and any other available relief.

Respondents filed motions to dismiss the action, arguing the following: (1) there was substantial compliance with the constitutional mandate that the Great Seal be affixed to acts of the General Assembly, which has retroactive effect because the Great Seal has now been affixed to the Acts; (2) the claims are moot because the Acts have been codified; (3) Appellants lack standing; (4) the claims should be dismissed because the federal claims are untimely; and (5) the claims are barred by res judicata.

During a hearing on the motions to dismiss, Appellants argued if the laws became valid with the later application of the Great Seal, the Acts were valid prospectively only, and Appellants were still entitled to challenge the validity of the Acts during the period of time between passage and the application of the seal.

The circuit court found (1) Appellants' claims were barred by res judicata; (2) Appellants lacked standing to bring the claims; (3) the state law claim was moot due to codification and because the Acts now have the Great Seal affixed to them; and (4) the federal claims were barred by the statute of limitations. Thus, the court dismissed the action with prejudice. This appeal followed.

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[3] 2011 Act No. 52, eff. Jan. 1, 2012.

[4] The Acts were codified in 2018 by 2018 Act No. 129.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss under Rule 12(b)(6), the trial court's ruling must be based "solely on allegations set forth in the complaint." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

LAW/ANALYSIS

I. RES JUDICATA

Appellants argue the circuit court erred in finding their claims were barred by res judicata. We disagree.

The circuit court found Appellants alleged the Acts unconstitutionally reduced their recovery in prior civil actions in which Appellants were counsel, and the doctrine of res judicata bars Appellants from raising their claims now when they could have been raised in the prior actions.

"Res judicata bars subsequent actions by the same parties [or their privies] when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999); *see Venture Eng'g, Inc. v. Tishman Constr. Corp. of S.C.*, 360 S.C. 156, 162, 600 S.E.2d 547, 550 (Ct. App. 2004) (explaining res judicata applies to parties or their privies). "One in privity is one whose legal interests were litigated in the former proceeding." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). "'Privity' as used in the context of res judicata . . . , does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). The doctrine of res judicata bars litigants "from raising any issues which were adjudicated in the former suit and any issues which might have

been raised in the former suit." *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)).

Appellants argue their claims that the Acts are unconstitutional and invalid have not been litigated. However, the challenges to the constitutionality and validity of the Acts could have been raised in any of the prior actions in which Appellants represented clients whose recoveries were limited by the Act, which led to Appellants' fees being limited. We find no error by the circuit court. *Id.* at 34, 512 S.E.2d at 109 (barring a litigant from raising issues which might have been raised in a former suit).

II. STANDING

Appellants argue they have standing because the laws directly impact them and are of public importance. We disagree.

Appellants essentially claim they settled cases for less money than they could have received prior to the Acts; thus, their fees were diminished and they were directly impacted by the Acts. The circuit court found that although Appellants claimed they experienced reduced recovery in past cases and will continue to do so, the Acts challenged do not address attorneys' fees, which are a matter of private contract. The court found Appellants lacked standing because there is no causal connection between the constitutionality of the Acts and Appellants' alleged injury. As to Appellants' clients, the court found any reduction in their recovery did not impact Appellants personally, and because the former clients are not parties to this action, the court could not address their alleged damages. Finally, the court found the alleged recovery from future cases was conjectural, which rendered the claims "insufficiently concrete to be redressed or to provide [Appellants] standing."

"Generally, a party must be a real party in interest to the litigation to have standing." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). "Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Michael P. v. Greenville Cnty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009)). "Standing may be acquired (1) by statute, (2) under the principle of 'constitutional standing,'

or (3) via the 'public importance' exception to general standing requirements." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 209–10, 845 S.E.2d 481, 486 (2020).[5]

Our supreme court has explained the requirements of constitutional standing as follows:

> To possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between the injury and the challenged conduct. Finally, it must be likely that a favorable decision will redress the injury.

Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 317–18, 741 S.E.2d 515, 518 (2013) (internal citations omitted).

In this case, Appellants do not allege a "concrete, particularized, and actual or imminent invasion of a legally protected interest," which is required for constitutional standing. Even courts that have relaxed rules of standing to declare tort reform legislation unconstitutional have not permitted private actions. *See, e.g.,* Basil M. Loeb, Comment, *Abuse of Power: The Courts Are Disregarding Standing and Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional*, 84 Marq. L. Rev. 491, 505–06 (2000) (explaining the Ohio Supreme Court found standing in an action by the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO challenging the constitutionality of a tort reform bill, but noted the claim would not be allowed as a private action).

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[5] Appellants' allegation of standing under the public importance exception is not preserved for our review because the circuit court addressed only constitutional standing in its order, and Appellants failed to raise the issue in a post-trial motion. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). In addition, Appellants do not claim standing by statute. Thus, we address only constitutional standing.

We find no error in the circuit court's finding that Appellants lacked constitutional standing to challenge the Acts. *See ATC S. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (concluding constitutional standing requires an injury to a legally protected interest); *id.* at 196, 669 S.E.2d at 340 (finding no constitutional standing based on alleged damages arising from perceived unfair competition); *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 444–45, 586 S.E.2d 124, 127–28 (2003) (determining a prisoner was not entitled to judicial review of the denial of his application to participate in a treatment program because he did not have a liberty interest in participation in the program).

CONCLUSION

Based on the foregoing, the order on appeal is

AFFIRMED.[6]

MCDONALD and HEWITT, JJ., concur.

[6] We need not consider Appellants' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tammy Dianne Brown, Appellant.

Appellate Case No. 2018-000988

Appeal From Clarendon County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5914
Heard September 15, 2021 – Filed May 25, 2022

AFFIRMED

Appellate Defender Adam Sinclair Ruffin, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Ernest Adolphus Finney, III, of Sumter, for Respondent.

KONDUROS, J.: Tammy Dianne Brown appeals her convictions and sentences for felony driving under the influence (DUI) resulting in death and felony DUI resulting in great bodily injury. On appeal, Brown argues the trial court erred in (1) refusing to quash or dismiss the indictments against her because they did not allege the particular traffic violation the State sought to prove as an essential

element of each offense; (2) admitting into evidence the blood sample taken from her at the hospital because she was not provided an independent sample and law enforcement did not offer her affirmative assistance; and (3) allowing testimony regarding her blood alcohol level from a sample obtained by law enforcement at the hospital when the collection of the sample was not recorded by video. We affirm.

FACTS/PROCEDURAL HISTORY

On August 30, 2014, around 11:56 p.m, Brown was driving a vehicle involved in a two-car collision in Clarendon County. The driver of the other vehicle died at the scene of the accident, and the passenger of that vehicle was unresponsive but breathing at the scene and was transported to a hospital.

As a result of the accident, a Clarendon County grand jury indicted Brown for felony DUI resulting in death and felony DUI resulting in great bodily injury. Prior to the jury being sworn, Brown "move[d] to dismiss the indictment[s] for reasons concerning the sufficiency of the indictment[s] as it relate[d] to due process." The indictments alleged "while driving a vehicle under the influence of alcohol, drugs, or a combination . . . Brown did an act forbidden by law or neglected a duty imposed by law in the driving of said vehicle . . . all in violation of [s]ection 56-5-2945" of the South Carolina Code (2018). Brown argued the indictments were required to have "state[d] with particularity the act forbidden by law or duty imposed by law" on which the State planned to rely to support the charges. Brown asserted that because the indictments did not specifically point to the act on which the State would rely, the indictments were flawed and should be dismissed. The State countered, asserting an indictment's language was sufficient if it tracked the language of a statute and both of Brown's indictments tracked the statute she was charged with violating. The trial court denied Brown's motion to quash or dismiss the indictments, finding that as long as an indictment tracked the language of a statute, it was sufficient and both Brown's indictments tracked the statute.

The trial court conducted a suppression hearing regarding Brown's blood sample and the voluntariness of her statements to law enforcement.[1] Trooper Jeffrey Minnix, of the South Carolina Highway Patrol, testified he was the investigating trooper assigned to work the accident. He stated that when he arrived on scene, he activated his body microphone and his camera and went to the truck involved in the accident. Trooper Minnix indicated that an individual with the fire department informed him the driver of the truck was dead on arrival and the passenger was being extricated from the truck. He stated he walked towards Brown's car, which was some distance away, and someone from the fire department informed him Brown was in an ambulance further down the road. He asserted he went to the ambulance and as emergency medical services (EMS) attended to Brown, he spoke with her to determine how the collision occurred. Trooper Minnix recounted his conversation with Brown, stating:

> [Brown] told me she [was] coming from a friend's house. At that point in time I [could] smell a strong odor of alcohol[ic] beverage coming from her person. I asked her if she had anything to drink. She said, yes, she had two tequila shots. Then she quickly changed it to, no, she had two wine coolers instead. . . . I asked her what was in the clear cup in the vehicle at the time. And she said a friend of hers made her a drink to go. She believed it was a wine cooler. . . . At that point in time EMS was ready to take her to the ER . . . .

He confirmed he had not advised Brown of her *Miranda*[2] rights at that time because she was not in custody. He recalled Brown had several scrapes and scratches but needed to be brought to the hospital to ensure she had no internal trauma. Trooper Minnix asserted he stayed at the scene, finished his investigation, and then went to the hospital to speak with Brown again. He testified that at the hospital, Brown told him the accident occurred because the individuals in the truck were attempting to pass someone and they hit her head on. He confirmed that at the time Brown told him this, she still had not been placed under arrest and

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[1] The suppression hearing was conducted on the second day of trial, after a few witnesses testified, instead of at the beginning of trial because the trial court wished to accommodate the jury.

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

therefore had not been advised of her *Miranda* rights. Trooper Minnix stated that after Brown recounted her story, she was placed under arrest for felony DUI and advised of her *Miranda* rights and her implied consent rights. He asserted although Brown had previously agreed to give a blood sample, after she was placed under arrest, she no longer wanted to provide a sample and became "belligerent" and started yelling. Trooper Minnix testified Brown appeared to understand the rights as they were read to her and continued to speak after she had been advised of those rights. He stated Corporal Jennifer Paige Dubose, also with South Carolina Highway Patrol and with him at the hospital, left to obtain a search warrant for Brown's blood and urine samples. He confirmed the search warrant was obtained and blood and urine samples were taken from Brown. Trooper Minnix testified the blood sample was taken in his presence and the urine sample was taken in Corporal Dubose's presence.

On cross-examination, Trooper Minnix stated that although he had turned his body microphone on when he arrived at the scene, the microphone did not record his conversation with Brown because his vehicle was too far away. He confirmed Brown initially told him she had two tequila shots but she then stated she had two wine coolers instead. He stated he did not conduct a field sobriety test at the scene because Brown was in the back of an ambulance and EMS wanted to transport her to the hospital. He testified he did not offer Brown additional affirmative assistance to obtain an independent blood sample because she was at the hospital. He asserted because Brown was already at the hospital, she only needed to ask the nurse to provide her with an independent sample.

On recross-examination, Trooper Minnix identified the implied consent form he read to Brown and acknowledged Brown refused to sign the form.

Corporal Dubose testified she was Trooper Minnix's training officer and arrived at the scene of the vehicle collision with him. Corporal Dubose stated Trooper Minnix informed her he smelled alcohol coming from Brown and Brown admitted she had been drinking and the amount of alcohol she had consumed. Corporal Dubose asserted that when she and Trooper Minnix initially spoke to Brown at the hospital, Brown was not in custody at the time because she wanted to confirm that Brown was impaired by alcohol. Corporal Dubose averred they both made the determination Brown was impaired. Corporal Dubose recalled that once they read Brown her implied consent rights, Brown became irritated and refused to voluntarily provide a blood sample. Corporal Dubose confirmed she secured the

search warrant to obtain Brown's blood sample. Corporal Dubose indicated two vials of blood and one container of urine were obtained from Brown. Corporal Dubose testified Brown never verbalized a request to have someone conduct an independent test of her blood or asked for assistance in obtaining an independent test. Corporal Dubose acknowledged that on the South Carolina Law Enforcement Division (SLED) urine/blood collection report (the collection report), the line that stated "a blood sample is requested by the subject for an independent test" had a check mark beside it. However, Corporal Dubose stated Angela Floyd, the phlebotomist who took the samples, checked the box by mistake. Corporal Dubose reiterated Brown did not verbalize any request to have an independent test conducted on her blood. Corporal Dubose testified that to her knowledge, Brown never contacted highway patrol again to inquire whether or not she could have an independent analysis performed on her blood sample.

Brown testified the person who drew her blood at the hospital told her she could get a sample of her blood and she said "okay." She stated she wanted her own sample because she did not really trust the hospital. Brown asserted that neither Trooper Minnix nor Corporal Dubose assisted her in obtaining an independent test of her blood sample. On cross-examination, Brown stated she gave the nurse permission to obtain a blood sample. Brown testified the nurse told her "that they were [going to take] some blood samples and I [could] have my own done. . . . I already knew I was go[ing to] let [my doctor] do it . . . ." She stated law enforcement told her they were going to take her blood and she had a right to have her own test done, and she said "okay" and then turned her head away from the blood being drawn.

At the conclusion of the suppression hearing, the trial court found Brown voluntarily made her statement and was not coerced or threatened in any way. The trial court also found law enforcement provided Brown with substantial assistance and Brown did not ask for an independent blood test. The court indicated Brown could argue to the jury that she had checked the box for an independent blood test and had not gotten it.

At trial, Billy Ward, a firefighter, testified he responded to a vehicle collision on August 30, 2014. He stated two individuals were in a truck and Brown was at a sedan. He asserted the driver of the truck was "unconscious, unresponsive[, and] not breathing" and the passenger of the truck was unresponsive but breathing. Ward testified Brown was out of her vehicle and able to walk around.

Bucky Mock was the coroner of Clarendon County at the time of trial. He testified the previous coroner, Hayes Samuels, had responded to the scene of the accident. Mock stated Samuels pronounced the driver of the truck dead at 11:56 p.m. at the scene of the accident.

Dr. Mark Reynolds, an expert in trauma surgery, stated that at the hospital on August 31, 2014, he attended to the passenger from the truck for multiple traumas resulting from a vehicular crash. Dr. Reynolds testified the passenger suffered severe traumatic brain injuries as a result of the crash but survived.

Trooper Minnix testified to the same information he provided in the suppression hearing. He explained he read Brown her *Miranda* rights and implied consent rights at the hospital and informed her she was under arrest for felony DUI. He reiterated Brown initially agreed to provide a blood sample; however, she refused once she was arrested. Trooper Minnix acknowledged that one of the advisements on the implied consent rights form was that a suspect had the right to have an additional, independent test administered if the suspect wanted one. He explained that if a suspect wanted an independent test, the highway patrol would provide affirmative assistance and transport the suspect to the closest medical facility. Trooper Minnix stated that in this case, he did not need to provide additional affirmative assistance because Brown was already at the hospital. He asserted Brown did not convey any desire to have an additional independent test done. He stated the highway patrol provided Brown with the collection report and she refused to sign it. Trooper Minnix confirmed that during the course of advising Brown of her rights, she was notified of her right to obtain an independent test of her blood. He reasserted Brown did not indicate to him or anyone in his presence that she wanted an independent test.

On cross-examination, Trooper Minnix confirmed that the collection report had a check mark on it next to the sentence that indicated Brown requested a sample of blood for her own independent test; however, he stated law enforcement did not make the check mark and Brown never asked him or Corporal Dubose for a sample to obtain an independent test. He testified the nurse who took the blood sample "may have inadvertently checked the box."

On redirect, Trooper Minnix stated that if requested, the highway patrol had the responsibility to assist an individual who had been arrested for DUI in obtaining an

individual sample of the person's blood by taking them to the nearest medical facility. He confirmed that was the only assistance the highway patrol had a responsibility to provide regarding a blood sample.

Floyd testified she worked at Clarendon Memorial Hospital in 2014 and took the sample of Brown's blood. She confirmed she filled out part of the collection report. She testified she made the check mark indicating Brown requested an independent blood sample in error. Floyd asserted Brown never indicated in her presence she wanted a blood sample for an independent test.

Stacey Matthew, an expert in toxicology, testified that while she worked for SLED, she received Brown's blood and urine specimens. She confirmed the samples remained in the proper chain of custody and no one had tampered with the evidence. Brown objected to Matthew testifying to the blood alcohol concentration of her samples, stating two breaks in the chain of custody had occurred. Additionally, Brown argued the samples were inadmissible because the act of the blood being drawn was not videotaped, which she asserted section 56-5-2950(B) of the South Carolina Code (2018) required. The State asserted the video recording section 56-5-2950(B) mentioned related to section 56-5-2953 of the South Carolina Code (2018), the statute concerning incident site and breath test site and video recording. The trial court held the State met its burden concerning the chain of custody and the statute did not require the blood draw to be videotaped. Matthew testified she found Brown's alcohol concentration to be 0.210.

Kelly Bugden, an expert in toxicology employed by SLED, testified she analyzed Brown's blood sample and determined it had a blood alcohol concentration of 0.210. She confirmed there was correlation between a person's blood alcohol concentration and intoxication.

Timothy Grambow, an expert in forensic toxicology and a senior toxicologist at SLED, testified he analyzed Brown's blood sample and reported a blood alcohol level of 0.210 and a positive result for Xanax. Brown objected to Grambow testifying regarding the "condition of a person in general where their blood concentration level was at [0.210]." The trial court overruled the objection. Grambow stated that anyone, regardless of age, sex, or size, would have been too impaired to drive at a 0.210 blood alcohol level.

Brown testified she did not remember having a conversation with Trooper Minnix at the hospital. She stated a nurse informed her they needed to take her blood because she "kill[ed] somebody." Brown stated she told the nurse to take the blood because she was tired and ready to go home. Brown confirmed the nurse informed her she could obtain her own blood sample "to be tested by someone else."

On cross-examination, the State asked Brown if she remembered telling a highway patrolman that she wanted an independent sample of blood and Brown stated she "told the nurse that." Brown recalled the conversation with the nurse, stating "I remember some people nurse, whatever ask me can she draw[] some blood. At first I said, no . . . . Then later on, later on . . . someone say, well, you can have your own test and I say fine." When asked if she said anything other than fine, Brown answered, "No, because that's their procedure. I can't question their procedures, that's what they do, that's what they do." Brown asserted the nurse told Brown she could have her own blood sample but she never saw a sample. Brown testified someone informed her she was entitled to have her own independent blood test drawn and she said "fine."

The jury found Brown guilty as indicted. The trial court sentenced Brown to concurrent sentences of fifteen years' imprisonment for felony DUI resulting in death and twelve years' imprisonment for felony DUI resulting in great bodily injury. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate "[c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

LAW/ANALYSIS

I. Indictments

Brown argues the trial court erred by denying her motion to dismiss the indictments against her by improperly relying on *State v. Campbell*.[3] Brown

[3] 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) (overruling cases to the

asserts *Campbell* held "an indictment for felony DUI was sufficient to confer subject matter jurisdiction . . . even though it did not state with particularity the underlying traffic offense [on] which the [S]tate intended to rely" but applied "only in the context of a guilty plea." Brown contends the trial court should have instead relied on *State v. Grampus*,[4] which noted "that an indictment in a felony DUI case must include the underlying traffic offense the [S]tate intends to rely on." Brown argues that because her indictment "did not state with particularity 'the act forbidden by law' on which the State would rely, [she] was not sufficiently notified of what she would be required to defend at trial." We disagree.

"The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *State v. Tumbleston*, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support." *Id.*

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20 (2014). "An indictment is sufficient when it uses substantially the same language contained in the statute prohibiting the crime charged, or when it is described in such a way that the nature of the charge is plainly understood." *Campbell*, 361 S.C. at 533, 605 S.E.2d at 579.

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extent they combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction).

[4] 288 S.C. 395, 343 S.E.2d 26 (1986), *abrogated on other grounds by State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997), *overruled on other grounds by State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018).

"A challenge to the sufficiency of an indictment must be made before the jury is sworn." *Tumbleston*, 376 S.C. at 96, 654 S.E.2d at 852.

> If the objection is timely made, the [trial] court should evaluate the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense intended to be charged.

Id. at 96-97, 654 S.E.2d at 852.

"In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances." *Gentry*, 363 S.C. at 103, 610 S.E.2d at 500. An indictment is sufficient if "it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." *Campbell*, 361 S.C. at 533, 605 S.E.2d at 579 (quoting *Browning v. State*, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995), *overruled on other grounds by Gentry*, 363 S.C. at 105-06, 610 S.E.2d at 501-02 (overruling to the extent it combined the concepts of the sufficiency of an indictment and subject matter jurisdiction)). "[W]hether the indictment could be more definite or certain is irrelevant." *Gentry*, 363 S.C. at 103, 610 S.E.2d at 500. "Therefore, an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *Tumbleston*, 376 S.C. at 98, 654 S.E.2d at 853.

"The indictment must state the offense with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer." *State v. Reddick*, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002). "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." *Id.* (quoting *State v. Beam*, 336 S.C. 45, 50, 518 S.E.2d 297, 300 (Ct. App. 1999)).

In the present case, Brown was indicted for felony DUI resulting in death and felony DUI resulting in great bodily injury. The language of both indictments included the following: "while driving a vehicle under the influence of alcohol, drugs, or a combination . . . Brown did an act forbidden by law or neglected a duty imposed by law in the driving of said vehicle . . . all in violation of [s]ection 56-5-2945" of the South Carolina Code. Section 56-5-2945, the section Brown was indicted for violating, states:

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to another person, is guilty of the offense of felony driving under the influence . . . .

S.C. Code Ann. § 56-5-2945(A) (2018).

Because the indictments followed the language of the statutes prohibiting the crimes, the trial court did not err in denying Brown's motion to dismiss or quash the indictments. The indictments were sufficient to make Brown aware she was being charged with the crimes of felony DUI resulting in death and felony DUI resulting in great bodily injury. The language of the indictments followed the language of the statute, and the indictments were sufficient to enable the trial court to know what judgment to pronounce and Brown to know what to answer to at trial and the elements of the offense with which she was charged.

Further, the trial court did not err in relying on *Campbell*. Like Brown, the defendant in *Campbell* was charged with felony DUI resulting in death. 361 S.C. at 531, 605 S.E.2d at 578. In *Campbell*, the court held an indictment was sufficient if it tracked the language of the statute. *Id.* at 533, 605 S.E.2d at 579. Here, both of Brown's indictments tracked the language of section 56-5-2945(A). Brown argues the *Campbell* holding was limited to guilty pleas; however, the *Campbell* court did not appear to limit its holding to guilty pleas but instead seemed to rely on the fact that the defendant pled guilty as an additional reason she was aware of the charge against her. *See id.* ("Even a cursory reading of the indictment . . .

shows it contains virtually identical language to that contained in the statute defining the offense. *In addition, because Campbell pled guilty*, it is clear she was aware of the nature of the charge against her." (emphasis added)).

Moreover, despite the fact that *Gentry* overturned *Campbell* on other grounds, *Gentry*, which did involve a trial, reiterated the same language from *Campbell*. *Compare Gentry*, 363 S.C. at 102-03, 610 S.E.2d at 500 ("[T]he [trial] court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged."), *and id.* at 103, 610 S.E.2d at 500 ("[W]hether the indictment could be more definite or certain is irrelevant."), *with Campbell*, 361 S.C. at 533, 605 S.E.2d at 578-79 ("The general rule regarding the adequacy of an indictment is that '[a]n indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon.' Furthermore, '[t]he true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.'" (alterations by court) (first quoting *State v. Adams*, 354 S.C. 361, 364, 580 S.E.2d 785, 791 (Ct. App. 2003); then quoting *Browning*, 320 S.C. at 368, 465 S.E.2d at 359)).

This court in *Tumbleston*, which involved a jury trial and was decided after *Gentry*, also used similar language as that from *Campbell*. *Compare Tumbleston*, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n indictment passes legal muster when it charges the crime *substantially in the language of the statute* prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." (emphasis added)), *with Campbell*, 361 S.C. at 533, 605 S.E.2d at 579 ("An indictment is sufficient when it uses *substantially the same language contained in the statute* prohibiting the crime charged, or when it is described in such a way that the nature of the charge is plainly understood." (emphasis added)). Thus, the trial court did not err in relying on *Campbell*.

Additionally, *Grampus*, the case on which Brown asserts the trial court should have relied, did not hold in the body of the opinion that an indictment "must include the underlying traffic offense." Instead, the *Grampus* court mentioned the sufficiency of an indictment in a footnote, noting *Grampus* did not argue the issue of the sufficiency of the indictment on its face. 288 S.C. at 397 n.2, 343 S.E.2d at 27 n.2 ("Appellant has not argued the sufficiency of the indictment on its face; however, we note that the indictment must state with particularity the 'act forbidden by law or . . . duty imposed by law' which will be relied on by the State to support the felony D.U.I. charge." (alteration by court) (quoting § 56-5-2945)).

Accordingly, the trial court did not err in finding Brown's indictments were sufficient.

II. Affirmative Assistance

Brown argues the trial court erred in admitting her blood sample into evidence because she requested an independent sample and law enforcement did not offer her affirmative assistance to obtain the sample. Brown contends she testified she requested a sample for an independent test and the fact that the collection report had a check mark next to the line stating she requested a sample for an independent test corroborated her testimony. She asserts that despite the fact she was already at the hospital, Trooper Minnix and Corporal Dubose failed to provide the required affirmative assistance because they should have ensured she was provided with her own sample to take to a testing location of her choosing. We disagree.

"A trial [court]'s decision to admit or exclude evidence is within [its] discretion and will not be disturbed on appeal absent an abuse of discretion." *State v. Frey*, 362 S.C. 511, 515-16, 608 S.E.2d 874, 877 (Ct. App. 2005). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

> The arresting officer shall provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration.

> If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED shall test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in a judicial or administrative proceeding.

S.C. Code Ann. § 56-5-2950(E) (2018).

> The person tested or giving samples for testing may have a qualified person of the person's own choosing conduct additional tests at the person's expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

S.C. Code Ann. § 56-5-2950(D) (2018).

"The purpose of . . . [section] 56-5-2950[(E)] 'is to permit an accused person to gather independent evidence to submit in reply to that of the prosecuting authority.'" *State v. Harris*, 311 S.C. 162, 166, 427 S.E.2d 909, 911 (Ct. App. 1993) (quoting *Town of Fairfax v. Smith*, 285 S.C. 458, 460, 330 S.E.2d 290, 290 (1985)). "Whether one receives affirmative assistance [that] is reasonable under the statute depends on the circumstances of each case." *State v. Knighton*, 334 S.C. 125, 131, 512 S.E.2d 117, 120 (Ct. App. 1999).

The trial court did not err by admitting into evidence the analysis of Brown's blood sample. Trooper Minnix and Corporal Dubose provided Brown with affirmative assistance as required by section 56-5-2950(E). Although the collection report had a check mark that indicated Brown requested an independent blood sample, Floyd, Trooper Minnix, and Corporal Dubose's testimonies indicated it was checked in error. Brown was informed she could obtain an independent sample of her blood

to take to a testing location of her choosing, and she acknowledged she told the nurse "fine" and "okay." Trooper Minnix and Corporal Dubose testified Brown did not request an independent blood sample in their presence. Additionally, Floyd stated Brown never requested an independent sample when she took Brown's blood. Based on all of the testimony and the fact that Brown refused to sign the collection report, the trial court did not abuse its discretion in finding Brown did not request an independent blood sample.

Moreover, Trooper Minnix and Corporal Dubose provided affirmative assistance to Brown to obtain an independent blood sample because they informed Brown of her rights, she was present at a hospital where she could have requested a sample of her blood, and they did not do anything to prevent Brown from obtaining an independent sample. *See* § 56-5-2590(E) ("Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration."); *Knighton*, 334 S.C. at 131, 512 S.E.2d at 120 ("Whether one receives affirmative assistance [that] is reasonable under the statute depends on the circumstances of each case."). Thus, the trial court did not err in denying Brown's motion to suppress the results of Brown's blood sample analysis on this basis because Trooper Minnix and Corporal Dubose provided Brown with the required affirmative assistance for obtaining an independent blood sample.

III. VIDEO RECORDING REQUIREMENTS

Brown argues the trial court erred in allowing testimony regarding her blood alcohol level from a blood sample obtained at the hospital. She contends that law enforcement violated section 56-5-2950(B) by not video recording the act of drawing her blood. Brown asserts the statute "provide[s] that no tests or samples could be obtained unless video recording equipment was activated prior to the commencement of the testing procedure." We disagree.

"A trial [court]'s decision to admit or exclude evidence is within [its] discretion and will not be disturbed on appeal absent an abuse of discretion." *Frey*, 362 S.C. at 515-16, 608 S.E.2d at 877. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265.

The implied consent statute provides: "No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed" of his or her implied consent rights.[5] S.C. Code Ann. § 56-5-2950(B) (2018).

Section 56-5-2953 mandates the video recording of a driver's "conduct at the incident site and the breath test site" if the driver violates section 56-5-2930, -2933, or -2945 of the South Carolina Code (2018). S.C. Code Ann. § 56-5-2953(A) (2018). The statute provides the following requirements for the recording:

> (1)(a) The video recording at the incident site must:
>
> > (i) not begin later than the activation of the officer's blue lights;
> >
> > (ii) include any field sobriety tests administered; and
> >
> > (iii) include the arrest of a person for a violation of [s]ection 56-5-2930 or [s]ection 56-5-2933, or a probable cause determination in that the person violated [s]ection 56-5-2945, and show the person being advised of his [*Miranda*] rights.

[5] Those rights are the person does not have to take the test or give the samples, but if the person refuses, the person's privilege to drive must be suspended and the refusal may be used in court; if the person takes the test or gives the samples and has a certain alcohol concentration, the person's privilege to drive must be suspended for at least one month; the person has the right to have independent tests conducted and to request a contested case hearing; and if the person does not request a contested case hearing or if the suspension is upheld, the person shall enroll in an alcohol and drug program. *See* § 56-5-2950(B).

> (b) A refusal to take a field sobriety test does not constitute disobeying a police command.
>
> (2) The video recording at the breath test site must:
>
> (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;
>
> (b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and
>
> (c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

§ 56-5-2953(A).

"Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015) (alteration by court) (quoting *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007)). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551 (Ct. App. 2013) (quoting *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010)). "Courts will reject a statutory interpretation which 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." *Sweat*, 386 S.C. at 351, 688 S.E.2d at 575. "The legislature is presumed to intend that its statutes accomplish something." *State v. Long*, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Sweat*, 386 S.C. at 351, 688 S.E.2d at 575 (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)).

"Statutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if reasonable." *State v. Prince*, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999). A court "should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505-06 (Ct. App. 2004).

In 2008, the legislature amended section 56-5-2950 to add the phrase on which Brown relies—"upon activation of the video recording equipment and prior to the commencement of the testing procedure."[6, 7, 8] Act No. 201, 2008 S.C. Acts 1644, 1674. The act that amended section 56-5-2950 in no way suggests the legislature intended to mandate videotaping of blood and urine tests. *See* Act No. 201, 2008 S.C. Acts 1644, 1674. The amended version simply specifies the time frame when the implied consent rights[9] must be provided, both in written form and orally, to a driver—before the testing procedure begins. § 56-5-2950(B). This clause does not create a requirement to video record all types of samples being taken. The purpose

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[6] Prior to the amendment, the portion of the statute this phase was added to stated: "No tests may be administered or samples obtained unless the person has been informed in writing" of his or her implied consent rights. S.C. Code Ann. § 56-5-2950(a) (2006).

[7] The act also added that a driver must be verbally informed of his or her implied consent rights, in addition to being given a written copy, whereas before a driver only had to be given a written copy. Act No. 201, 2008 S.C. Acts 1644, 1674.

[8] The statute was again amended in 2014 but made no changes relevant to the issue here. *See* Act 158, 2014 S.C. Acts 1994, 2027.

[9] At trial, Brown's counsel stated he understood Brown had received the implied consent warnings.

of subsection B was to lay out certain rights a driver has relating to implied consent.

Section 56-5-2953 specifies in detail that a recording must be done for breath testing at the incident site. In stating what the act amended in section 56-5-2950, the act did not indicate it was creating a new requirement to record tests in addition to breath testing at the incident site. [10] If the legislature had intended to establish video recording for all tests, including blood and urine samples, it would have done so in a more explicit way, including laying out the procedures as it did in section 56-5-2953. *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 82-83, 862 S.E.2d 706, 708-09 (2021) (recognizing that the legislature was "capable of drafting a provision prohibiting all mask mandates" when one proviso applying to public K-12 schools clearly demonstrated the legislature's intent to prohibit the use of state funds to

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[10] The act stated it was

> amend[ing] section 56-5-2950, relating to a driver's implied consent to testing for alcohol or drugs, so as to make technical changes, to provide when breath samples must be collected under this provision, to delete the provision that provides that an officer may not require additional tests of a person under certain circumstances, to delete the term "Department of Public Safety" and replace it with the term "South Carolina Criminal Justice Academy[,"] to revise the provisions that provide the procedures for administering breath tests or obtaining samples, to revise the information that a person charged with violating this provision must be given, to provide the circumstances in which a person must pay for the cost of tests performed under this section and provide for the disbursement of these monies, to delete the provision that provides that a certain level of alcohol concentration is a violation of section 56-5-2933, and to revise the circumstances in which certain evidence may be excluded in a proceeding that occurs under this section . . . .

Act No. 201, 2008 S.C. Acts 1644, 1648 (text altered for capitalization).

require any mask mandate in those settings, but another provision applying to public institutions of higher education used different language that left "little doubt that [the higher education proviso] was not intended to prohibit all mask mandates at public institutions of higher education, but only, as its terms specifically provide, mask mandates for the unvaccinated"); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (holding when one provision does not include a right that is included in a related provision, a right will not be implied when it does not exist); *Est. of Guide v. Spooner*, 318 S.C. 335, 338, 457 S.E.2d 623, 624 (Ct. App. 1995) (noting that a "provision expressly applie[d] to a 'formal testacy or appointment proceeding commenced in this state' as opposed to an informal proceeding" because "[i]t is reasonable to assume that if the legislature had intended the statute to apply to both formal and informal proceedings, it would have said so either by stating that it applied to any testacy or appointment proceeding, or by expressly including informal proceedings in the first sentence"). Accordingly, the trial court did not err in finding section 56-5-2950 did not require video recording the taking of the blood sample. Therefore, the trial court did not abuse its discretion in admitting the blood sample as evidence, and we affirm that decision.

CONCLUSION

Based on the foregoing, the trial court did not err in denying Brown's motion to quash the indictment. Additionally, the trial court did not abuse its discretion in denying Brown's motion to suppress the blood sample. Therefore, Brown's convictions of felony DUI resulting in death and felony DUI resulting in great bodily injury are

AFFIRMED.

HILL and HEWITT, JJ., concur.