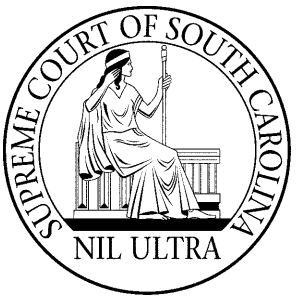

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
May 8, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

C-Sculptures, LLC, Respondent,

v.

Gregory A. Brown and Kerry W. Brown, Petitioners.

Appellate Case No. 2011-195907

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 27246
Heard February 7, 2013 – Filed May 8, 2013

REVERSED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Petitioners.

Donald R. McCabe, Jr. and Stephanie C. Trotter, both of McCabe, Trotter & Beverly, P.C., of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted certiorari to review the court of appeals decision affirming the circuit court's order that upheld an arbitration award. *C-*

Sculptures, LLC v. Brown, 394 S.C. 519, 716 S.E.2d 678 (Ct. App. 2011). We reverse, for we find the arbitrator exceeded his powers, as his decision constitutes a "manifest disregard of the law." *See* S.C. Code Ann. § 15-48-130 (Supp. 2012); *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320 (2009).

I.

The underlying dispute arises from a construction contract whereby Respondent C-Sculptures, LLC, a general contractor, agreed to build a home for Petitioners Gregory and Kerry Brown. The contract price was in excess of $800,000. However, Respondent only possessed what is referred to as a Group II license, limiting Respondent to construction projects that did not exceed $100,000. A dispute arose between the parties, and Respondent filed an action in circuit court seeking to enforce a mechanic's lien against Petitioners. Upon Petitioners' motion and pursuant to an arbitration clause in the parties' contract, the circuit court matter was stayed pending arbitration.

Petitioners sought to have the matter dismissed after they learned Respondent held only a Group II license. In a detailed memorandum in support of their motion to dismiss, Petitioners argued that Respondent did not have a valid license and was therefore prohibited from bringing a legal or equitable action to enforce the contract pursuant to S.C. Code Ann section 40-11-370(C) (Supp. 2012).[1]

The arbitrator was apprised of the applicable law, but nevertheless denied Petitioners' motion to dismiss "after due consideration of all the evidence and authorities presented by the parties in this Arbitration." Respondent prevailed at arbitration, receiving an award of damages and an award of attorney's fees as the prevailing party pursuant to S.C. Code Ann. section 29-5-10(b) (Supp. 2012). Petitioners challenged the arbitration award, contending the arbitrator's denial of their motion to dismiss amounted to a manifest disregard of the law. Following adverse decisions in the circuit court and the court of appeals, we granted a writ of certiorari.

---

[1] Section 40-11-370(C) provides: "An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. . . ."

II.

South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution, including arbitration. *See Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009) ("Arbitration is a favored method of disputes in South Carolina"). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *Id.* at 241, 676 S.E.2d at 323. An award will be vacated only under narrow, limited circumstances, *inter alia*, "when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." *Id.* (citing *Tech. College v. Lucas & Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985)). This Court has held that for a court to vacate an arbitration award based upon an arbitrator's "manifest disregard for the law," the "governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." *Id.* Indeed, "[a]n arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Id.* at 241-42, 676 S.E.2d at 323.

III.

Petitioners argue the court of appeals erred in refusing to find the arbitrator manifestly disregarded the law in declining to dismiss the action. They maintain the plain language of section 40-11-370(C) is clear, defined, explicit, and unquestionably applicable, yet the arbitrator simply chose to ignore it. We agree.

"Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where 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." *Id.*

It is undisputed that Respondent is a "general contractor" that performs "general construction" within the meaning of section 40-11-20(8) and (9) of the South Carolina Code. Section 40-11-30 states:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of

> construction is greater than five thousand dollars for general contracting . . . *without a license issued in accordance with this chapter*.

S.C. Code Ann. § 40-11-30 (Supp. 2012) (emphasis added).

A contractor's failure to hold a license required by section 40–11–30 is governed by section 40–11–370 of the South Carolina Code, which provides in pertinent part:

> (A) It is unlawful to use the term "licensed contractor" or to perform or offer to perform general or mechanical construction without first obtaining a license as required by this chapter.
>
> ….
>
> (C) An entity which does not have a *valid license* as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. . . .

(emphasis added).

The term "valid" is clear and unambiguous, and leaves no room for statutory construction. Respondent admits it did not have the appropriate license, yet attempts to avoid the door-closing effect of section 40-11-370(C) by claiming it was merely "under-licensed." The statute manifestly forecloses Respondent's interpretation, as the term "valid" does not give rise to the slightest ambiguity.[2] Our case law is in accord.

In *Duckworth v. Cameron*, 270 S.C. 647, 244 S.E.2d 217 (1978), a residential home builder, who was not licensed, entered into a contract for the construction of a house. This Court analyzed a similar statute that prohibited a residential home builder who did not have the required license from bringing an action to enforce

[2] Moreover, section 40-11-270(A) provides that "[a] licensee is confined to the limitations of the licensee's license group and license classifications or subclassifications as provided in this chapter."

the contract. We found the statute "clear and unambiguous. Any builder who violates the chapter by entering into a contract for home construction without obtaining *the required license* simply cannot enforce the contract." *Id.* at 649, 244 S.E.2d at 218 (emphasis added); *see also Earthscapes Unlimited, Inc. v. Ulbrich*,

390 S.C. 609, 614, 703 S.E.2d 221, 224 (2010) (recognizing but not enforcing section 40-11-370(B) because "Appellants did not raise section 40-11-370 of the South Carolina Code as an affirmative defense at any stage in the proceeding below, we find this affirmative defense was not properly pled"); *Skiba v. Gessner*, 374 S.C. 208, 210, 648 S.E.2d 605, 605-06 (2007) (citing section 40-11-370 and recognizing it as an affirmative defense, noting "that an entity which does not have a valid license as required by Chapter 40 may not bring an action at law or in equity to enforce the provisions of a contract").

In this case, the arbitrator erred in failing to grant Petitioners' motion to dismiss based upon the affirmative defense of section 40-11-370. Despite such error, Respondent seeks refuge in the narrow standard of manifest disregard. Indeed, manifest disregard is an exacting standard, but it is not insurmountable. *See, e.g.*, *N.Y. Tel. Co. v. Commc'ns Workers of Am. Local 1100*, 256 F.3d 89 (2nd Cir. 2001) (affirming district court's vacating of arbitration award where arbitrator manifestly disregarded the law by explicitly rejecting precedent of the Second Circuit and relying on opinions outside of the Circuit); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997) (finding lack of indication that arbitrators rejected party's express urging to disregard the law necessitated reversing affirmance of the arbitration award); *Spear, Leeds & Kellogg v. Bullseye Sec., Inc.*, 291 A.D.2d 255 (N.Y. App. Div. 2002) (finding that because individual claimants, as a matter of law, cannot assert a cause of action to recover for wrongdoing done to a corporation, the rendering of award based on such a claim was properly vacated as manifest disregard of the law); *Wichinksy v. Mosa*, 847 P.2d 727 (Nev. 1993) (finding arbitrator demonstrated a manifest disregard of the law by awarding punitive damages in the absence of clear and convincing evidence of fraud, oppression or malice).

Here, we hold "the governing law ignored by the arbitrator [is] well defined, explicit, and clearly applicable[,]" and consequently, the manifest disregard

standard has been met. *See Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. Therefore, we reverse the court of appeals and direct that judgment be entered for Petitioners.[3]

REVERSED.

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

[3] Having resolved the case on the basis of the section 40-11-370 challenge, we do not reach the remaining issue. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

JUSTICE PLEICONES: I am appalled that respondent, licensed only for construction projects up to $100,000, bid upon this project that far exceeded the scope of his license. Unlike the majority, however, I cannot say that the arbitrator manifestly disregarded the law. *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320 (2009); *Lauro v. Visnapuu*, 351 S.C. 507, 570 S.E.2d 551 (Ct. App. 2002) (Hearn, J., concurring). I therefore reluctantly dissent and would affirm the decision of the Court of Appeals.

Heretofore we have not had occasion to define the term "valid license" as used in S.C. Code Ann. § 40-11-370(C) (Supp. 2012). While I may very well agree with the majority that respondent did not possess a valid license within the meaning of that statute, the question, in my view, is not whether the statutory term is clear and unambiguous, but whether the arbitrator knowingly refused to give the term its well-defined and explicit meaning. *Gissel*, *supra*. In my opinion, this strict standard is not met here either by reference to an opinion analyzing the term in a similar statute[4] or to a decision that mentioned but did not enforce the statute,[5] especially since in both cases the contractor had no license while respondent here admittedly possesses a Group II license. Under our very limited scope of review, I would uphold the arbitrator's award.

Since I would uphold the decision of the Court of Appeals on the "manifest disregard" issue, I reach the question whether the Court of Appeals erred in affirming the attorney's fee award. While I question that court's application of the mechanic's lien statute, the arbitrator's attorney's fee award rested on multiple grounds, not all of which have been challenged. I would therefore affirm the award of attorney's fee in result only.

For the reasons given above, I reluctantly dissent and would affirm the result reached by the Court of Appeals.

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[4] *Duckworth v. Cameron*, 270 S.C. 647, 244 S.E.2d 217 (1978).

[5] *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 703 S.E.2d 221 (2010).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Arthur Tuggle Bryngelson, Jr., Respondent.

Appellate Case No. 2013-000681

Opinion No. 27247
Submitted April 16, 2013 – Filed May 8, 2013

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Arthur Tuggle Bryngelson, Jr., of Ridgeville, for Respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) 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 a public reprimand. Respondent has also resigned his position and has agreed never to seek nor accept a judicial office in South Carolina without the express written permission of this Court after written notice to ODC. We accept the agreement and publicly reprimand respondent, the most severe sanction we are able to impose under these circumstances.

Facts

Matter I

A defendant appeared before respondent in a criminal matter. After initially setting a higher bond, respondent set the defendant's bond at $10.00. Thereafter, respondent posted bond on the defendant's behalf out of respondent's own personal funds and signed the bond form as both Judge and Surety. Respondent self-reported this matter.

Matter II

Respondent arraigned a defendant on the felony charge of Malicious Injury to Property. Subsequently, at the request of the parties, respondent signed a paper stating that the victim agreed to drop all charges against the defendant based upon payment of $1,178.80. The defendant was later indicted on the matter and was arrested when he failed to appear. Respondent submits he felt that he signed the paper as a witness to the parties' exchange for restitution but now recognizes that he should not have signed the paper as it could give the defendant the impression that the matter was dismissed by him.

Matter III

A defendant was charged with four counts of unlawful use of a telephone. The matter was continued at the request of the prosecuting officer. When the jail mistakenly transported the defendant, respondent allowed the prisoner to plead guilty without the arresting officer and victim being present or being notified of the proceeding. In mitigation, respondent submits the defendant served the maximum amount of jail time for the crime.

Matter IV

A defendant who was ticketed for an expired tag failed to appear for court and was tried in her absence by another judge in April 2010. The defendant was found guilty, a fine was imposed, and the defendant's driver's license was suspended.

In June 2010, a clerk changed the case history from guilty to not guilty, and the disposition code for the matter was changed to respondent's disposition code to

reflect that respondent was the trial judge. The clerk reports she changed the disposition at respondent's direction.

A municipal court judge reports that he spoke with respondent at the time the defendant received the ticket. The municipal court judge reported that he called respondent when the defendant provided proof that she had renewed her tags and asked respondent to dismiss the matter.

Respondent does not remember the matter, but submits in mitigation that tickets for expired tags are dismissed as a matter of course when the defendant provides proof that the tags have been renewed. While acknowledging it is improper to change another judge's order, respondent submits that any actions he took were consistent with how other defendants with the same charge are treated.

Matter V

Respondent presided over a matter where the complainant sought a restraining order against a police officer. In announcing his decision, respondent commented on the fact that granting a restraining order could have a serious effect on the officer's career and incorrectly applied a reasonable doubt standard in not granting the complainant a restraining order. While there is no indication respondent knew the officer in question, respondent acknowledges it was improper to apply a beyond a reasonable doubt standard.

Law

Respondent admits that by his conduct he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity and independence of judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and appearance of impropriety in all of judge's activities); Canon 2A (judge shall respect and comply with the law); Canon 3B(2) (judge shall be faithful to the law); and Canon 3B(7) (judge shall accord to every person who has a legal interest in a proceeding the right to be heard according to law).

Respondent admits he has also violated the following provisions of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct) and Rule 7(a)(4) (it shall be ground for discipline for judge to persistently perform judicial duties in an incompetent or neglectful manner).

Conclusion

We accept the Agreement for Discipline by Consent and issue a public reprimand because respondent is no longer a judge and because he has agreed not to hereafter seek nor accept another judicial position in South Carolina without first obtaining express written permission from this Court after due notice in writing to ODC. As previously noted, this is the strongest punishment we can give respondent, given the fact that he has already resigned his duties as a judge. *See In re Gravely*, 321 S.C. 235, 467 S.E.2d 924 (1996) ("A public reprimand is the most severe sanction that can be imposed when the respondent no longer holds judicial office.") Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Matthew Bodman, Plaintiff,

v.

State of South Carolina and South Carolina Department of Revenue, Defendants.

Appellate Case No. 2011-187466

ORIGINAL JURISDICTION

Opinion No. 27248
Heard November 29, 2011- Filed May 8, 2013

JUDGMENT FOR DEFENDANTS

A. Camden Lewis and Ariail E. King, both of Lewis, Babcock & Griffin LLP, of Columbia, and Richard A. Harpootlian, of Richard A. Harpootlian, PA, of Columbia, for Plaintiff.

Attorney General Alan Wilson, Deputy Attorney General Robert D. Cook, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, and Ray N. Stevens, Parker Poe Adams &

Bernstein, LLP, of Columbia, for Defendant State of South Carolina.

Milton G. Kimpson, Carol I. McMahan, Adam I. Marinelli, Sarah A. Powell, and Harry T. Cooper, Jr., all of Columbia, for Defendant South Carolina Department of Revenue.

Bradley S. Wright and Charles F. Reid, both of Columbia, for *Amici Curiae* Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, and W. Brian White, in his official capacity as Chairman of the South Carolina House of Representatives Ways and Means Committee.

Michael R. Hitchcock, John P. Hazzard, V, and Robert E. Maldonado, all of Columbia, for *Amici Curiae* Glenn F. McConnell, in his official capacity as President *Pro Tempore* of the South Carolina Senate, and Hugh K. Leatherman, in his official capacity as Chairman of the South Carolina Senate Finance Committee.

Burnet Rhett Maybank, III, of Nexsen Pruet, LLC, of Columbia, for *Amicus Curiae* South Carolina Manufacturers Alliance.

John C. von Lehe, Jr. and Bryson M. Geer, of Nelson Mullins Riley & Scarborough LLP, of Charleston, for *Amicus Curiae* Council on State Taxation.

JUSTICE HEARN: Mark Twain once quipped, "What is the difference between a taxidermist and a tax collector? The taxidermist takes

only your skin." Not necessarily so, according to Matthew Bodman. In this action brought in our original jurisdiction, Bodman alleges that the sheer number of exemptions to and caps on this State's sales and use tax removes any rational relationship they have to the underlying tax itself. He therefore requests that we strike down all of the exemptions and caps as being unconstitutional, leaving behind only the imposition of the tax. In particular, he contends that the entire exemption and cap scheme violates our State constitution's equal protection guarantee and prohibition against special legislation. We disagree.

FACTUAL/PROCEDURAL BACKGROUND

The facts of this case are simple and not in dispute. Bodman is a resident and taxpayer of Richland County, South Carolina. He is also the proud father of two young children, who presently are not yet old enough to attend public school. Ostensibly, he is also a consumer of goods subject to this State's sales and use tax.

A state-wide tax totaling six percent is imposed on the sale of all personal property at retail, the proceeds of which are used to support education. The first part of this tax is a five percent tax imposed by Section 12-36-910 of the South Carolina Code (2000 & Supp. 2011). This five percent tax is divided up into a four percent levy and a one percent levy. *Id.* § 12-36-2620 (2000 & Supp. 2011). The four percent portion of the tax is credited to the public school building fund. *Id.* § 12-36-2620(1); *id.* § 59-21-1010 (2004). As to the remaining one percent, the funds it raises are deposited into the South Carolina Education Improvement Act of 1984 Fund "as a fund separate and distinct from the general fund of the State." *Id.* § 12-36-2620(2); *id.* § 59-21-1010(B).

On top of this five percent tax, Section 12-36-1110 of the South Carolina Code (Supp. 2011) levies an additional one percent sales tax. Revenues derived from this tax are credited to the Homestead Exemption Fund, *id.* § 12-36-1120 (Supp. 2011), which is also separate and distinct from the general fund, *id.* § 11-11-155 (2011). Without delving into too much

detail, this fund provides a revenue stream for school districts in lieu of certain property taxes. *See id.* § 11-11-156 (2011).

Over the years, the General Assembly has passed into law a series of exemptions to and caps on the tax imposed by this general scheme. Currently, there are seven caps on the amount of the tax. *Id.* § 12-36-2110 (2000 & Supp. 2011). Additionally, there are seventy-eight exemptions from the tax. *Id.* § 12-36-2120 (Supp. 2011). These exemptions run the gamut from textbooks used in primary and secondary education, *id.* § 12-36-2120(3) (2000), to water sold by public utilities, *id.* § 12-36-2120(12) (Supp. 2011), to electricity used to irrigate crops, *id.* § 12-36-2120(44) (2000), to a certain percentage of the gross proceeds from the rental or lease of portable toilets, *id.* § 12-36-2120(62) (Supp. 2011), and to sweetgrass baskets, *id.* § 12-36-2120(64) (Supp. 2011). Recent data show that as a result of these numerous exemptions, South Carolina now exempts more sales taxes than it collects.

Spurred on by recent budget concerns and this declining source of revenue for education, Bodman sought our original jurisdiction pursuant to Rule 245, SCACR, to challenge the sales tax exemption and cap scheme. He asks that we strike down the exemptions and caps *in toto* because the number of them has grown to the point where they no longer bear a rational relationship to the purpose of imposing the tax in the first place. He therefore argues that sections 12-36-2110 and 12-36-2120 violate the equal protection clause and the prohibition against special legislation found in our State's constitution. We accepted this suit in our original jurisdiction.

STANDARD OF REVIEW

We are reluctant to declare a statute unconstitutional. *In re Treatment and Care of Luckbaugh*, 351 S.C. 122, 134, 568 S.E.2d 338, 334 (2002). Hence, we will make every presumption in favor of finding it constitutional. *Id.* Moreover, if possible, we must construe a statute so that it is valid. *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). The party challenging the statute bears the heavy burden of proving that "its repugnance

to the constitution is clear and beyond a reasonable doubt." *Luckabaugh*, 351 S.C. at 134-35, 568 S.E.2d at 344.

ISSUES PRESENTED

I. Does Bodman have standing to bring this claim?

II. Do sections 12-36-2110 and 12-36-2120 violate the equal protection clause of the South Carolina Constitution?

III. Do sections 12-36-2110 and 12-36-2120 violate the prohibition against special legislation where a general law can be made applicable?

LAW/ANALYSIS

I. STANDING

As a threshold matter, the State and the Department of Revenue (collectively, Defendants) assert that Bodman does not have standing to bring this action because he has not suffered an individualized injury. Bodman counters that he has sufficient standing as a taxpayer and under the public importance exception to the individualized injury requirement.

"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). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Bodman does not claim any statute confers standing upon him.[1] As to constitutional standing, one of the core requirements is that the plaintiff suffered a "'concrete and particularized'" injury. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, to the extent Bodman has suffered or will suffer any harm as a result of this tax scheme, this harm is shared by all taxpayers in the State. In *ATC*, we unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer for this reason. There, we explained that "[t]he injury to ATC . . . as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury." *Id.* at 198, 669 S.E.2d 340-41 (citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (holding that a taxpayer lacks standing when he "suffers in some indefinite way in common with people generally")). We reaffirm this principle today and hold that Bodman's status as a mere taxpayer is insufficient to confer standing upon him.

What remains to be determined is whether Bodman can claim standing under the public importance exception, a rule which "has been the subject of much confusion and misapplication." Jessica Clancy Crowson & C.W. Christian Shea, *Standing in South Carolina: What is Required and Who Has It?*, S.C. Law., July 2009, at 19. Generally speaking,

> a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained.

Joytime Distribs., 338 S.C. at 639, 528 S.E.2d at 649-50. However, we have recognized that "standing is not inflexible." *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). Thus, "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* In recent years, we routinely

[1] We reject any averment that the fact Bodman is proceeding under the Declaratory Judgment Act has any impact on our standing analysis

have found standing through this exception. *See Sloan v. Dep't of Transp.*, 379 S.C. 160, 170-71, 666 S.E.2d 236, 241 (2008); *Davis*, 372 S.C. at 500, 642 S.E.2d at 741-42; *Sloan v. Hardee*, 371 S.C. 495, 497 n.1, 640 S.E.2d 457, 458 n.1 (2007); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878-79 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 436-37, 608 S.E.2d 579, 582-83 (2005), *abrogated on other grounds, Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004); *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999).

We tempered the application of the public importance exception somewhat in *ATC*. In doing so, we reminded the bench and bar that "[w]hether an issue of public importance exists necessitates a cautious balancing of the competing interests presented." *ATC*, 380 S.C. at 198, 669 S.E.2d at 341. To avoid an overzealous use of this exception, we said that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Id.* at 199, 669 S.E.2d at 341. Moreover, the Supreme Court of the United States recently explained how more limited rules of standing are actually beneficial for the judicial process:

> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so. Making the . . . standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011).

However, we need not revisit the requirements for the public importance exception today because even if Bodman does have standing under it, his claims fail on the merits.

II. EQUAL PROTECTION

Bodman's first challenge is that sections 12-36-2110 and 12-36-2120 are unconstitutional because they do not afford equal protection of the laws. Based on the limited grounds on which Bodman has presented this case to us, we disagree.

The South Carolina Constitution provides that no "person shall be denied the equal protection of the laws." S.C. Const. art. I, § 3. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995); *see also Sloan v. Bd. of Physical Therapy Exam'rs*, 370 S.C. 453, 481, 636 S.E.2d 598, 613 (2006) ("A crucial step in the analysis of any equal protection issue is the identification of the pertinent class . . . ."). Not all classifications are unconstitutional, however, for "[t]he equal protection clause only forbids irrational and unjustified classifications." *Luckabaugh*, 351 S.C. at 147, 568 S.E.2d at 351 (quotation omitted). So long as the statute "does not implicate a suspect class or abridge a fundamental right, the rational basis test is used" to determine whether the classification falls into the prohibited group. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis. *Id*.

We give great deference to the General Assembly's decision to create a classification. *Davis v. Cnty. of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386. Consequently, those who challenge the validity of one under rational basis review must "negate every conceivable basis which might

support it." *Lee v. S.C. Dep't of Natural Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000). Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. *Id.* Moreover, "[t]he fact that the classification may result in some inequity does not render it unconstitutional." *Davis*, 313 S.C. at 465, 443 S.E.2d at 386.

Accordingly, our entire equal protection inquiry revolves around interplay between the specific classification created and the purported basis for it, with a challenger coming under rational basis review facing a steep hill to climb. As illustrated above, sections 12-36-2110 and 12-36-2120 do not create a single classification each[2]; they create eighty-five between them covering a wide range of commercial activity from the leasing of portable toilets to the sale of textbooks for primary and secondary education. Thus, we are unable to examine the scheme as a whole. Instead, consistent with the principles outlined above, we must determine whether each one of them is supported by any rational basis.

However, Bodman has prevented us from doing so. The argument he advances instead is that the sheer number of exemptions and caps in sections 12-36-2110 and 12-36-2120 has rendered the statutes arbitrary and thus unconstitutional. Moreover, he points to the wide range of transactions which fall under these statutes as evidence of a lack of a "cohesive scheme," which accordingly makes the entire group arbitrary and presumably lacking in a rational basis. Yet, in no uncertain terms he argues that the scheme must stand or fall *as a whole* based *solely* on the number of "patchwork" exclusions and caps. He even went so far as to explicitly decline the

[2] We assume *arguendo* that each cap and exemption would be a classification for equal protection purposes. Additionally, we assume *arguendo* that Bodman has been subjected to disparate treatment as a result of these classifications.

Defendants' invitation to examine whether individual exemptions and caps are supported by a rational basis.[3]

We rejected this very argument in *Ed Robinson Laundry & Dry Cleaning, Inc. v. South Carolina Department of Revenue*, 356 S.C. 120, 588 S.E.2d 97 (2003). There, we considered an identical challenge to the same statutory scheme, where Ed Robinson Laundry contended that the number of exemptions alone rendered section 12-36-2120 arbitrary and therefore unconstitutional. *Id.* at 125-26, 588 S.E.2d at 100. We noted that while the exemptions may be arbitrary in the political or economic sense of the word, that does not mean they are arbitrary in the constitutional sense. *Id.* at 126, 588 S.E.2d at 100. We accordingly held "Robinson's argument that '[t]he sheer number of exemptions demonstrates the exemptions are arbitrary' is without merit. We are concerned not with size or volume but with content." *Id.* Because Bodman's challenge, like Ed Robinson Laundry's, deals only with size and volume and not content, it must fail.

Furthermore, we reject Bodman's contention that we should not be bound by this decision[4] and hold that it is in accord with our constitutional principles. Bodman bears the burden of proving beyond a reasonable doubt that the classifications created are not supported by any rational basis, not just that the scheme as a whole is arbitrary. Indeed, we recently noted that "[w]ere we to examine the rationality of a law irrespective of any classification it creates, we would impermissibly step from our position as the arbiter of a statute's constitutionality and into the seats of the General Assembly." *Cabiness v. Town of James Island*, 393 S.C. 176, 191, 712 S.E.2d

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[3] In his reply brief, he writes, "the Court cannot make a determination as to the 'adequacy, fairness, and sufficiency' of the various exemptions, but must look at the exemption scheme as a whole."

[4] He argues both that stare decisis should not bar our reconsideration of this issue and, regardless, that *Ed Robinson Laundry* is distinguishable from the case at hand because there were fewer exemptions in the statute when that case was decided. At the time, section 12-36-2120 contained sixty-one exemptions. *Ed Robinson Laundry*, 356 S.C. at 125 n.2, 588 S.E.2d at 100 n.2.

416, 424 (2011). Permitting him to attack these statutes on equal protection grounds without any consideration of the classifications or their relationship to their putative legislative goal therefore would fundamentally alter the core of our analysis, which is a step we refuse to take. Bodman's view would even remove our presumption of constitutionality by employing a form of "guilt by association," where potentially valid caps and exemptions are struck down for violating the equal protection clause simply because they happen to be in a larger scheme that may include invalid parts (but we do not know for sure). We cannot sanction a rule which so readily vitiates the high burden of proof a challenger must meet in these cases.[5]

By expressly declining to offer proof as to the basis underlying any of the classifications created by sections 12-36-2110 and 12-36-2120, the manner in which Bodman has presented this case for our review precludes us from determining whether the exemptions and caps violate equal protection. Bodman therefore has not met his burden of proof.

III. SPECIAL LEGISLATION

Next, Bodman argues sections 12-36-2110 and 12-36-2120 violate our constitution's prohibition against special legislation. Due to our conclusion above, this issue need not detain us long.

Our constitution prohibits the enactment of special laws where a general law can be made applicable. S.C. Const. art. III, § 34, cl. IX. "When a statute is challenged on the ground that it is special legislation, the first step is to identify the class of persons to whom the legislation applies." *Cabiness*, 393 S.C. at 189, 712 S.E.2d at 423. Next, we must determine the basis for that classification, remembering that "the mere fact a statute creates a classification does not render it unconstitutional special legislation." *Id.*

[5] This disposes of Bodman's reliance on *People v. Abrahams*, 353 N.E.2d 574 (N.Y. 1976) and *Kroger Co. v. O'Hara Township*, 392 A.2d 266 (Pa. 1978) for the proposition that a statute violates equal protection when it contains too many exceptions. Those cases are not consistent with the law of South Carolina.

Thus, our special legislation analysis parallels the one we use for equal protection. *Id.*

As with his equal protection challenge, Bodman's contention that sections 12-36-2110 and 12-36-2120 constitute special legislation rests solely on the fact that there are so many caps and exemptions that they no longer bear a rational relationship to the purpose of the tax. Once again, we stated in *Ed Robinson Laundry* that "[w]e are concerned not with size or volume but with content." 356 S.C. at 126, 588 S.E.2d at 100. Because Bodman expressly insists that we not examine the content of the caps and exemptions, we hold he has failed to meet his burden in proving them unconstitutional.

CONCLUSION

For the foregoing reasons, we hold Bodman has not met his burden of proof and enter judgment in favor of the Defendants. We emphasize that our holding rests solely on the fact that Bodman's challenge is to the number of caps and exemptions and not whether individual ones would withstand constitutional scrutiny. Thus, nothing in our opinion today should be construed as precluding a challenge based on the content of individual caps and exemptions at a later date.

BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., concurring in a separate opinion. PLEICONES, J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: I concur in the majority's well-reasoned decision, but write separately to emphasize our conclusion that today's result does not foreclose a future challenge based on the content of *individual* exemptions and caps. In my opinion, many of these exemptions and caps could not withstand even a minimal level of scrutiny under an equal protection analysis. The most egregious violation of equal protection is the sales tax cap found in section 12-36-2110(A) of the South Carolina Code. S.C. Code Ann. § 12-36-2110 (A) (2000 & Supp. 2012).[6] That section provides a maximum

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[6] (A) The maximum tax imposed by this chapter is three hundred dollars for each sale made after June 30, 1984, or lease executed after August 31, 1985, of each:

> (1) aircraft, including unassembled aircraft which is to be assembled by the purchaser, but not items to be added to the unassembled aircraft;
>
> (2) motor vehicle;
>
> (3) motorcycle;
>
> (4) boat;
>
> (5) trailer or semitrailer, pulled by a truck tractor, as defined in Section 56-3-20, and horse trailers, but not including house trailers or campers as defined in Section 56-3-710 or a fire safety education trailer;
>
> (6) recreational vehicle, including tent campers, travel trailer, park model, park trailer, motor home, and fifth wheel; or

$300 sales tax cap on all sales and leases of aircrafts, motor vehicles, motor cycles, boats, certain trailers, and recreational vehicles.

To determine whether a statue violates equal protection we utilize a three prong test examining (1) whether the law treats "similarly situated" entities differently, and if so, (2) whether the General Assembly has a rational basis for that disparate treatment, and (3) whether that disparate treatment bears a rational relationship to a legitimate governmental purpose. *See Ed Robinson Laundry and Dry Cleaning, Inc. v. S.C. Dep't of Revenue*, 356 S.C. 120, 123–24, 588 S.E.2d 97, 99 (2003). In my opinion, under the exemptions and caps scheme, retailers who specialize in selling exempted products are treated differently from retailers who sell non-exempted products, and this disparate treatment extends to manufacturers of exempted and non-exempted products. In my view, this disparate treatment does not bear a rational relationship to a legitimate governmental purpose.

In 2009, the General Assembly created the South Carolina Taxation Realignment Commission (TRAC). The General Assembly directed TRAC to undertake a thorough assessment of the State's current tax structure. In its December 2010 report, TRAC noted that South Carolina adopted its motor vehicles sales tax cap of $300 in 1984 to compete with a similar cap utilized in North Carolina. Final Report of the S.C. Taxation Realignment Comm'n, at 55 (Dec. 2010) (hereinafter *TRAC Report*).[7] The General Assembly sought to appease automobile dealers, particularly in border counties, who complained of lost sales to North Carolina car dealers. *Id*. While originally intended to place South Carolina on competitive footing with North Carolina,

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> (7) self-propelled light construction equipment with compatible attachments limited to a maximum of one hundred sixty net engine horsepower.

S.C. Code Ann. § 12-36-2110 (A) (2000 & Supp. 2012).

[7] South Carolina Taxation Realignment Commission, www.scstatehouse.gov/citizensinterestpage/TRAC/TRAC.html (last visited Apr. 11, 2013).

the sales tax cap no longer serves this purpose because North Carolina has moved away from a flat, across the board tax cap on motor vehicles. *Id*. at 55–58. Indeed, TRAC noted the obsolete nature of the cap, concluding, "South Carolina's $300 maximum sales tax cap on motor vehicle purchases is truly unique among the 50 states. The cap, entirely appropriate and necessary in 1984, 26 years later, represents one of the most regressive aspects of the State's entire sales and use tax code today."[8] *Id*. at 73.

From my perspective, while South Carolina's sales tax cap for motor vehicles had a rational basis connected to a legitimate governmental purpose in 1984, in 2012, it has outlived the intended purpose of making South Carolina competitive with neighboring states with regard to the motor vehicle market. Moreover, section 12-36-2110's regressive nature is clearly evident in its application to consumers who purchase old or debilitated motor vehicles and those consumers with the financial means to afford modern luxury motor vehicles and private aircraft. Thus, in my view, section 12-36-2110(A) of the South Carolina Code represents an arbitrary and capricious exception to the sales tax.

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[8] TRAC explained:

> As case in point, a resident purchasing a $6,000 car pays an effective sale tax rate of 5 percent—a tax rate that is 10 times HIGHER than a resident buying a car that costs $56,000, whose effective tax rate in South Carolina is just 0.54 percent—a tax rate 10 times less on a car that costs 10 times more. That is the definition of a regressive tax. TRAC therefore recommends repeal of South Carolina's outdated and regressive sales tax cap on cars.

TRAC Report, *supra*, at 73 (emphasis in original).

It is likely that the same can be said for many of the other exemptions or caps when viewed on an individual basis. However, the nature of Bodman's argument prevents this Court from exercising such a review.

JUSTICE PLEICONES: I concur in the judgment for the defendants, but write separately because I would decide the case on the ground that Bodman lacks standing. Bodman asserts that both taxpayer and "public importance" standing entitle him to maintain this declaratory judgment action challenging the constitutionality of certain tax statutes. While we permit generalized taxpayer standing when an individual seeks equitable relief, e.g., *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993), Bodman does not seek an injunction but rather requests we strike down numerous statutory provisions. Accordingly, he lacks taxpayer standing. *ATC S., Inc., v. Charleston Cty.*, 380 S.C. 195, 669 S.E.2d 337 (2008).

Bodman also asserts standing under our state-created "public importance" exception. In my opinion, this narrow exception to standing cannot be invoked by a taxpayer, challenging taxing statutes, who cannot meet the taxpayer standing threshold. "Public importance" standing should be invoked only where the challenge cannot be otherwise raised, and should not be used to evade the application of other well-established standards. *Cf. Sloan v. Dep't of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008) (Pleicones, J., dissenting); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005).

I concur in the decision to award judgment to the defendants on the basis that Bodman lacks standing.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tourism Expenditure Review Committee, Appellant,

v.

City of Myrtle Beach, Respondent.

Appellate Case No. 2011-200407

Appeal from Richland County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 27249
Heard January 8, 2013 – Filed May 8, 2013

VACATED AND APPEAL DISMISSED

John M.S. Hoefer and Chad N. Johnston, both of Willoughby & Hoefer, PA, of Columbia, for Appellant.

Michael W. Battle, of Battle & Vaught, PA, of Conway, for Respondent.

JUSTICE KITTREDGE: In this declaratory judgment action, the Tourism Expenditure Review Committee appeals the circuit court's declaration of the meaning of section 6-4-10 of the South Carolina Code. We vacate the circuit court's order for lack of subject matter jurisdiction and dismiss this appeal.

I.

This case involves the South Carolina Accommodations Tax Act (Act), which sets forth the administration of the state sales tax of seven percent imposed on all sleeping accommodations provided to overnight guests. S.C. Code Ann. § 12-36-920(A) (Supp. 2012). That seven percent tax is composed of several components, including a two percent "local accommodations tax" (A-Tax), which is remitted to the counties and municipalities where it was collected.[1] S.C. Code Ann. § 12-36-2630(3). Counties and municipalities receiving A-Tax revenues must expend those funds in accordance with the statutory provisions governing the allocation of A-Tax revenues (the Act). *See* S.C. Code Ann. § 6-4-5 to -35 (Supp. 2012) (providing procedure for expending A-Tax funds).

For purposes of disposing of this case, we need only examine briefly section 6-4-10(4), which provides for the expenditure of A-Tax funds generally referred to as "65% Funds." These funds are allocated for "tourism-related expenditures." S.C. Code Ann. § 6-4-10(4)(a) and (b). It is statutory provisions relating to these 65% Funds that are the subject of this appeal.

The Act defines tourism-related expenditures to include:

> The criminal justice system, law enforcement, fire protection, solid waste collection, and health facilities when required to serve tourists and tourist facilities. This is based on the estimated percentage of costs directly attributed to tourists.

S.C. Code Ann. § 6-4-10(4)(b)(4).

Subsection (4)(b) further explicitly provides that municipalities with "a high concentration of tourism activity" may use the 65% Funds "to provide additional county and municipal services, including, but not limited to, law enforcement, traffic control, public facilities . . . ." However, subsection (4)(b) also provides:

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[1] The other components are as follows: four percent is credited to the state public school building fund and the remaining one percent is credited to the South Carolina Education Improvement Act of 1984 Fund. S.C. Code Ann. § 59-21-1010(A) & (B) (2004).

> The funds must not be used as an additional source of revenue to provide services *normally provided* by the county or municipality but to promote tourism and enlarge its economic benefits through advertising, promotion, and providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists.

S.C. Code Ann. § 6-4-10(4)(b) (emphasis added). The Act makes clear that "[i]n the expenditure of these [65%] funds, counties and municipalities are required to promote tourism . . . ." S.C. Code Ann. § 6-4-10(4)(d).

The legislature specifically provided for a local advisory committee and, more importantly for purposes of this appeal, a statewide oversight body—the Tourism Expenditure Review Committee (TERC)—to ensure counties and municipalities comply with the basic requirements set forth in the Act. S.C. Code Ann. § 6-4-35. Counties and municipalities are required to submit annual reports, which TERC reviews to determine if the expenditures comply with the Act. S.C. Code Ann. §§ 6-4-25(D); -35(B)(1)(a). In its annual report, the county or municipality must submit a "list of how funds from the accommodations tax are spent" and "must include funds received and dispersed [sic] during the previous fiscal year." S.C. Code Ann. § 6-4-25(D)(3).

The legislature granted TERC the authority to challenge a local government's expenditure of 65% Funds. TERC must notify the county or municipality, which may provide "further supporting information" regarding its expenditure for TERC to consider in its compliance determination. S.C. Code Ann. § 6-4-35(B)(1)(a). Significantly, for TERC to pursue a challenge, the Act further provides:

> If [TERC] finds an expenditure to be in noncompliance, it *shall* certify the noncompliance to the State Treasurer, who shall withhold the amount of the expenditure found in noncompliance from subsequent distributions in accommodations tax revenue otherwise due the municipality or county. An appeal from an action of [TERC] under this subitem lies with the Administrative Law Judge Division.

S.C. Code Ann. § 6-4-35(B)(1) (emphasis added).

II.

Over the years, the City of Myrtle Beach and TERC have occasionally disputed the meaning of various provisions of section 6-4-10(4)(b). However, no particular expenditure or allocation is at issue here, nor are any A-Tax revenues being held by the State Treasurer in connection with this appeal. While TERC has indicated that it may certify as noncompliant the City's expenditures of 65% Funds, it has not done so here. To resolve this difference of opinion, the City first filed an action in the Administrative Law Court, which granted TERC's motion to dismiss the matter for lack of jurisdiction. TERC then filed the current action in circuit court as a declaratory judgment action seeking to have section 6-4-10(4) construed. The City did not challenge the jurisdiction of the circuit court. The circuit court adopted the City's view of section 6-4-10(4), from which TERC has appealed. We dismiss the appeal.

III.

Although neither party has raised the question, we first consider whether this Court has subject matter jurisdiction over this case. Even where the parties do not raise such a challenge, the issue of subject matter jurisdiction is properly raised for the first time on appeal by the appellate court "since the parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy." *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970).

To fall within the intended purpose and scope of the Declaratory Judgments Act,[2] the parties must seek adjudication of a justiciable controversy. *Sunset Cay, LLC, v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) ("Despite the [Declaratory Judgments] Act's broad language, it has its limits."); *see also Power*, 255 S.C. at 154-55, 177 S.E.2d at 553 (noting that where adjudication of a question "would settle no legal rights of the parties," it would be "only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment"). "'Questions of statutory interpretation, by themselves, do not rise to the level of actual controversy.'" *Entergy Nuclear Generation Co. v. Dep't of Envtl. Prot.*, 944

[2] S.C. Code Ann. §§ 15-52-10 to -140 (Supp. 2012).

N.E.2d 1027, 1034 (Mass. 2011) (quoting *Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Martha's Vineyard Comm'n*, 405 N.E.2d 961, 966 (Mass. 1980)).

"The Uniform Declaratory Judgment[s] Act is not an independent grant of jurisdiction." *Brown v. Oregon State Bar*, 648 P.2d 1289, 1292 (Or. 1982). Further, it is fundamental that the Declaratory Judgments Act does not eliminate the case-or-controversy requirement. *See Power*, 255 S.C. at 153—54, 177 S.E.2d at 553—54 ("'The existence of an actual controversy is essential to jurisdiction to render a declaratory judgment.'" (quoting *S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 215, 54 S.E.2d 777, 787 (1949))); *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 ("The Uniform Declaratory Judgment[s] Act . . . 'does not require the Court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise,' or 'license litigants to fish in judicial ponds for legal advice.'" (citations omitted)).

Here, the legislature has provided an exclusive statutory procedure for challenging the expenditure of A-Tax funds. Under section 6-4-35(B), TERC is authorized to "certify noncompliance to the State Treasurer." Once that process is initiated, the State Treasurer "shall withhold the amount of the expenditure . . . ." S.C. Code Ann. § 6-4-35(B). An appeal from TERC's noncompliance certification "lies with the Administrative Law Judge Division." *Id.* Section 6-4-35(B) provides the exclusive process and means to challenge an expenditure of A-Tax funds. No case or controversy exists outside this statutory process. The Declaratory Judgments Act may not be invoked to avoid or circumvent the legislature's exclusive method for challenging A-Tax funds expenditures. *See also Dep't of Cmty. Affairs v. Mass. State Coll. Bldg. Auth.*, 392 N.E.2d 1006, 1009 (Mass. 1979) ("A mere difference of opinion or uncertainty over the meaning to be ascribed a statute does not, without more, rise to the level of a justiciable controversy."); *Harrington v. State Office of Court Admin.*, 451 N.Y.S.2d 595, 596-97 (1982) (finding the court was without power to grant declaratory relief on the grounds that any declaration would be "merely an advisory opinion evaluating the accuracy of the statutory interpretation and would not determine any justiciable controversy between the parties" where there existed no genuine controversy, but rather the parties sought only an abstract resolution of their different interpretations of a law).

IV.

We vacate the circuit court's order for lack of subject matter jurisdiction and dismiss this appeal.

VACATED AND DISMISSED.

Acting Justice James E. Moore, concurs. BEATTY, J., concurs in result only. PLEICONES, ACTING CHIEF JUSTICE, dissenting in separate opinion in which HEARN, J., concurs.

ACTING CHIEF JUSTICE PLEICONES: I respectfully dissent as I find the circuit court has subject matter jurisdiction over this declaratory judgment action. Moreover, I would reach the merits and affirm.

In South Carolina, "subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Storm M.H. ex rel. McSwain v. Charleston Cty. Bd. of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012) citing *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000**).** As set forth below, I find the circuit court has subject matter jurisdiction over this declaratory judgment suit.

Under South Carolina's declaratory judgment act:

> Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.
>
> S.C. Code Ann. § 15-53-30 (2005).

Further, § 15-53-20 (2005) of the act provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

The circuit court has subject matter jurisdiction to hear this declaratory judgment action and to construe the statute. While it is true that the enforcement mechanism is in the Administrative Law Judge Division and therefore the circuit could have exercised its discretion and declined to hear this matter,[3] the existence of this remedy does not deprive the circuit court of jurisdiction nor does it negate the existence of a justiciable controversy. I therefore dissent from the majority's *sua sponte* conclusion that the circuit court lacked subject matter jurisdiction over this declaratory judgment action. Further, I would affirm the circuit court's construction of S.C. Code Ann. § 6-4-10(4) (2004).

HEARN, J., concurs.

[3] *See e.g. Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 152 S.E.2d 676 (1967).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John Herndon, Appellant.

Appellate Case No. 2011-184909

Appeal From Beaufort County
D. Craig Brown, Circuit Court Judge

Opinion No. 27250
Heard March 5, 2013 – Filed May 8, 2013

AFFIRMED

Appellate Defender Susan Barber Hackett, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Tommy Evans, Jr., of South Carolina Department of Probation, Parole, and Pardon Services, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: John Herndon (Appellant) appeals the circuit court's order imposing lifetime sex offender registration for his failure to complete sex abuse counseling required by the terms of his probation. We affirm.

FACTUAL/PROCEDURAL HISTORY

On July 26, 2007, the Beaufort County Grand Jury indicted Appellant for criminal sexual conduct with a minor in the first degree (CSC-First) in violation of section 16-3-655 of the South Carolina Code. On July 1, 2010, Appellant and the State negotiated a plea to Assault and Battery of a High and Aggravated Nature (ABHAN) pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) (*Alford* plea). The negotiated plea included a sentence of ten years' imprisonment suspended upon the service of five years' probation, and also included two special conditions prohibiting Appellant from contacting the victim, or her family, and requiring Appellant to successfully complete sex abuse counseling. According to the terms of the negotiated plea, Appellant would face lifetime sex offender registration if he failed to successfully complete sex abuse counseling.

The circuit court explained to Appellant the significance of his *Alford* plea:

> The Court: What you are basically doing is you are pleading guilty but you say I'm just doing this to get it over with. I'm not really admitting I did it, but I will go ahead and plead that I did it and suffer the consequences?
>
> Appellant: Yes, sir. I'm not guilty but I'm pleading to this—
>
> The Court: That's what you are doing?
>
> Appellant: Because I'm three years into this—
>
> The Court: If you enter your plea, even if you say it's under *Alford*, *you subject yourself to being sentenced just like you were pleading guilty straight up*; do you understand that?
>
> Appellant: Yes.

(emphasis added).

The circuit court also explained the sex abuse counseling requirement of Appellant's probation:

> The Court: Now the other condition that I heard is you've got to complete sex offender counseling. If you don't successfully complete that, you are going to have to register as a sex offender forever. Believe me, that's about worse than going to jail?
>
> Appellant: I agree.
>
> . . . .
>
> The Court: Anyway, if you don't like that sex offender counseling once you start it, you can stop it but there are going to be even worse consequences. Do you understand that?
>
> Appellant: Yes, sir.
>
> The Court: Do you think you can comply with probation if I accept the negotiation?
>
> Appellant: Yes, sir.

The circuit court accepted the negotiated plea, and sentenced Appellant under the plea's terms. Prior to the conclusion of the proceeding, the circuit court reminded Appellant of the importance of fulfilling the negotiated plea's counseling requirement:

> The Court: You must *successfully complete* sex abuse counseling. If not completed, you must register as a sex offender. And that's forever. Do you have any questions?
>
> Appellant: No, sir.

(emphasis added).

Appellant initially complied with his probation requirements and began sex abuse counseling with SouthEastern Assessments (SEA) in July 2010. SEA's sex abuse counseling methodology called for Appellant to accept responsibility for the underlying acts of his conviction while undergoing at least three polygraph

examinations. The Record suggests that Appellant submitted to at least two polygraph examinations. Appellant failed a polygraph examination on September 15, 2010, and then admitted that he abused the victim in this case, providing details of the abuse. On October 26, 2010, Appellant informed his probation agent that he would not attend a third polygraph examination, although he desired to comply with required sex abuse counseling. Appellant claimed his probation required him to complete sex abuse counseling, but not a polygraph examination, and that he did not want to admit guilt to a sex offense because he pled guilty to ABHAN. As a consequence, Appellant's probation agent issued him a Probation Citation charging Appellant with violating a special condition of his probation:

> Appellant has been instructed by his agent to complete Sex Abuse Counseling with [SEA]. [SEA] requested [Appellant], as part of his counseling, to complete a 3rd and subsequent lie detector test in order to be allowed to attend sex abuse counseling classes. [Appellant] has refused to attend any further lie detector test[s] although he has stated he is willing to attend counseling classes. [Appellant] has failed to follow the advice and instructions of his agent and special condition that he successfully complete sex abuse counseling.

(alterations added).

On November 8, 2010, SEA terminated Appellant from the sex abuse counseling program due to noncompliance, informing Appellant's probation agent that, "The use of the polygraph is a standard of care as established by the Association for the Treatment of Sexual Abusers (ATSA), an international organization dedicated to the assessment and treatment of sexual offenders."

Appellant appeared before the circuit court on November 18, 2010, regarding the alleged probation violation. The circuit court continued Appellant's probation and ordered Appellant to successfully complete the required sex abuse counseling. However, on January 12, 2011, Appellant received another Probation Citation alleging that he failed to comply with the sex abuse requirement:

> Failure to follow the advice and instructions of his agent and the continuation order by [the circuit court] on 11/18/2010 by: Not being able to attend sex offender counseling, offender will NOT admit his guilt, which is a requirement of sex offender counseling. This action constitutes a violation of his original agreement.

(emphasis in original) (alterations added).

On January 28, 2011, Appellant again appeared before the circuit court regarding his second alleged probation violation. Appellant argued that at his original sentencing, the circuit court did not provide adequate notice that Appellant would have to admit guilt as part of his sex abuse counseling. The circuit court rejected Appellant's assertion:

> It's clear, from [the] sentencing sheet, condition two of the sentence that [Appellant], one, must complete it and he doesn't complete it he's got to register. It's an either or proposition and that's my reading of it. It's an either or proposition. He hasn't completed it. He's been given every opportunity to complete it. I think he was in front of [the circuit court] last month . . . . [The circuit court] ordered him to go back and he didn't complete it . . . . Because he hasn't successfully completed sex abuse counseling, I'm going to order that he now has to register as a sex offender . . . . He's had the opportunity to go through sex abuse counseling. He has not successfully completed it as ordered by [the circuit court] and so therefore, I am ordering that he register as a sex offender based on his failure to complete counseling.

(alterations added).

Appellant appealed the circuit court's decision, and this Court certified the case for review pursuant to Rule 204(b), SCACR.

ISSUE PRESENTED

> Whether the circuit court erred in requiring Appellant to register as a sex offender for failing to complete sex abuse counseling when Appellant failed to complete sex abuse counseling as a result of his refusal to admit guilt, and Appellant was not given prior notice that completion of counseling would require such an admission.

STANDARD OF REVIEW

The determination to revoke probation is within the discretion of the circuit court. *State v. Ellis*, 397 S.C. 576, 579, 726 S.E.2d 5, 6 (2012) (citing *State v. White*, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950)). This Court's authority to review the findings of a lower court regarding probation revocation and related

issues is confined to the correction of errors of law, unless it appears that the action of the circuit court amounted to a manifest abuse of discretion. *Id.*

LAW/ANALYSIS

Appellant claims that the circuit court failed to provide adequate notice that a condition of his probation required him to admit guilt. The gravamen of Appellant's claim is that his *Alford* plea allowed him to maintain his innocence, and therefore, he should not have to comply with a probation sanction which requires him to accept responsibility for the crime. Alternatively, Appellant argues that, at the very least, due process required the circuit court inform Appellant of this possibility. We disagree.

In *Alford*, a grand jury indicted the defendant, Henry Alford, for first degree murder. *Alford*, 400 U.S. at 26. Alford directed his attorney to interview several witnesses that Alford claimed would confirm his innocence. *Id.* at 27. However, the witnesses did not support Alford's claim, and instead provided statements strongly indicating Alford's guilt. *Id.* Alford's attorney recommended that he plead guilty, and the prosecutor agreed to accept a guilty plea to second degree murder. *Id.* Alford, of his own volition, pled guilty to the reduced charge. *Id.* Prior to acceptance of the plea, the trial court heard sworn testimony from a police officer and two witnesses that supported the narrative that shortly before the killing Alford took his gun from his house, stated his intention to kill the victim, and returned home with the declaration that he had carried out the killing. *Id.* at 28. Alford testified that he did not commit the murder but pled guilty because he faced a possible death sentence if convicted. *Id.* at 28–29. The trial court asked Alford whether he desired to plead guilty in light of his denial of guilt, and Alford confirmed that he did. *Id.* The trial court then sentenced Alford to thirty years' imprisonment. *Id.*

Alford later filed a habeas petition, and argued that his guilty plea was the product of fear and coercion, and therefore invalid. *Id.* A divided panel of the United States Court of Appeals for the Fourth Circuit agreed. *Id.* at 30. However, the United States Supreme Court reversed, and held that the mere fact Alford pled guilty primarily to limit a possible penalty did not necessarily demonstrate that his plea was not the product of free and rational choice. *Id.* at 31. According to the Supreme Court, the strong factual basis for the plea and Alford's expressed desire to enter the plea prevented any constitutional deprivation:

> Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, its validity cannot be seriously questioned.

Id. at 38 (citation omitted); *see also Gaines v. State*, 335 S.C. 376, 380–81, 517 S.E.2d 439, 441–42 (1999) (establishing that the trial court must determine the voluntariness of a defendant's *Alford* plea pursuant to factors outlined in *Boykin v. Alabama*, 395 U.S. 238 (1969)); *Baxley v. State*, 255 S.C. 283, 286, 178 S.E.2d 535, 536 (1971) (recognizing the *Alford* plea's validity).

The primary thrust of the *Alford* decision is that a defendant may voluntarily and knowingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit he participated in the acts constituting the crime. *United States v. Morrow*, 914 F.2d 608, 611 (4th Cir. 1990). The *Alford* plea is, in essence, a guilty plea and carries with it the same penalties and punishments.[1] *See, e.g.*, *Carroll v. Virginia*, 701 S.E.2d 414, 420 (Va. 2010) ("We hold further that Carroll's failure to receive warning at the time he entered his *Alford* plea that such a refusal could result in the revocation of his probation is a collateral and not a direct consequence of his plea and does not render the revocation improper."); *Perry v. Virginia*, 533 S.E.2d 651, 652–53 (Va. App. 2000) (holding that *Alford* pleas are treated the same as guilty pleas and thus by freely and intelligently

[1] Thus, courts are generally required to confirm that a factual basis exists for the *Alford* plea. *See Morrow*, 914 F.2d at 611 (holding that trial court has wide discretion in determining this factual basis, and is not required to replicate the trial that the prosecutor and defendant entered a plea agreement to avoid); *see also Higgason v. Clark*, 984 F.2d 203, 208 (7th Cir. 1993), *cert. denied*, 508 U.S. 977 (1993) ("Whether a choice is informed and reached without inappropriate pressure—that is, whether it is voluntary—depends on the information known and options open to the defendant, including what he has learned out of court."); *United States v. Fountain*, 777 F.2d 351, 357 (7th Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986) ("Turning to the specifics of the present appeal, we must re-emphasize the dual responsibility of the prosecutor and the judge in establishing a factual basis for a guilty plea, and more importantly, the mutually exclusive nature of that responsibility.").

entering an *Alford* plea, the defendant waived his right to appeal the issue of whether the evidence was sufficient to prove beyond a reasonable doubt that he was guilty of the charge).

This Court touched on the minimal differences between an *Alford* plea and a standard guilty plea in the punishment context with its decisions in *State v. Ray*, 310 S.C. 431, 427 S.E.2d 171 (1993) and *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008).

In *Ray*, this Court held that an *Alford* plea may provide a valid basis for imposition of the death penalty. In that case, a grand jury indicted the defendant for assault and battery with intent to kill, armed robbery, first degree burglary, grand larceny, kidnapping, and murder arising from three different incidents which occurred during late August and early September 1990. *Ray*, 310 S.C. at 433, 427 S.E.2d at 172. The defendant sought to mitigate his culpability by claiming to have been voluntarily intoxicated during commission of the crimes, and entered an *Alford* plea to the kidnapping and murder charges. *Id.* at 434, 427 S.E.2d at 173. The trial court accepted the plea, and imposed a death sentence in the separate sentencing proceeding. *Id.*

The defendant argued on appeal that the trial court erred in accepting his guilty plea to capital murder in the absence of an admission of guilt, and that a death sentence should not rest on an *Alford* plea which does not include an explicit admission of guilt. *Id.* This Court disagreed:

> In determining the validity of a guilty plea, we are persuaded that the paramount concern is whether it was entered freely and voluntarily. We discern no prejudice to an accused in a capital punishment case who seeks to plead guilty without an explicit admission of guilt if such a plea would be in his best interests, and if freely and voluntarily made. In the present case, appellant does not claim innocence or allege that his guilty plea was involuntary, made under duress, or that the trial judge committed a constitutional violation. Therefore, we conclude that an *Alford* plea may form a valid basis for imposition of the death penalty.

Id. at 435, 427 S.E.2d at 173.

In *Zurcher*, this Court held that a defendant's *Alford* plea collaterally estops that defendant from litigating a civil claim based on the same facts as the criminal conviction, stating:

> We find no legal or practical justification for excluding guilty pleas from the ambit of the doctrine of collateral estoppel. Although the defendant who enters a guilty plea has chosen a legal strategy which avoids a trial while the defendant who is adjudicated guilty has opted to take his chances at a contested trial, both are means to the same legal end: the imposition of the punishment prescribed by law. . . . An *Alford* plea is not distinguishable from a standard guilty plea in this regard. An *Alford* plea—a guilty plea accompanied by an assertion of innocence—was held to be a constitutional admission of guilt . . . . The *Alford* court reasoned that so long as a factual basis exists for a plea, the Constitution does not bar sentencing a defendant who makes a calculated choice to accept a beneficial plea arrangement rather than face overwhelming evidence of guilt. Under this same reasoning, we find that the defendant must likewise accept the collateral consequences of that decision. Therefore, we hold that the entry of an *Alford* plea at a criminal proceeding has the same preclusive effect as a standard guilty plea.

Id. at 136–37, 666 S.E.2d at 226–27.

This Court's decisions in *Ray* and *Zurcher* clearly establish that in South Carolina there is no significant distinction between a standard guilty plea and an *Alford* plea. The *Alford* plea may nevertheless offer advantages to both the state and the defendant by facilitating a more efficient trial, providing the defendant a choice that benefits her interests, or obviating a humiliating public admission of guilt. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal Law Values and Criminal Procedure*, 88 Cornell L. Rev. 1361, 1373–74 (2003). However, under South Carolina law, the *Alford* plea does not create a special category of defendant exempt from the punishment applicable to her conviction. Thus, circuit courts are under no duty to provide notice to *Alford* defendants any differently than the notice provided to defendants entering a standard guilty plea, or those defendants adjudicated guilty. As the circuit court noted in the instant case, "If you enter your

plea, even if you say it's under *Alford*, you subject yourself to being sentenced just like you were pleading guilty straight up."[2]

In the instant case, the circuit court ensured that Appellant understood that his *Alford* plea did not mean that he would be sentenced any differently than a guilty defendant. The Record demonstrates that Appellant maintained his innocence, but made a knowing, voluntary, and intelligent *Alford* plea to conclude the proceedings and place the matter behind him. Appellant simply failed to satisfy a condition of his probation, and the circuit court properly ordered him to register as sex offender for life as would have been appropriate for a defendant sentenced pursuant to a standard guilty plea.[3]

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[2] *See Colorado v. Birdsong*, 958 P.2d 1124, 1127 (Colo. 1998) ("An *Alford* plea is a guilty plea. As such, the trial court's obligations to advise the defendant were no greater than any other guilty plea. Similarly, the trial court's concession to the defendant in accepting the *Alford* plea did not create an implicit agreement to permit him to continue on probation in the violation of the clear and reasonable conditions of that probation."); *Warren v. Schwarz*, 579 N.W.2d 698, 707, 709 (Wis. 1998) ("Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather it is a device that defendants may call upon to avoid the expense, stress, and embarrassment of trial and to limit one's exposure to punishment . . . . A circuit court's plea colloquy cannot reasonably be expected to encompass all treatment and conditions of probation which the defendant might need in the future."); *Idaho v. Jones*, 926 P.2d 1318, 1322 (Idaho 1996) (holding that trial court did not deny the defendant due process by accepting his *Alford* plea and imposing a probation condition ordering the defendant complete sex abuse counseling requiring an admission of guilt).

[3] Appellant attempts to place his claim within the ambit of the court of appeals' decision in *State v. Brown*, 349 S.C. 414, 563 S.E.2d 339 (Ct. App. 2002). However, Appellant's case is distinguishable from *Brown*. In that case, the defendant pled guilty to two counts of CSC-First, and in addition to his prison sentence, the circuit court imposed a probation condition that the defendant obtain "treatment for problem." *Id.* at 415, 563 S.E.2d at 339. The defendant attended all sex abuse counseling sessions, but failed to admit guilt, and thus, his probation officer issued him a Probation Citation for violating the condition of his probation requiring him to obtain "treatment for problem." *Id.* at 415–16, 563 S.E.2d at 339–40. At a revocation hearing, the circuit court viewed ordering the defendant to "attend and successfully complete," as unnecessary, and that ordering mental

health counseling and directing a defendant to "follow all advice," was sufficient. *Id.* at 417, 563 S.E.2d at 340. The court of appeals reversed, holding:

> Here, the probation order unambiguously stated [the defendant] was to obtain treatment for his problem; it did not specifically order him to *complete* treatment. Nor did it specify that [the defendant] "must follow all advice" or anything of that nature. Moreover, even if the order were interpreted to mean [the defendant] had to successfully complete a treatment program, it did not on its face require him to complete a particular sex offender program or admit his guilt in order to do so. Finally, the record reflects the order's vague directive to "obtain treatment for problem" clearly resulted in confusion among the complaining probation agent, [the defendant's] mental health counselor, the [South Carolina Department of Probation, Parole, and Pardon Services (DPPPS)] administrative hearing officer, and the DPPPS prosecuting officer.

Id. at 418, 563 S.E.2d at 341 (emphasis in original) (alterations added). Although the court of appeals noted that the circuit court's order did not provide sufficient warning that he would have to admit guilt, the court also did not hold that probation orders must contain specific language regarding guilt. To the contrary, the court of appeals expressed approval of the circuit court's clarification of the order which mentioned only "successful completion of the program," and found error only with the circuit court refusal to allow the defendant the opportunity to comply with that interpretation. *Id.* at 418, 419–20, 563 S.E.2d at 341, 342. ("Although we agree with the circuit court's reading of the probation order, we find [the defendant] should have been afforded an opportunity to comply with that interpretation, particularly in light of the fact that he otherwise complied with all aspects of his probationary sentence.").

We agree with the court of appeals' analysis in *Brown*, and hold that a circuit court's order requiring successful completion of court ordered counseling provides a defendant with sufficient notice of her probation conditions. *See, e.g., North Carolina v. Alston*, 534 S.E.2d 666, 669 (N.C. App. 2000) ("[D]efendant's plea bargain set forth specified probationary conditions, which he agreed to perform, including "active" participation and "successful" completion of "a sexual offender treatment program," as well as defendant's stipulation that his "[f]ailure to fully participate and successfully complete" such program would "constitute immediate grounds for revocation" of his probation. Defendant not only agreed to such terms

CONCLUSION

The foregoing authority and this Court's precedent demonstrate the general consensus that an *Alford* plea is merely a guilty plea with the gloss of judicial grace allowing a defendant to enter a plea in her best interests. Moreover, the defendant entering an *Alford* plea is still treated as guilty for the purposes of punishment, and simply put, is not owed anything merely because the State and the court have agreed to deviate from the standard guilty plea. In the instant case, the circuit court ordered Appellant to successfully complete sex abuse counseling or face lifetime sex offender registration. It is clear that this treatment would comprise counseling for the crime Appellant pled guilty to committing. Additionally, Appellant then received notice that he would need to admit guilt through his participation in the program, and the circuit court re-ordered Appellant to complete the counseling prior to the probation revocation. However, Appellant failed to comply. *See, e.g.*, *New Hampshire v. Woveris*, 635 A.2d 454, 455 (N.H. 1993) ("In this case, however, the defendant is hard-pressed to argue that he was not on notice of these requirements, particularly after the first probation revocation hearing, the entirety of which focused on his failure to participate adequately in the counseling programs because of his continued denial of culpability for his actions."). Therefore, for the foregoing reasons, we affirm the circuit court order imposing lifetime sex offender registration.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE, and HEARN, JJ., concur.

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during the oral plea colloquy with the court, but personally, along with his counsel, signed the plea transcript incorporating the terms of the plea bargain.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Chris and Frankie Broom, Respondents,

v.

Jennifer J., Derrick H., and South Carolina Department of Social Services, Defendants,

Of Whom Jennifer J. is the, Appellant.

Appellate Case No. 2012-206546

Appeal from Greenville County
W. Marsh Robertson, Family Court Judge

Opinion No. 27251
Heard April 2, 2013 – Filed May 8, 2013

AFFIRMED

Jennifer A. Jeffrey, of Jeffrey Law Firm, LLC, and Thomas L. Bruce, of S.C. Legal Services, both of Greenville, for Appellant.

Philip J. Temple, of Temple and Mann, of Greenville, for Respondents.

Deborah Murdock, of Murdock Law Firm, LLC., of Mauldin, for Amicus Curiae, Greenville County Department of Social Services.

JUSTICE HEARN: This would be a straightforward appeal in a termination of parental rights action but for the fact that the mother whose rights were terminated was erroneously denied counsel. However, because we hold she was not prejudiced by the error, the grounds for termination were established by clear and convincing evidence, and termination is in the child's best interest, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

In March of 2007, Mother gave birth to Child.[1] Five months later, on August 7, 2007, the Pickens County Department of Social Services received a report of neglect from a sheriff's deputy. Three families—six adults and eleven children—resided in Child's home, the trash was overflowing, moldy dishes and food were strewn about, Mother and Father admitted to using cocaine, and Child had a visibly flat head which Mother explained resulted from her being left in a car seat for extended periods. Mother also admitted that Child had received her immunizations from the health department, but had not seen a doctor since birth. The same day, DSS filed a complaint for removal of Child and her older half-sister (Sister) due to abuse and neglect.[2] The following day, Child tested positive for cocaine.

On August 17, 2007, Child and Sister were removed from the home and placed in emergency protective custody. A week later, Child was placed with the Brooms for foster care.[3] Following a hearing, the family court found probable cause for removal of Child based on the positive drug test and Mother's admission of substance abuse. The court also gave legal custody of Child to DSS and directed the appointment of counsel for Mother. At some point thereafter an attorney was appointed to represent Mother.

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[1] Child's father (Father) voluntarily relinquished his parental rights during this action.

[2] Child and Sister are both Mother's biological children, but have different fathers.

[3] Sister, who is not at issue in this case, was also placed with the Brooms for foster care. In February 2008, Sister was removed from the Brooms' home and placed with her paternal grandparents. Then in May 2009, the family court ordered that Sister could be returned to Mother immediately upon the completion of a favorable homestudy and approval of the guardian *ad litem*. However, Sister was not returned to Mother until almost a year later, in March of 2010.

Following a merits hearing, the family court issued an order finding physical abuse and neglect and approving treatment plans for the parents. Mother's treatment plan required her to obtain a safe and stable home, undergo psychological and substance abuse assessments, complete parenting classes, obtain and maintain employment for six consecutive months, and undergo random drug testing. Additionally, the court approved a visitation plan which provided that Mother was to visit Child at least twice per month.

In the ensuing months, Mother failed several drug tests, with her last failed test occurring in January of 2008. At a permanency planning hearing that month, she admitted that if she was tested at that time, she would be positive for cocaine. Presumably, she quit using drugs at some point thereafter as she passed all subsequent drug tests. At the permanency planning hearing, she also agreed Child should remain in DSS custody because her home was still not safe. In the resulting initial permanency planning order, the family court declined to return Child to Mother and Father because Mother had tested positive for cocaine and they both admitted to continued use.

In April of 2008, Mother was arrested on burglary and grand larceny charges and spent two months in jail. She was released and completed a pretrial intervention program. One year later, in April of 2009, a second permanency planning hearing was held. Mother and the other parties agreed that Child should not be returned to her at that time because Child faced an unreasonable risk of harm from her not having completed the treatment plan. The court ordered that Child was to remain in DSS custody.

On May 15, 2009, the Brooms filed this action for termination of parental rights and adoption, listing Mother, Father, and DSS as defendants. The complaint sought termination of Mother's parental rights on the grounds of Mother failing to visit Child in excess of six months, Mother failing drug rehabilitation and suffering from the diagnosable condition of drug addiction, Mother surrendering possession of Child without making adequate arrangements for her care, and Child having been in foster care for fifteen of the most recent twenty-two months.

The Brooms filed a motion for temporary relief which, in part, sought the appointment of counsel for Mother and Father. In an order entered June 30, 2009, the Honorable Kinard Johnson found they were not entitled to court-appointed counsel because the action was not brought by DSS. In a later hearing before the Honorable Alex Kinlaw, Mother objected to proceeding without counsel, and

while the court noted that objection in its subsequent order, it did not make any findings or rulings relevant thereto.

In October of 2009, Mother married. In November 2010, she had a third child, fathered by her husband. Mother ceased working outside the home and devoted her time to caring for her third child and Sister.

A final hearing was scheduled for August 11, 2010, but Mother retained South Carolina Legal Services to represent her one week prior to the hearing. Her new counsel moved for a continuance of the hearing in order to prepare, and the motion was granted. While several additional continuances were granted in the case, none were requested by Mother.

On November 1, 2011, a final hearing, at which Mother was represented by counsel, was held on the Brooms' TPR action.[4] Christy Harris, the DSS caseworker assigned to Child, testified about the visitation between Mother and Child, stating Child often cried during the visitation and did not identify Mother as her parent. She also presented a visitation log which showed that Mother typically visited Child for one hour once per month. Mother only exercised her minimum, twice per month visitation in two of the fifty months Child had been in foster care. She did not visit Child for eight months from December 21, 2007, to August 30, 2008. She also failed to visit Child in eleven other months.[5] In short, Mother exercised only thirty-four of the minimum one hundred visits she was permitted to make. She explained her failure to visit more often as arising from difficulties scheduling visits with DSS and the Brooms and the cancellation of visits by the Brooms. Harris acknowledged that her log did not reflect when visitation was requested but was unable to be scheduled. She also acknowledged there were times when Mother requested visitation but she or the Brooms were not available.

Harris testified that for two and a half years after the April 2, 2009 permanency planning hearing, DSS did not request another hearing despite the family court stating Mother would be ready for the return of Child by October of 2009. While DSS policy apparently—and remarkably—does not require the

[4] The adoption matter was held in abeyance until after the termination of parental rights and any appeal were resolved.

[5] Mother failed to visit Child in the months of July, September, and November 2008; January, June, August, and October 2009; February, April, and July 2010; and September 2011.

automatic scheduling of a hearing when a parent completes a treatment plan, Harris asked a DSS attorney to set a hearing for the case but it was never done. She also testified Mother did not complete her treatment plan in a timely manner because she did not complete it within one year of Child's removal. She noted that the foster care review board, which meets every six months, recommended adoption at its previous five or six meetings. However, she testified that DSS supported the reunification of Mother and Child as being in Child's best interest.

Mrs. Broom testified concerning her family and Child's place in it. Both Mr. and Mrs. Broom hold advanced degrees in their respective fields and are gainfully employed. At the time, in addition to having four-year-old Child, they had three sons, ages seventeen, fifteen, and ten and another foster child, age three, in their home. Their sons are all accomplished as students, athletes, and musicians.

When Child arrived in the Brooms' home she suffered from serious developmental difficulties. At the age of five months, when placed stomach-down on a blanket she was unable to roll-over, move, or even turn her head to breathe. She was also unable to track movement with her eyes or sit up on her own. Since that time, the Broom family engaged in numerous treatments and exercises to address Child's misshapen head and developmental difficulties. The most striking example is that Child had to wear a corrective helmet for six months in order to reshape her head. She is now developmentally advanced for her age and is actively involved in family activities, school, and church.

Over Mother's objection that neither she nor her report had been disclosed prior to the hearing, bonding expert Meredith Loftis testified about the bond between Child and the Brooms. She expressed her opinion that Child should be placed with the Brooms and highlighted the permanency needed in a child's life and the feeling of permanency Child had developed in the Broom family. She testified that Child views the Brooms as her family and if she was removed from them, she would be at risk of suffering from attachment disorder which may cause emotional, behavioral, and substance abuse problems later in life.

Mother testified an attorney was appointed to represent her in the DSS case. However, she last heard from him in 2009, and was unsure why he failed to continue to represent her. He did state to her at one point that he could not represent her in the Brooms' TPR action. It seems he was still representing her at the initial permanency planning hearing on April 2, 2009, because he is listed as appearing as her counsel in the ensuing order.

Mother further testified that her understanding from the April 2009 permanency planning hearing was that she had completed the treatment plan but would have to return to court to have Child returned. She thought DSS would schedule the necessary hearing. She acknowledges that at no time, even after retaining South Carolina Legal Services, did she file a motion for Child's return.

The guardian *ad litem* for Child testified that termination of parental rights and adoption by the Brooms was in Child's best interest. In support, he testified that Child is more bonded with the Brooms and that to remove her from their home would be detrimental. Additionally, a volunteer guardian *ad litem* testified that termination of parental rights and adoption by the Brooms was in Child's best interest due to the bond she developed with them in the important early years of her life.

The family court entered a final order terminating Mother's parental rights. The order first found that the termination of parental rights and adoption by the Brooms was in Child's best interest. It relied on the fact that Child was removed from Mother at age five months and had lived with the Brooms for over four years thereafter. It also highlighted the efforts by the Brooms to alleviate Child's problems, the improvement Child made in their home, Child's beliefs that the Brooms are her family, the bonding between Child and the Brooms, and the excellent home environment the Brooms provide Child. The order also acknowledged Mother's love for Child and the strides Mother had made in improving her life and ability to serve as a parent. In conclusion, the order summarized TPR and adoption as being in Child's best interest because:

> [Child] has essentially spent the entire 4½ years of her life with the Brooms. She is fully integrated into the Broom family, and has very little bonding or attachment to [Mother]. . . . The evidence is compelling that taking this child out of her current home would be a highly traumatic event for [her], presenting a significant risk of major long-term consequences including attachment and other possible disorders.

Turning to the statutory grounds for TPR, the court found that the Brooms failed to present clear and convincing evidence of a diagnosable condition, drug addiction, or abandonment, and thus two of the alleged statutory grounds were not satisfied. However, the court found both the ground of a child remaining in foster care for fifteen of the last twenty-two months and the failure to visit ground were

satisfied. Regarding the failure to visit, the court found "an inconsistent pattern of visitation," and that Mother failed to visit Child "for a period exceeding six consecutive months from December 21, 2007 until August, 2008." As to the fifteen months in foster care ground, the court found it was estalished by the undisputed evidence that Child had lived with the Brooms in foster care for the previous four years. The court also considered *Charleston County Department of Social Services v. Marccuci*, 396 S.C. 218, 721 S.E.2d 768 (2011), which held that the fifteen months ground should not be strictly applied where much of the delay is attributable to others. The court acknowledged that Mother experienced significant procedural delays attributable to others in that her counsel "unilaterally stopped representing her in the DSS action," and the case was continued four times delaying its resolution by one year—from October 27, 2010, to November 1, 2011. However, it found those delays distinguishable from the delays in *Marccuci* because Child had already been in foster care for fifteen months before any of those delays occurred. It also found *Marccuci* distinguishable because there the father did not abuse or neglect the child, whereas here, Mother admitted she abused and neglected Child.

Accordingly, the family court terminated Mother's parental rights and placed custody of the Child with the Brooms. Mother filed a motion for reconsideration based on the failure to appoint her counsel and that the court erred, in light of *Marccuci*, in strictly adhering to the fifteen of twenty-two months ground where there were procedural delays she did not cause. The family court denied the motion and this appeal followed.

ISSUES PRESENTED

I. Did the family court err in terminating Mother's parental rights where she was denied the assistance of appointed counsel?

II. Did the family court err in finding a statutory ground for termination existed?

III. Did the family court err in permitting an expert to testify where the expert and her report were not disclosed prior to the hearing?

LAW/ANALYSIS

I. DENIAL OF COUNSEL

Mother asserts the family court erroneously terminated her parental rights because she was denied counsel at critical stages of the proceedings. She contends that had counsel been appointed, her attorney would have moved for the return of Child. She asserts therefore that because Child would not have been in foster care for as long, Child would have been returned to her. While we find the denial of counsel was erroneous, we conclude the error did not prejudice Mother or render the termination of her parental rights unfair, and thus does not warrant reversal.

In the criminal context, the United States Supreme Court has held the Due Process Clause of the United States Constitution provides criminal defendants with an absolute right to counsel where their liberty is at stake. *See Argersinger v. Hamlin*, 407 U.S. 25, 37–38 (1972). In light of the serious consequences of a criminal conviction, the Court concluded that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). However, the procedural protections required by the Due Process Clause in the criminal setting do not necessarily apply to the termination of parental rights.

In *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), the United States Supreme Court held there is no absolute right to counsel for an indigent parent in a TPR proceeding. In reaching that conclusion, the Court viewed its prior case law as establishing a presumption that an absolute right to appointed counsel only exists where a defendant's physical liberty is at stake. *Id.* at 25. Specifically, the Court noted there is no per se right to counsel for parole revocation proceedings or for a criminal prosecution in which imprisonment is not a possible punishment. *See id.* at 26 (citing *Scott v. Illinois*, 440 U.S. 367 (1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972)). Applying the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for determining what procedural protections due process requires, the Court concluded a parent subject to a termination of parental rights proceeding has an extremely important right at stake, the state's interest is often aligned with the parent in seeking a correct decision, and the complexity of a TPR proceeding and the likely incapacity of the parent create a risk of erroneous determinations. *Lassiter*, 452 U.S. at 31. The Court thus held that while there is no absolute right of indigent parents in TPR proceedings to have appointed counsel, there may be specific cases where the parent's interest is particularly strong, the state's interest is weak, and there is such a high risk of error, that due process would require the appointment of counsel. *Id.* Accordingly, the

Court adopted the standard set forth in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), as governing whether due process requires the appointment of counsel for a particular indigent parent in a TPR proceeding. *Lassiter*, 452 U.S. at 31–32. Under that standard, if considering the totality of the circumstances "fundamental fairness" would be lacking absent appointed counsel, the state must provide counsel. *Gagnon*, 411 U.S. at 790.

This Court dealt with the issue of appointed counsel for indigent TPR defendants in *South Carolina Department of Social Services v. Vanderhorst*, 287 S.C. 554, 340 S.E.2d 149 (1986), where a mother's parental rights were terminated without representation by counsel. The Court described *Lassiter* as requiring "a reviewing court [to balance] private interests, the government's interests and the risk that procedures used will lead to erroneous decisions." *Id.* at 559, 340 S.E.2d at 152. Based on the use of expert psychological evaluations, the mother's erratic behavior indicating mental instability, and the damage to her position caused by her pro se representation, the Court held that due process required that the mother be appointed counsel. *Id.* at 559–60, 340 S.E.2d at 152–53. The Court also declined to "join the majority of states which hold that due process requires the appointment of counsel for indigents in all termination of parental rights case," but did express "caution that under our interpretation of *Lassiter*[,] cases in which appointment of counsel is not required should be the exception." *Id.* at 560, 340 S.E.2d at 153.

Thereafter, the South Carolina General Assembly enacted Section 20-7-1570 of the South Carolina Code (Supp. 1985) which provided: "If the parent is not represented by counsel, the judge shall make a determination on a case by case basis whether counsel is required. If the parent is indigent and counsel is not appointed, the judge shall enter on the record the reasons counsel was not required." *Vanderhorst*, 287 S.C. at 559 n.3, 340 S.E.2d at 152 n.3. As the Court recognized, that statute was merely "legislative recognition of the *Lassiter* requirement." *Id.* However, the legislature subsequently replaced that statute with a provision that: "Parents, guardians, or other persons subject to a termination of parental rights action are entitled to legal counsel. Those persons unable to afford legal representation must be appointed counsel by the family court, unless the defendant is in default." S.C. Code § 63-7-2560(A) (2010).

Thus, while under the United States Constitution and the South Carolina Constitution there is no absolute right to counsel for an indigent parent subject to a TPR proceeding, S.C. Code §63-7-2560(A) now provides an absolute statutory

right to counsel for indigent parents subject to TPR proceedings. The statutory language could not be clearer in providing that an indigent parent *must* be appointed counsel. Furthermore, the absolute nature of the requirement is especially manifest in light of the fact that the current statute replaced a statute requiring counsel only on a case-by-case basis.

Here, Mother was denied counsel because the TPR action was a private action rather than one filed by DSS. However, Section 63-7-2560(A) makes no distinction based on the party seeking the termination of parental rights. Rather, it provides that any indigent parent subject to "a termination of parental rights proceeding" must be provided counsel. S.C. Code § 63-7-2560(A). Thus, the denial of counsel was erroneous.[6]

In considering whether the denial of counsel requires reversal, we are mindful that TPR actions are markedly different from criminal cases, the area in which the denial of counsel commonly arises. While the remedy of reversing and remanding for the appointment of counsel and a new trial where a defendant is denied counsel is appropriate in a criminal case, that is not necessarily true in the TPR context. In a sense, the facts of a criminal trial are frozen in time. However, a family court considering the termination of parental rights must make a decision as to what is best for the child going forward. Thus, the merits of a TPR action can change during the pendency of the action, whereas the merits of a criminal trial do not ordinarily change during its pendency. Additionally, while criminal cases are focused on the rights of the defendant, a TPR action must consider both the right of the parent to raise her child and the child's best interest.

In short, unlike a criminal case, it may be impossible to truly remedy the denial of counsel in a TPR action. The best interest of a child changes with the passage of time, and thus there is no way to turn back the hands of time and put a parent in the position she would have been in had she not been denied counsel. Furthermore, simply ordering the child to be returned to the parent may be neither a just nor proper remedy because the best interest of the child is paramount and may not be served by that remedy.

For those reasons, we elect to join other courts in holding that where a parent is deprived of counsel for some time prior to the final TPR hearing, but has counsel

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[6] We note that Mother's constitutional right to counsel under the case-by-case approach set forth in *Lassiter* and *Vanderhorst* was not at issue here.

at the final hearing, the decision will only be reversed where the denial of counsel prejudiced the parent. *See, e.g.*, *Briscoe v. State, Dep't of Human Servs.*, 912 S.W.2d 425, 427 (Ark. 1996); *In re People ex rel. S.D. Dep't of Soc. Servs.*, 691 N.W.2d 586, 592 (S.D. 2004); *In re Tiffany Marie S.*, 470 S.E.2d 177, 186–87 (W. Va. 1996); *In re MN*, 78 P.3d 232, 240 (Wyo. 2003). Accordingly, where the parent erroneously denied counsel was not prejudiced thereby, the denial of counsel is not reversible error.

Here, while the lack of counsel likely delayed the resolution of the case, we find that it did not affect the outcome. Even had counsel been present, the statutory grounds for termination would have been satisfied and it would have been in Child's best interest for Mother's parental rights to be terminated. Child was placed in foster care on August 24, 2007, and while the exact date is not clear from the record, Mother's appointed attorney did not cease representing her until after April 2, 2009.[7] At that point, Child had already been in foster care for nineteen months, and thus the fifteen months in foster care was already satisfied while she was still represented by counsel.

Also, assuming her counsel abandoned her following the hearing on April 2, 2009, Mother was unrepresented for only sixteen months before she obtained representation from S.C. Legal Services in August of 2010. That sixteen months represents only a small portion of the fifty months Child had been in foster care at the time of the final hearing. It is inescapable that a longer period of delay in the resolution of this case—the nineteen months between the removal of Child in August 2007 and the permanency planning hearing in April 2009—was due to Mother's failure to satisfy her treatment plan. Also, Mother was not even capable of having Child returned for some portion of the sixteen months she was unrepresented as she agreed at the April 2, 2009 permanency planning hearing that she had not yet completed the treatment plan and was not ready to have Child returned to her.

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[7] While the details are not clear from the record, we are deeply concerned that here an appointed attorney apparently unilaterally terminated his representation of Mother. The Rules of Professional Conduct could not be clearer that "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." Rule 1.16, RPC, Rule 407, SCACR. Furthermore, attorneys have a duty to communicate with their clients. *See* Rule 1.4, RPC, Rule 407, SCACR.

Furthermore, Mother was again represented for fifteen months from August 2010 until the final hearing in November 2011, and she never filed a motion for the return of Child during that time. Additionally, that fifteen month period means that the fifteen of the most recent twenty-two months in foster care ground for TPR was satisfied even excluding the time before she obtained counsel in the TPR action.

Finally, even if the lack of counsel affected the length of time Child remained in foster care, the failure to visit ground for termination was still satisfied. Mother did not argue that the lack of counsel affected her ability to visit Child, nor do we see how it could have. To the contrary, Mother did not provide any explanation beyond her own conduct for the majority of the visits she missed. Therefore, we conclude her denial of counsel was not prejudicial.

II. STATUTORY GROUNDS FOR TERMINATION

The family court found that two statutory grounds for termination were satisfied: Child having been in foster care for fifteen of the most recent twenty-two months and Mother's failure to visit. Mother contends the family court erred because those grounds were not satisfied by clear and convincing evidence. We disagree.[8]

The statutory grounds for termination of parental rights must be proven by clear and convincing evidence. *Richberg v. Dawson*, 278 S.C. 356, 257, 296 S.E.2d 338, 339 (1982). On appeal, pursuant to its de novo standard of review, the Court can make its own determination from the record of whether the grounds for termination are supported by clear and convincing evidence. *S.C. Dep't of Soc. Servs. v. Cummings*, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001).

A. Fifteen of the Most Recent Twenty-Two Months in Foster Care

Section 63-7-2570(8) of the South Carolina Code (2010) provides for the termination of parental rights where: "The child has been in foster care under the

[8] We note that Mother made a conclusory assertion in her brief that the family court erred in considering Child's best interest prior to determining whether a statutory ground for termination existed. Mother failed to raise that issue to the family court, and thus it is not preserved for our review. *Hoffman v. Powell*, 298 S.C. 338, 340 n.2, 380 S.E.2d 821, 822 n.2 (1989) (holding that a claim not raised before the trial court will not be considered for the first time on appeal).

responsibility of the State for fifteen of the most recent twenty-two months." Mother did not contest the fact that Child continuously remained in foster care for over four years prior to the TPR hearing—from August 24, 2007, until November 1, 2011. Thus, there can be no dispute that simply in terms of time spent in foster care, the ground was satisfied.

The real crux of Mother's argument is that the resolution of the case was extensively delayed for reasons beyond her control and thus the family court erred in strictly adhering to the statutory ground. In support, Mother relies on *Marccuci* and *Loe v. Mother, Father, & Berkeley County Department of Social Services*, 382 S.C. 457, 675 S.E.2d 807 (Ct. App. 2009).

In *Marccuci*, a father was arrested and his daughter was removed to DSS custody. His parental rights were later terminated on the ground the child had been in foster care for fifteen of the last twenty-two months, among other grounds. *Marccuci*, 396 S.C. at 224, 721 S.E.2d at 772. On appeal, the Court held that while the family court was technically correct in finding the ground satisfied, the particular facts of the case caused the ground to not support termination of parental rights. The Court stated, "Where there is 'substantial evidence that much of the delay . . . is attributable to the acts of others,' a parent's rights should not be terminated based solely on the fact that the child has spent greater than fifteen months in foster care." *Id*. at 227, 721 S.E.2d at 773 (quoting *S.C. Dep't of Soc. Servs. v. Cochran*, 356 S.C. 413, 420, 589 S.E.2d 753, 756 (2003) (Pleicones, J., concurring)). The Court went on to conclude that "the delays generated and road blocks erected in the removal action made it impossible for the parties to regain legal custody of [the child] prior to the expiration of the fifteen month period." *Id.*

In *Loe*, the family court terminated a mother's parental rights based on the fifteen months ground, among others, after her children were in foster care for over three years. *Loe*, 382 S.C. at 461–62, 675 S.E.2d at 809–10. DSS admitted that it had caused the delays in reunifying the mother and her children. *Id.* at 469, 675 S.E.2d at 814. On appeal, the court of appeals held that the fifteen months ground was not satisfied because DSS was responsible for the delays. *Id.* at 471, 675 S.E.2d at 814.

Marccuci and *Loe* are inapposite here. While the resolution of this case was delayed in part for reasons beyond Mother's control, it was also significantly delayed due to her failure to participate in her treatment plan. Furthermore, Child had already been in foster care for fifteen months before any of the delay not

attributable to Mother occurred. Mother, and no one else, through her drug usage and resistance to the treatment plan, caused Child to remain in foster care for fifteen months. The delay that followed does not change the fact that Child spent an excessive period of time during the crucial early years of her life in foster care solely because of Mother's actions. Accordingly, we find the fifteen months in foster care statutory ground for termination satisfied by clear and convincing evidence.

B. Failure to Visit

Mother also argues the family court erred in finding she willfully failed to visit Child. She does not dispute that she failed to visit Child for a period of six months or more in 2008. Rather, she argues the period she failed to visit in 2008 is insufficient to find the ground satisfied and there is no evidence her failure to visit was willful. We disagree.

Section 63-7-2570(3) provides that parental rights may be terminated where "[t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has willfully failed to visit the child." Willfulness is a question of intent to be determined by the facts and circumstances of each case, and the family court judge has wide discretion in making the determination. *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992). While the judge has wide discretion, willfulness must be established by clear and convincing evidence. *S.C. Dep't of Soc. Servs. v. Smith*, 343 S.C. 129, 137, 538 S.E.2d 285, 289 (Ct. App. 2000). Conduct by a parent that shows a purpose to forego parental duties is willful "because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *S.C. Dep't of Soc. Servs. v. Seegars*, 367 S.C. 623, 630, 627 S.E.2d 718, 721–22 (2006).

Mother contends the facts of her case are analogous to those in *South Carolina Department of Social Services v. M.R.C.L.*, 390 S.C. 329, 701 S.E.2d 757 (Ct. App. 2010), *rev'd on other grounds*, 393 S.C. 387, 712 S.E.2d 452 (2011), and the failure to visit finding should be overturned for the same reasons. There, the mother was permitted to visit her child for fifteen months and made fourteen visits, but the visits were characterized as "sporadic," with three of them occurring during the month preceding the TPR hearing. *Id.* at 335, 701 S.E.2d at 760. The court of appeals noted that "South Carolina courts have not quantified how many visits a parent may make while legally failing to visit." *Id.* at 335, 701 S.E.2d at 759. The court reversed the finding of failure to visit because the mother visited

the child on average once per month and the record failed to provide sufficient evidence of willfulness. *Id.* at 335, 701 S.E.2d at 760.

This case is materially distinguishable from *M.R.C.L.* There, the evidence only indicated the visitation was sporadic, not that there was a sustained period during which no visitation occurred. Also, in *M.R.C.L.*, the mother visited on average once per month. Here, Mother failed to visit for eight consecutive months and visited significantly less than once per month—visiting only thirty-four times over the fifty months Child was in foster care.

While there was no evidence the mother's sporadic visitation was willful in *M.R.C.L.*, here there was ample evidence of willfulness. Willfulness does not mean that the parent must have some ill-intent towards the child or a conscious desire not to visit; it only means that the parent must not have visited due to her own decisions, rather than being prevented from doing so by someone else. Mother was questioned at the TPR hearing as to why she failed to visit for eight months in 2008 and her only explanation was that she "wasn't where I needed to be at the time" and that she was incarcerated for a portion of that time. In other words, she does not explain her failure to visit for that period of time as the result of anything but her own choices and actions. Similarly, Mother was not able to provide an explanation for why she failed to visit Child in September 2011, just two months prior to the TPR hearing, other than to say that she was sure she called to schedule a visit. While Mother tried to explain away the lack of visits as resulting from difficulties scheduling visits with DSS and the Brooms, that explanation does not alter the fact that she missed numerous months of visitation when it was clearly possible to schedule at least one visit per month. In conclusion, Mother's willful failure to visit Child for eight months followed by infrequent and sporadic visitation over the following years is sufficient to satisfy this statutory ground.

III. EXPERT TESTIMONY

Finally, Mother argues the family court erred in permitting the Brooms' bonding expert, Meredith Loftis, to testify. At the hearing, Mother objected to Loftis' testimony on the ground she "was never given any sort of notice of a written report or her testimony." Mother's counsel explained that she had twice requested a list of the Brooms' witnesses, but Loftis had never been disclosed, and the Brooms' counsel admitted he failed to disclose Loftis. The Brooms' called Loftis

as a witness, and the court stated it was going to permit her to testify over Mother's objection.

We find Mother has abandoned this issue. Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal. *Hunt v. Forestry Comm'n*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004). Her brief cites no authority, other than Family Court Rule 25 which only encourages the prompt exchange of information, in support of her position. She also presents no argument as to how the family court's ruling was an abuse of discretion or prejudiced her. *See Fields v. Reg'l Med. Cent. Orangeburg*, 363 S.C. 19, 25–26, 609 S.E.2d 506, 509 (2005) (the admission or exclusion of evidence is within the trial judge's discretion and to warrant reversal an appellant must show both abuse of discretion and prejudice).

CONCLUSION

For the reasons set forth, while we hold it was error for Mother to be denied counsel, we find both statutory grounds for TPR were satisfied during the time she had appointed counsel, so we discern no prejudice. Because we find the statutory grounds for termination were satisfied and termination of Mother's parental rights was in Child's best interest, we affirm the family court's termination of Mother's parental rights.

TOAL, C.J., and KITTREDGE, J., concur. PLEICONES and BEATTY, JJ., concur in result only.

The Supreme Court of South Carolina

RE: Rule Amendments

ORDER

On January 31, 2013, the following orders[1] were submitted to the General Assembly pursuant to Article V, § 4A of the South Carolina Constitution.

(1) An order amending Rule 4 of the South Carolina Rules of Civil Procedure (SCRCP) and Rule 6 of the South Carolina Rules of Magistrates Court (SCRMC);

(2) An order amending the South Carolina Court-Annexed Alternative Dispute Resolution Rules;

(3) An order amending the South Carolina Rules of Criminal Procedure.

A copy of these orders is attached. Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

[1] An order amending Rule 16 and Rule 19 of the South Carolina Rules of Magistrates Court was withdrawn from consideration.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 1, 2013

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Rules of Civil Procedure and the South Carolina Rules of Magistrates Court

Appellate Case No. 2012-212128

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 4 of the South Carolina Rules of Civil Procedure (SCRCP) and Rule 6 of the South Carolina Rules of Magistrates Court (SCRMC) are amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2013

Rule 4(d), SCRCP, is amended to add paragraph (d)(9) as follows:

(d)(9) Service by Commercial Delivery Service. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c) by a commercial delivery service which meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2). Service is effective upon the date of delivery as shown in the delivery record of the commercial delivery service. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a delivery record showing the acceptance by the defendant which includes an original signature or electronic image of the signature of the person served. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the delivery receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

The following Note is added to Rule 4(d), SCRCP:

Note to 2013 Amendment:

Rule 4(d)(9) authorizes service of process to be made by a qualifying commercial delivery service and is similar to service by registered or certified mail.

Rule 4(g), SCRCP, is amended to provide as follows:

(g) Proof and Return. The person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same. If served by the sheriff or his deputy, he shall make proof of service by his certificate. If served by any other person, he shall make affidavit thereof. If served by publication, the printer or publisher shall make an affidavit thereof, and an affidavit of mailing shall be made by the party or his attorney if mailing of process is permitted or required by law. Failure to make proof of service does not affect the validity of the service. The proof of service shall state the date, time and place of such service and, if known, the name and address of the person actually served at the address of such person, and if not known, then the date, time and place of service and a description of the person actually served. If service was by mail, the

person serving process shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt or returned envelope when received by him showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also make proof of any further service on the defendant pursuant to paragraph (8) of subdivision (d) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record. If service was by commercial delivery service, the person initiating the service of process shall make an affidavit identifying the process or other documents served and shall attach to the affidavit a delivery record of the commercial delivery service which shall contain the date, time, and place of delivery, the name of the person served, and include an original signature or electronic image of the signature of the person served. The affidavit and delivery record and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record.

The following Note is added to Rule 4(g), SCRCP:

Note to 2013 Amendment:

This amendment to Rule 4(g) details the proof required when a party serves process utilizing a commercial delivery service.

Rule 6(d), SCRMC, is amended to add paragraph (d)(7) as follows:

(7) Service by Commercial Delivery Service. Service of a summons, complaint, and any appropriate attachments upon a defendant of any class referred to in paragraph (d)(1) or (d)(3) of this subdivision of this rule may be made by a commercial delivery service which meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2). Service is effective upon the date of delivery as shown in the delivery record of the commercial delivery service. Service pursuant to this paragraph shall not be the basis for the entry of a default judgment unless the record contains a delivery record showing the acceptance by the defendant, which includes an original signature or electronic image of the signature of the person served. Any default judgment shall be set aside pursuant to Rule 12 if the defendant demonstrates to the court that the delivery record was

signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Rule 6(g), SCRMC, is amended to provide as follows:

(g) Proof and Return. The person serving the process shall promptly make proof of service and deliver it to the court. If served by the sheriff, the sheriff's deputy, or a magistrate's constable, proof of service shall be made by certificate. If served by any other person, the person shall make an affidavit of service. If served by publication, the printer or publisher shall make an affidavit of publication, and an affidavit of mailing shall be made to the party or the party's attorney if mailing of process is permitted or required by law. Failure to make proof of service does not affect the validity of service. The proof of service shall state the date, time, and place of service and a description of the person actually served. If service was by mail, the person serving process shall show in the proof of service the date and place of mailing, and attach a copy of the return receipt or the returned envelope showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also show proof of any further service on the defendant pursuant to paragraph (d)(6) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed with the court with the pleadings and become a part of the record. If service was by commercial delivery service, the person initiating the service of process shall make an affidavit identifying the process or other documents served and shall attach to the affidavit a delivery record of the commercial delivery service which shall contain the date, time, and place of delivery, the name of the person served, and include an original signature or electronic image of the signature of the person served. The affidavit and delivery record and any other proof shall be promptly filed with the court with the pleadings and become a part of the record.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2012-213642

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Court-Annexed Alternative Dispute Resolution Rules are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2013

Rule 4(d)(1), South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide as follows:

(1) If there are unresolved issues of custody or visitation, the court may in its discretion order an early mediation of those issues upon motion of a party or upon the court's own motion.

The first sentence of Rule 4(d)(2), South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide as follows:

(2) If issues are in dispute and no Proof of ADR has been filed certifying that the issues have been mediated, the parties must mediate those issues prior to the scheduling of a hearing on the merits; provided, however, the parties may submit the issues of property and alimony to binding arbitration in accordance with subparagraph (5).

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Criminal Procedure

Appellate Case No. 2012-212106

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Rules of Criminal Procedure are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 31, 2013

The South Carolina Rules of Criminal Procedure are amended by adding the following Rule:

RULE 35

TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

Note:

Rule 35 is the language of Rule 6(a), SCRCP.

The Supreme Court of South Carolina

In the Matter of Rosalee Hix Davis, Respondent.

Appellate Case No. 2013-000925

ORDER

Pursuant to Rule 28(d) of Rule 413 of the Rules for Lawyer Disciplinary Enforcement (RLDE), of the South Carolina Appellate Court Rules, the Office of Disciplinary Counsel (ODC) petitions the Court to transfer respondent to incapacity inactive status. ODC also seeks the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE.

The petition is granted. Respondent is hereby transferred to incapacity inactive status.

IT IS FURTHER ORDERED that Alford Haselden, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Haselden shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Haselden may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Alford Haselden, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Alford Haselden, Esquire, has been duly appointed by this

Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Haselden's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.

Columbia, South Carolina
May 3, 2013

The Supreme Court of South Carolina

Michael E. Hamm, Petitioner,

v.

State of South Carolina, Respondent

Appellate Case No. 2012-209727

ORDER

Michael E. Hamm (Hamm) seeks a writ of habeas corpus and a declaratory judgment with regard to his civil commitment to the South Carolina Department of Mental Health's Sexually Violent Predator Treatment Program (SVPTP) for long term control, care, and treatment pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq*. (the SVP Act). We deny the petition for a writ of habeas corpus and motions to amend or correct the petition, and decline to issue a declaratory judgment.

Hamm seeks habeas relief on the ground that the plea judge and plea counsel were ineffective for failing to inform Hamm that he was subject to the SVP Act as a direct consequence of pleading guilty. Hamm argues that in light of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010),[1] his guilty plea was not knowingly, voluntarily,

[1] In *Padilla*, the United States Supreme Court (USSC) determined that as a matter of law, Padilla's plea counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his deportation. *Padilla*, 130 S. Ct. at 1478. Although the Kentucky Supreme Court rejected Padilla's ineffectiveness claim on the ground that the risk of deportation was a collateral matter of which counsel did not have to advise him, the USSC stated "deportation as a consequence of criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence" and the "collateral versus direct distinction is thus ill-suited in evaluating a *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] claim concerning the specific risk of deportation." *Id.* at 1481-82. The USSC further found that although deportation was not purely punitive, it was (1) of great importance; (2) virtually mandatory; (3) intimately related to the criminal process; and

or intelligently entered because defendants must be advised that pleading guilty to certain sex crimes subjects defendants to the SVP Act and its potential implications, such as civil confinement. Hamm also argues that section 16-15-140 is classified as a non-violent offense in the criminal code, but a violent offense for purposes of the SVP Act, and that this distinction is in violation of double jeopardy, due process, and the separation of powers doctrine.

Habeas corpus is available only when other remedies, such as post-conviction relief (PCR), are inadequate or unavailable. *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998); *see also Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) (stating "a writ of habeas corpus is reserved for the very gravest of constitutional violations which, in the setting, constitute[ ] a denial of fundamental fairness shocking to the universal sense of justice"); *McWee v. State*, 357 S.C. 403, 406, 503 S.E.2d 456, 457 (2004) (stating habeas relief will only be granted under "unique and compelling circumstances"); *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) ("[N]ot every intervening decision, nor every constitutional error at trial will justify issuance of the writ.") (internal quotations and citations omitted).

Hamm failed to file a PCR application raising any issue related to *Padilla* within one year of that decision, issued March 31, 2010, as required by section 17-27-45 of the South Carolina Code. S.C. Code Ann. § 17-27-45(B) (2003). Because Hamm failed to exhaust all other remedies, he is barred from habeas corpus relief on his *Padilla*-related grounds. *Gibson*, 329 S.C. at 40, 495 S.E.2d at 427-28 (stating a petition for habeas relief must, in addition to other requirements, allege petitioner has exhausted all other remedies in order to be entitled to a hearing).

However, were we even to reach Hamm's *Padilla* claim, he is not entitled to relief. Commitment pursuant to the SVP Act does not automatically flow from the

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(4) a drastic measure. *Id.* at 1478-82. The USSC determined that "constitutionally competent counsel would have advised him that his conviction . . . made him subject to automatic deportation." *Id.* at 1478. Additionally, the USSC held counsel must inform the defendant whether his plea carries a risk of deportation because it is a critical factor the defendant is likely to consider in deciding whether to enter a plea or proceed to trial. *Id.* at 1484-86. Accordingly, the Court held that in order for counsel's representation to be deemed reasonable under *Strickland*, he must advise the defendant about the possibility of deportation. *Id.* at 1486-87. Thus, the USSC ruled counsel was deficient for failing to inform his client when the plea carried the risk of deportation. *Id.* at 1483. Notably, the USSC stated that to be afforded relief a party still needs to demonstrate the prejudice required by *Strickland*. *Id*. at 1483-84.

conviction, rather a civil proceeding occurs where the defendant is evaluated before confinement is certain;[2] the USSC's rationale under *Padilla* does not extend to a person's civil commitment under the SVP Act;[3] and *Padilla* does not apply retroactively.[4]

We further find that classification of S.C. Code Ann. § 16-15-140 as a non-violent offense in the criminal code, but a violent offense for purposes of the SVP Act does not violate double jeopardy, due process, or separation of powers.

Hamm's arguments are without merit because the General Assembly clearly established its intent in enacting the SVP Act was to establish a civil commitment process to address dangerous sexually violent predators likely to re-offend and provide long term care, control and treatment of offenders determined to fall within that group. *See, e.g. In the Matter of the Care and Treatment of Beaver*, 372 S.C. 272, 277-78, 642 S.E.2d 578, 581 (2007) (holding the lower court erred in finding the lewd act charge was "non-violent" and that defendant should not be confined as a sexually violent predator on the basis of a "non-violent" charge because, while it is true commission of a lewd act on a minor is considered a non-violent offense for

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[2] *See Page v. State*, 364 S.C. 632, 636-37, 615 S.E.2d 740, 742 (2005) (finding any possible civil commitment pursuant to the SVP Act does not flow directly from a defendant's guilty plea, but rather from a separate civil proceeding in which testing, evaluation, a probable cause hearing, and a trial by either the court or jury occurs).

[3] In *Chaidez v. U.S.*, 133 S. Ct. 1103 (2013), the USSC re-emphasized the underlying rationale in *Padilla* that deportation is unique and such a detrimental and drastic consequence it should be treated differently than other collateral consequences. *See Chaidez*, 133 S. Ct. at 1110. Thus, *Padilla* does not broadly apply to other potential consequences of a guilty plea, such as civil confinement under the SVP Act.

[4] In holding *Padilla* does not apply retroactively, the USSC observed that under *Teague v. Lane*, 489 U.S. 288 (1989), when a new rule of criminal procedure is announced, a person whose conviction is already final may not benefit from the decision in a collateral proceeding. *Chaidez*, 133 S. Ct. at 1107. The USSC noted that "a case does not announce a new rule when it is merely an application of the principle which governed a prior decision to a different set of facts." *Id.* (citations and internal quotations omitted). However, the USSC held *Padilla* did something more than simply apply the test in *Strickland* to the factual situation of deportation advice because answering the preliminary question of whether *Strickland* applied at all required the adoption of a new rule. *Id.* at 1108. Specifically, the USSC noted it found deportation was "unique;" a particularly severe penalty that is intimately related to the criminal process; and an automatic result of some convictions. *Id.* at 1110. As such, the USSC held *Padilla* announced a new rule; therefore, the Court concluded it does not apply retroactively. *Id.* at 1110-11.

criminal purposes, the General Assembly deemed it appropriate to consider the charge violent for purposes of the SVP Act and civil commitment and probable cause hearings under the act).

Moreover, commitment to the SVPTP is a civil, non-punitive commitment, and commitment proceedings under the SVP Act are entirely civil and completely independent of criminal proceedings. *See In the Matter of the Care and Treatment of Matthews*, 345 S.C. 638, 648-51, 550 S.E.2d 311, 316-17 (2001) ("Where the [General Assembly] has manifested its intent that the legislation is civil in nature, the party challenging the classification must provide the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the [General Assembly's] intention.") (citations omitted). Therefore, we find the SVP Act, and its application to Hamm, is not in conflict with the criminal statutes and does not violate double jeopardy. *Id.* Furthermore, because commitment requires a separate civil proceeding and is not automatic, and only review of a defendant's mental condition is mandatory under the SVP Act, we find proceedings under the SVP Act do not impact the finality of Hamm's criminal sentences and, thus, do not violate the separation of powers doctrine. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 218-19, 226-27 (1995) (stating a judicial decision conclusively resolves the particular case or controversy, and the legislative branch may not command by retroactive legislation that courts reopen final judgments); *see also State v. Burdette*, 335 S.C. 34, 40-41, 515 S.E.2d 525, 528-29 (1999) (stating that where a defendant is convicted of a triggering offense for a mandatory sentence term, the matter of sentencing becomes the "province of the legislature" and the legislature's judgment will not be disturbed). Therefore, we deny Hamm's request for habeas and declaratory relief on these grounds.[5]

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[5] As to Hamm's contention that the trial court erred in allowing him to voluntarily commit himself to the SVPTP, we find he is not entitled to habeas corpus relief.

It is well established under South Carolina law that a defendant may waive both constitutional and statutory rights. *See State v. Torrence*, 322 S.C. 475, 479, 473 S.E.2d 703, 706 (1996); *but see State v. Motts*, 391 S.C. 635, 647-49, 707 S.E.2d 804, 810-11 (2011) (holding a defendant sentenced to death cannot waive this Court's statutorily-imposed duty to review his capital sentence, as it is this Court's duty to ensure the death sentence conforms to statutory requirements). A defendant's knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record. *State v. Ray*, 310 S.C. 431, 436-37, 427 S.E.2d 171, 174 (1993) (the waiver of a constitutional or statutory right must be clearly shown on the record and must reflect that the defendant made such waiver knowingly and intelligently). The trial court's "Order of Voluntary Commitment" clearly establishes Hamm knowingly and voluntarily

Accordingly, we deny Hamm's petition for a writ of habeas corpus and declaratory judgment and motions to amend or correct the petition.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 8, 2013

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waived his right to trial and committed himself into the SVPTP. *See Torrence*, *supra*; *Ray*, *supra*; *see also Spoone v. State*, 379 S.C. 138, 142 n.4, 665 S.E.2d 605, 607 n.4 (2008) (noting that a defendant may waive constitutional rights pursuant to a plea agreement and, therefore, it logically follows that he ought to be able to waive rights that are created by statute) (citation omitted). The order states the trial court inquired into whether Hamm was aware of and waived his rights under the SVP Act. The order also states the court inquired and Hamm advised, through counsel, that he waived such rights freely, voluntarily, intelligently, and without coercion, and that he voluntarily consented to long-term control, care, confinement and treatment under the SVP Act. Hamm further advised the court he made the decision after consulting with counsel and that he was satisfied with counsel's representation. We find Hamm has failed to present any evidence to the contrary. *See Gibson*, 329 S.C. at 40, 495 S.E. 2d 427-28. Therefore, we deny Hamm's petition for habeas relief on this ground.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Robert Steve Jolly, Respondent.

Appellate Case No. 2011-190688

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5128
Heard January 10, 2013 – Filed May 8, 2013

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark Reynolds Farthing, all of Columbia, for Appellant.

Chief Appellate Defender Robert Michael Dudek and Appellate Defender David Alexander, of Columbia, for Respondent.

KONDUROS, J.: The State appeals the circuit court's dismissal of two counts of obtaining property by false pretenses against Robert Steve Jolly based on double jeopardy. The State contends the circuit court erred in finding Jolly's being held in

criminal contempt for the same conduct precluded his prosecution because the offenses were not identical and required proof of different elements. We reverse and remand.

FACTS

Jolly was allegedly involved in a fraudulent mortgage scheme in which he induced distressed homeowners to transfer their mortgaged property to him through quitclaim deeds. Jolly represented to the victims he would pay off the mortgages on their behalf once they transferred their property to him and instructed them to submit their future mortgage payments to him instead of the original mortgage holder. Jolly's scheme caused the filing of at least forty-five foreclosure actions against the victims' properties. Jolly's frivolous filings in the master-in-equity's court caused an enormous backlog of cases. Additionally, Jolly filed claims against the masters-in-equity for Horry and Georgetown County. Circuit Court Judge J. Michael Baxley was assigned to remedy the backlog of cases created by Jolly.

On March 12, 2009, Judge Baxley issued an order directing Jolly to appear for a hearing and rule to show cause as to why he should not be sanctioned, held in contempt, and dismissed from further involvement in pending cases. On April 3, 2009, the State filed a summons and complaint and a motion for a temporary injunction against Jolly. The court held a hearing on the matter on April 16, 2009. Jolly appeared pro se. Jolly informed the court he had removed the case to federal court but only presented a receipt for payment of a filing fee.[1] He also indicated he had amended his answer to the State's action to assert a third-party claim directly against Judge Baxley, requiring the recusal of Judge Baxley.

At the hearing, Ernest Mauck and Esther Reinhardt, two victims of Jolly's alleged scheme, testified regarding their dealings with him. On May 4, 2009, Judge Baxley issued an order holding Jolly in criminal contempt of court and sentencing him to six months' imprisonment. Judge Baxley found, "Jolly's orchestration of the aforementioned Scheme, his conduct in the Foreclosure Actions, and his conduct before the Court at the April 16th hearing has interfered with judicial proceedings, exhibited disrespect for the Court, and hampered the parties and witnesses" as well

[1] The federal court ultimately did not accept removal, dismissing the petition and remanding the case back to circuit court.

as "were calculated to obstruct, degrade, and undermine the administration of justice." The court also issued a temporary injunction prohibiting Jolly and his company from withdrawing funds collected through the fraudulent acts.[2]

A grand jury indicted Jolly for one count of the unauthorized practice of law and five counts of obtaining property by false pretenses. Trial commenced on April 12, 2011. Jolly moved to dismiss the indictments, arguing double jeopardy would be violated because of Judge Baxley's finding of criminal contempt. Following arguments, the State informed the court it would immediately appeal if the court dismissed the charges. The trial court granted Jolly's motion to dismiss as to two counts[3] of obtaining property by false pretenses.[4] This appeal followed.

LAW/ANALYSIS

The State argues the trial court erred in dismissing two indictments for obtaining property by false pretenses based on double jeopardy because the elements of obtaining property by false pretenses were distinctly different from the elements of criminal contempt and each required a proof of fact the other did not. We agree.

"The Double Jeopardy Clauses of the United States and South Carolina Constitutions operate to protect citizens from being twice placed in jeopardy of life or liberty for the same offense." *State v. Brandt*, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011). "The United States Constitution, which is applicable to South Carolina via the Fourteenth Amendment provides: '[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .'" *Id.* (quoting U.S. Const. amend. V) (alterations by court). Additionally, the South Carolina Constitution states: "'No person shall be subject for the same offense to be twice put in jeopardy for life or liberty. . . .'" *Id*. (quoting S.C. Const. art. I, § 12) (alteration by court). "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against

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[2] On June 15, 2009, Judge Baxley issued a global order for all foreclosure cases in which Jolly was a party, dismissing him as a party and declaring void ab initio any deeds through which Jolly claimed an interest in those properties.

[3] These counts related to his actions towards Mauck and Reinhardt.

[4] Trial proceeded on the remaining counts, Jolly was convicted, and this court dismissed the appeal of those convictions. *See State v. Jolly*, Op. No. 2013-UP-043 (S.C. Ct. App. filed Jan. 30, 2013).

multiple punishments for the same offense." *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999).

"A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two distinct offenses." *Brandt*, 393 S.C. at 538, 713 S.E.2d at 597 (internal quotation marks omitted). The test for determining whether there are two offenses is whether each of the statutory provisions requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also Matthews v. State*, 300 S.C. 238, 240, 387 S.E.2d 258, 259 (1990) (finding to determine whether the legislature intended multiple punishments under different statutes when the intent is not otherwise clear from the face of the statute or its legislative history, the test is whether each statute requires proof of a fact that the other does not); *State v. Cuccia*, 353 S.C. 430, 438, 578 S.E.2d 45, 49 (Ct. App. 2003) (finding under traditional double jeopardy analysis, multiple punishments are not prohibited when each offense requires proof of a fact the other does not). Thus, to determine whether double jeopardy has been violated, the court must examine whether the offenses have the same elements. *Blockburger*, 284 U.S. at 304; *State v. Easler*, 327 S.C. 121, 130, 132, 489 S.E.2d 617, 622, 623 (1997). The Supreme Court of the United States has often concluded two statutes define the same offense when one is a lesser included offense of the other. *Rutledge v. United States*, 517 U.S. 292, 297 (1996).

The Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could be described as punishment. *Hudson v. United States*, 522 U.S. 93, 98-99 (1997); *see also State v. Blick*, 325 S.C. 636, 642, 481 S.E.2d 452, 455 (Ct. App. 1997) (holding administrative punishment by prison officials does not render subsequent judicial proceedings violative of the prohibition against double jeopardy). The Clause protects against the imposition of multiple criminal punishments for the same offense, and only then when such occurs in successive pleadings. *Hudson*, 522 U.S at 99.

"The United States Supreme Court and the South Carolina Supreme Court have determined that in the context of criminal penalties, the *Blockburger* . . . same elements test is the sole test of double jeopardy in successive prosecutions and multiple punishment cases." *Brandt*, 393 S.C. at 538-39, 713 S.E.2d at 597 (internal quotation marks omitted). "Under the *Blockburger* test, a defendant may be convicted of two separate crimes arising from the same conduct without being

placed in double jeopardy where his conduct consists of two distinct offenses." *Id.* at 539, 713 S.E.2d at 597-98 (internal quotation marks omitted). "An application of the *Blockburger* test requires a technical comparison of the elements of the offense for which the defendant was first tried with the elements of the offense in the subsequent prosecution." *Id.* at 539, 713 S.E.2d at 598 (internal quotation marks omitted).

In *Brandt*, the defendant, Brandt, argued double jeopardy barred his forgery prosecution because he had been held in criminal contempt after producing a fraudulent document in a civil proceeding. *Id.* at 536, 713 S.E.2d at 596. Brandt advocated the court apply Justice Scalia's "lesser-included offense" method of analysis instead of Chief Justice Rehnquist's "literal same-elements analysis" as set forth in *United States v. Dixon*, 509 U.S. 688 (1993). *Brandt*, 393 S.C. at 539, 713 S.E.2d at 598. The court interpreted Brandt's arguments as applying the "same elements test" by comparing the underlying conduct between the offenses of criminal contempt and forgery.[5] *Id.* The court found it did not need to choose between the divergent views of Chief Justice Rehnquist and Justice Scalia because the case did not involve a violation of a court order as *Dixon* did. *Id.* The court found that even if it "were to choose between the two views, we find this state's post-*Dixon* jurisprudence definitively establishes that our courts have adopted a traditional, strict application of the *Blockburger* 'same elements test.'" *Id.*

To apply the *Blockburger* analysis, the *Brandt* court compared the individual elements of the criminal contempt conviction and the forgery offense. *Id.* at 540, 713 S.E.2d at 598. The court found

[5] The court noted Brandt filed a petition for writ of habeas corpus for his conviction of criminal contempt in the United States District Court for the District of South Carolina, which was granted, and the United States Court of Appeals for the Fourth Circuit affirmed the decision. *Brandt*, 393 S.C. at 536 n.5, 713 S.E.2d at 596 n.5 (citing *Brandt v. Ozmint*, 636 F.3d 124 (4th Cir. 2011); *Brandt v. Ozmint*, 664 F. Supp. 2d 626 (D.S.C. 2009)). The court recognized that because this effectively vacated the prior conviction, Brandt could no longer assert Double Jeopardy barred his forgery prosecution. *Id.* However, the court analyzed the double jeopardy issue in the event the Fourth Circuit's decision was reversed. *Id.*

> each offense requires proof of a fact that the other does not. Specifically, the offense of forgery does not require any interference with judicial proceedings that is "calculated to obstruct, degrade, and undermine the administration of justice." In comparison, the commission of criminal contempt does not require the "uttering or publishing of a fraudulent document."

Id. at 541, 713 S.E.2d at 598 (citation omitted). The court found, "Brandt's subsequent prosecution for forgery did not violate the Double Jeopardy Clause as the prior criminal contempt conviction involved decidedly different elements." *Id.* at 541, 713 S.E.2d at 599 (citing *State v. Pace*, 337 S.C. 407, 417, 523 S.E.2d 466, 471 (Ct. App. 1999) (concluding that double jeopardy did not bar convictions for both forgery and insurance fraud, based on a forged "Affidavit of Total Theft of a Motor Vehicle" that was submitted to insurer "[b]ecause each offense contains at least one element which must be proven by an additional fact that the other does not require"); Jay M. Zitter, Annotation, *Contempt Finding as Precluding Substantive Criminal Charges Relating to the Same Transaction*, 26 A.L.R.4th 950, 952 (1983 & Supp. 2010) (discussing state and federal cases in which courts have determined double jeopardy safeguards were not involved when a defendant found in contempt is later prosecuted under penal statutes for the same actions; recognizing in those cases "the purpose of contempt citations is to maintain the dignity of and respect for the court and court proceedings, while the purpose of criminal charges is to punish violators of society's norms")).

"The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same." S.C. Code Ann. § 14-5-320 (1977). Direct contempt involves contemptuous conduct in the presence of the court. *State v. Kennerly*, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999). "This State's courts have held the 'presence of the court' extends beyond the mere physical presence of the judge or the courtroom to encompass all elements of the system." *Id.* A person may be found guilty of direct contempt if his or her conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses. *State v. Havelka*, 285 S.C. 388, 389, 330 S.E.2d 288, 288 (1985).

> A person who by false pretense or representation obtains the signature of a person to a written instrument or

> obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty of a:
> (1) felony and, upon conviction, must be fined not more than five hundred dollars and imprisoned not more than ten years if the value of the property is five thousand dollars or more.
> (2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the value of the property is more than one thousand dollars but less than five thousand dollars . . . .

S.C. Code Ann. § 16-13-240(2) (2003).

Criminal contempt occurs when a person acts contemptuously in the court's presence. Jolly did this in a number of ways. He informed the court he had removed the case to federal court, but only provided the court with a receipt for payment of a filing fee and did not serve the State. The court found he repeatedly filed frivolous answers and other documents manifestly devoid of merit to impede the orderly progress and disposition of cases. The court also found his conduct required withdrawal of orders of reference and returns to the circuit court of over forty-five cases and interfered with the orderly adjudication of dozens of foreclosure actions. The court found Jolly's involvement in the preparation, execution, and improper notarization of quitclaim deeds constituted fraud upon the court. Additionally, the court determined his "remarkable lack of candor evident in the testimony he elicited . . . was an affront to the integrity of the judicial process and evinced an intention to obstruct, degrade, and undermine the administration of justice."

Similarly to *Brandt*, 393 S.C. at 541, 713 S.E.2d at 598, the offense of obtaining property by false pretenses "does not require any interference with judicial proceedings that is 'calculated to obstruct, degrade, and undermine the administration of justice.'" In comparison, the commission of criminal contempt does not require the obtaining from another person by false pretenses real property with the intent to cheat and defraud a person of that property. Simply because the court found Jolly's orchestration of the scheme, in concert with his conduct in the foreclosure actions and his conduct before the court, amounted to contempt of court, does not prevent him from also being tried for obtaining property under false

pretenses for that scheme. The elements of contempt and obtaining property would have to be the same, and they are not.[6] Therefore, the trial court erred in finding double jeopardy barred Jolly's prosecution for obtaining property under false pretenses. Accordingly, the trial court's decision is

REVERSED AND REMANDED.

SHORT and LOCKEMY, JJ., concur.

[6] Jolly did not appeal the finding of criminal contempt. Because he did not, he is bound by the finding that he was in contempt. *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

Cameron N. F. L., Billy J. S., and "John Doe,"
Defendants,

Of whom Cameron N. F. L. is the Appellant.

In the interest of a minor child under the age of 18.

Appellate Case No. 2011-198926

Appeal From Pickens County
Alvin D. Johnson, Family Court Judge

Opinion No. 5129
Heard April 4, 2013 – Filed May 2, 2013

REVERSED AND REMANDED

Andrew Richard Havran, of The Law Office of Andrew R. Havran, LLC, of Greer, for Appellant.

Patti Austin Brady, of the South Carolina Department of Social Services, of Pickens, for Respondent.

Steven Luther Alexander, of Alexander Law Firm, of Pickens, for the Guardian ad Litem.

HUFF, J.: Cameron N. F. L. (Mother) appeals the family court's termination of her parental rights to her minor child (Child). After careful consideration, we hold the family court erred in finding termination of Mother's parental rights was in Child's best interest.

FACTS/PROCEDURAL HISTORY

Mother gave birth to Child in September of 2003. On July 28, 2008, the Department of Social Services (DSS) filed an intervention action against Mother due to the deplorable conditions of Mother's home, allegations of drug abuse, and domestic disputes. At that time, Mother's home was excessively cluttered and infested with cockroaches.

DSS removed Child from Mother's home in March 2009, when Child was five years old. On January 6, 2010, the family court held a merits hearing for removal. The merits order authorized DSS to forego reasonable efforts to preserve the family. On June 21, 2011, the family court held a termination of parental rights (TPR) hearing.

Following Child's removal, Mother moved into a friend's trailer. Mother presented three witnesses who testified the trailer was clean and in good condition. DSS did not present testimony of a caseworker who visited the trailer.

In May 2010, Mother moved back into her prior home. Mother's witnesses testified Mother renovated the home and kept it clean. Additionally, a DSS caseworker testified Mother gave birth to another child in July 2010, and DSS investigated Mother's home at that time to determine if it was safe for the infant. The DSS caseworker testified Mother's home was safe and suitable for an infant, and she did not see evidence of drug abuse or domestic violence. The case involving Mother's infant was unfounded. The second Guardian ad Litem (GAL) appointed to Child's case visited Mother's home the week before the TPR hearing and testified it was "clean and nice."

Mother testified Child lived in at least five foster homes during the first year he was in foster care. In September 2009, DSS placed Child at York Place Episcopal Home for Children (York Place). According to Child's therapist, Child is

developmentally delayed; has physical and verbal aggression and neglect issues; exhibits self-destructive behaviors, anxiety, and signs of depression; and has been diagnosed with attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder. Child's therapist testified Child began regressing around December 2010, but she did not know what caused the regression. Child's therapist testified Child misses Mother, and she believes Mother and Child have a bond. She testified, "[W]hen the visits do occur . . . interaction is appropriate and …[Child] definitely has a significant bond with [Mother]." However, Child's therapist was concerned about Mother's "sporadic contact" with Child. When asked about Child's feelings about adoption, Child's therapist testified, "Adoption hasn't really been explored with him. When I spoke with his adoption worker [she] kind of felt that right now just trying to stabilize him and get him situated that he developmentally would not process well with adoption . . . ."

Child's initial GAL testified, "[T]here is a great love and bond between [Mother] and [Child]," and Child "says he would like to [go] home." However, she expressed concern about Mother's ability to provide structure and discipline for Child, and she believed TPR was in Child's best interest because Child needed "someone who can give him that stability and hands on expertise with dealing with his personality issues . . . ." She continued, "[I]t's very difficult for me to say, Judge, because I do see how much [Child] loves [Mother]." When asked whether Child was ready to be adopted, she stated, "I don't think he would be ready yet. I mean, if he can continue to improve I think he would be adoptable."

The second GAL appointed to Child's case did not observe any contact between Child and Mother. However, she testified that every time she visited Child, he talked about Mother, and she believed a bond existed between Mother and Child. She testified TPR was in Child's best interest because Child needed special care and someone "who [could] handle someone with his difficulties." Child's GAL noted Child's medical issues and testified, "[I]t's going to take somebody with a lot of ability in that area to be able to take care of him." When asked whether she thought Mother could provide the care Child needed, she responded, "Well, if she's with him 24/7 the way the staff is at York Place[, but] she now has another child and she has a job."

Child's DSS caseworker testified Child missed Mother and always asked when he would see her again. However, she agreed DSS's plan for TPR was in Child's best

interest because she felt Child needed permanency. She testified Region One Adoptions assessed Child and accepted him as a candidate for adoption.

DSS did not present testimony from a caseworker who was involved in Child's case between March 2009, when Child was removed, and March 2010, when the case was reassigned to an intensive foster care caseworker. When questioned about Mother's visitation with Child, the intensive foster care caseworker testified, "From my records she has visited." However, she testified Mother did not visit between March 1, 2010, and July 20, 2010. Child's therapist testified York Place allows parents one two-hour visit or two one-hour visits per month, and Mother visited Child in July 2010, September 2010, October 2010, December 2010, and May 2011, and attended a treatment plan review in August 2010. York Place is approximately one-hundred seventeen miles from Pickens County, or two hundred thirty-four miles round trip. Child's therapist did not have any records of Mother's visitation prior to June 2010, and she did not know when Mother visited prior to then. Mother failed to visit between December 2010 and May 2011; however, Mother testified her home burned in a fire in December 2010, and she used her extra income to repair the home because she wanted it to be suitable for Child.

The family court found clear and convincing evidence supported TPR on the following grounds: (1) failure to support; (2) severe and repetitious abuse or neglect such that it was unlikely the home could be made safe within twelve months; and (3) Child had been in foster care for fifteen of the most recent twenty-two months. Additionally, it found TPR was in Child's best interest. This appeal followed.

STANDARD OF REVIEW

In reviewing the decision of the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). While this court retains its authority to make its own findings of fact, we recognize the superior position of the family court in making credibility determinations. *Id*. at 392, 709 S.E.2d at 655. In addition, "consistent with our constitutional authority for de novo review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact." *Id*. Thus, "the family court's factual findings will be affirmed unless 'appellant satisfies this Court that the preponderance of the evidence is against the finding of the family court.'" *Id*.

LAW/ANALYSIS

Mother contends the family court erred in finding TPR was in Child's best interest.[1] We agree.

"The purpose of [the TPR statute] is to establish procedures for the reasonable and compassionate [TPR] where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption . . . ." S.C. Code Ann. § 63-7-2510 (2010). In a TPR case, the best interest of the child is the paramount consideration. *S.C. Dep't of Soc. Servs. v. Smith*, 343 S.C. 129, 133, 538 S.E.2d 285, 287 (Ct. App. 2000). "The interest[] of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 63-7-2620 (2010). "Appellate courts must consider the child's perspective, and not the parent's, as the primary concern when determining whether TPR is appropriate." *S.C. Dep't of Soc. Servs. v. Sarah W.*, Op. No. 27235 (S.C. Sup. Ct. filed Mar. 20, 2013) (Shearouse Adv. Sh. No. 14 at 37).

"The termination of the legal relationship between natural parents and a child presents one of the most difficult issues this Court is called upon to decide." *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 626, 614 S.E.2d 642, 645 (2005). "We exercise great caution in reviewing termination proceedings and will conclude termination is proper only when the evidence clearly and convincingly mandates such a result." *Id.*

The Supreme Court of South Carolina has considered bonding when determining whether TPR is in a child's best interest. In *Charleston County Department of Social Services v. King*, the court held TPR was in the child's best interest because he had bonded with his foster family and did not remember his biological family. 369 S.C. 96, 104-06, 631 S.E.2d 239, 243-44 (2006). It determined the family court correctly concluded TPR was in the child's best interest even though his older siblings had reunited with their mother. *Id.* at 99, 106, 631 S.E.2d at 240, 244.

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[1] Mother also contends the family court erred in finding clear and convincing evidence of the statutory grounds for TPR. We decline to address this issue because our determination of the best interest issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

Additionally, this court has considered future stability when determining whether TPR is in a child's best interest. In *Charleston County Department of Social Services v. Jackson*, this court reversed a family court order terminating the parental rights of an incarcerated father. 368 S.C. 87, 105, 627 S.E.2d 765, 775 (Ct. App. 2006). We noted:

> Child's current foster parents wish to remain as foster parents and, as of the TPR hearing, have not expressed an interest in adopting him. Thus, terminating Father's parental rights will not ensure future stability for Child. Moreover, keeping Father's parental rights intact will not disrupt Child's current living situation. Father does not gain custody of Child simply because [DSS] failed to terminate his parental rights at this time. Rather, by not terminating Father's parental rights, Father merely maintains his right to connect with Child as well as his obligation to support Child, emotionally, financially, or otherwise.

Id. at 102-03, 627 S.E.2d at 774. We held TPR was not in the child's best interest even though the father's relationship with the child was "faint." *Id*. at 104, 627 S.E.2d at 775. This was in part due to Father's extraordinary efforts to locate and maintain a relationship with the child. *Id*.

Likewise, in *South Carolina Department of Social Services v. Janice C.*, this court held TPR was not in the children's best interest in part because the children enjoyed interacting with their mother and no pre-adoptive home had been identified. 383 S.C. 221, 229-30, 678 S.E.2d 463, 468 (Ct. App. 2009). We reversed the family court's termination of the mother's parental rights even though testimony suggested the mother would never be able to adequately parent her children due to mental disabilities. *Id*. at 229-31, 678 S.E.2d at 468. In doing so, we noted that in the absence of a pre-adoptive home, "TPR will not provide future stability for [the c]hildren." *Id*. at 230, 678 S.E.2d at 468.

We find a valuable bond exists between Child and Mother. During the TPR hearing, both of Child's GALs and Child's therapist testified Child misses Mother and Child has a significant bond with Mother. The DSS caseworker testified Child frequently asked when he would see Mother again. Furthermore, Child's therapist

testified Mother's contact with Child during visitation was appropriate. During oral argument, DSS admitted Child is bonded with Mother. When viewed from Child's perspective, it is undisputed a significant bond exists.

Additionally, the evidence suggests Child is not a viable candidate for adoption. *See* S.C. Code Ann. § 63-7-2510 (2010) ("The purpose of [the TPR statute] is to establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption…."). At the TPR hearing, Child's therapist testified she had not discussed adoption with Child because she was trying to get him stabilized, and she was not sure how he would process it. Likewise, the GAL testified she did not believe Child was ready to be adopted. Child is currently nine years old and has several emotional and behavioral issues, including ADHD, oppositional defiant disorder, physical and verbal aggression, neglect issues, self-destructive behaviors, anxiety, and signs of depression. At the time of the TPR hearing, Child was in a group home, and Mother testified he had lived in five foster homes during the first year he was in foster care. During oral argument, DSS indicated Child is currently in a therapeutic foster home. DSS has not identified a pre-adoptive home for Child, and his age coupled with his emotional and behavioral issues suggest a suitable and willing adoptive home may not exist. Accordingly, it is unclear how TPR will ensure future stability for Child.

Based on undisputed evidence of Child's bond with Mother, the evidence that suggests he is not a viable candidate for adoption, and the fact that DSS has not identified a pre-adoptive home for Child, we hold the family court erred in finding TPR was in Child's best interest. Although we are cognizant of policy considerations that seek to prevent a child from languishing in foster care, we feel this case is distinguishable due to Child's strong bond with Mother and DSS's failure to identify a pre-adoptive home. We do not believe the existence of a bond alone is significant enough to preserve parental rights. Nor do we believe DSS must identify a pre-adoptive home prior to terminating parental rights. Our determination is based solely on the unique facts presented in this case, and we view this decision from the perspective of Child and not Mother. If Child was currently thriving in a pre-adoptive home, or if the evidence suggested Child did not want to see Mother or was not bonded with Mother, our decision might be different.

Accordingly, we reverse the decision of the family court and remand this case for a permanency planning hearing pursuant to section 63-7-1700 of the South Carolina Code (2010 & Supp. 2012). A permanency planning hearing will allow all parties and the GAL an opportunity to update the family court on what has occurred since the TPR hearing. We make no finding as to whether reunification with Mother is in Child's best interest. We urge the family court to conduct a hearing as expeditiously as possible, including presentation of a new GAL report and an updated home evaluation of Mother's residence. If necessary, the family court may, *inter alia*, change custody, modify visitation, and approve a treatment plan offering additional services to Mother.

CONCLUSION

Based on the foregoing, we reverse the family court's order terminating Mother's parental rights and remand for a permanency planning hearing.

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brian Pulliam, Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Diturski, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, David Osborne, Celeste Arrowwood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, Eric Wilson, Don and Debbie Neff, and Marianna Junda, Respondents.

v.

Travelers Indemnity Company, M.U.I. Carolina Corporation, Kensington Place Owners Association, Inc., Regent Carolina Corporation, and Regent Corporation,

Of whom Travelers Indemnity Company is the Appellant.

Appellate Case No. 2012-211939

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5130
Heard April 3, 2013 – Filed May 8, 2013

AFFIRMED IN PART AND REVERSED IN PART

William Pearce Davis and Susan Drake DuBose, both of Baker Ravenel & Bender, LLP, of Columbia, for Appellant.
W. Jefferson Leath, Jr. and Michael S. Seekings, both of Leath Bouch & Seekings, LLP, of Charleston, for Respondents.

KONDUROS, J.: Travelers Indemnity Company (Travelers) appeals the circuit court's grant of summary judgment in favor of Respondents in this declaratory judgment action. The circuit court determined the Directors and Officers Endorsement (D&O Endorsement) issued by Travelers covered certain allegations against Kensington Place Property Owners Association (KPOA). We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

M.U.I. Carolina Corporation, Regent Carolina Corporation, and Regent Corporation (collectively Developers) purchased property from the PTL[1] bankruptcy estate in 1990. Developers completed construction and made repairs to the property in 1994 and 1995 and then began marketing condominium units as the Kensington Place Horizontal Property Regime (Kensington Place). Developers created KPOA to manage Kensington Place. From its inception in 1996 until April 2007, a three-member board comprised of Developers' employees or designates operated KPOA. The common elements of Kensington Place were transferred to the unit owners in April 2007, and individual unit owners became a part of KPOA's board.

In 2008, Respondents, individual unit owners in Kensington Place, filed an underlying lawsuit alleging breaches of fiduciary duty, negligence, and breach of the warranty of habitability against M.U.I. and Regent as developers of Kensington Developers. Respondents also sued KPOA for breaches of fiduciary duty and negligence in failing to (1) adequately inspect, repair, and maintain the common

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[1] PTL was an evangelistic ministry which began as a television program and eventually grew to include a theme park in Fort Mill, South Carolina. Charles H. Lippy, *PTL Club* (May 1, 2013), http://www.scencyclopedia.org/ptlclub.htm.

elements, (2) inform unit owners of the conflict of interest in a developer-controlled POA, and (3) establish a reserve fund to pay for repairs.

Respondents then filed this declaratory judgment action seeking a determination of whether the policy issued to KPOA by Travelers covered the claims alleged against KPOA in the underlying lawsuit. The parties agreed the allegations were based on "wrongful acts" as contemplated by the D&O Endorsement. However, Travelers filed a motion for summary judgment arguing, inter alia, Respondents' claims are for "property damage" and punitive damages, both of which are excluded under the D&O Endorsement. The Respondents filed a summary judgment motion arguing the only interpretation of the policy is that their claims were not excluded because they claimed economic loss based on breaches of duty and negligence, not "property damage."

As to KPOA, Respondents specifically alleged in the underlying complaint[2]:

> 19. The Defendant POA had the legal duty, as a fiduciary from 1996 until April 24, 2007, to insure that the Common Elements were properly inspected, repaired, and maintained, yet the POA, Inc., being controlled by the developer, failed in these duties, placed the interest of the developer ahead of the owners, including these Plaintiffs, and therefore breached its fiduciary duties. Additionally, the Defendant POA had the duty to create and fund an adequate fund of reserves for the normal replacement of the components of the Common Elements, yet, in placing the interest of the defendant Developers ahead of the owners, the POA failed to develop and fund and adequate reserve fund.
>
> 20. As a result of the aforementioned breaches of fiduciary duty, the Defendants are liable to the homeowners for all damages proximately flowing from

[2] In determining whether Respondents' claims were covered, the circuit court reviewed the Fifth Amended Complaint. For the sake of brevity, we refer to this simply as the complaint.

the breach, including damages for the continued deterioration of the common elements.

. . . .

26. That the actions of the POA were negligent, reckless, willful, and wanton, in one or more of the following of the following particulars, to wit:

a. In failing to perform adequate inspections of the Common Elements from 1996-2007;

b. In failing to retain experts to assess the conditions of the building from 1996-2007;

c. In failing to maintain the Common Elements to an adequate state of repair from 1996-2007;

d. In failing to repair the Common Elements of the building from 1996-2007;

e. In negligently placing the Developers' interests ahead of those of the individual property owners, so as to place the entire financial burden of deferred maintenance upon the property owners, including these Plaintiffs, while acting in the capacity of a fiduciary;

f. In failing to establish and fund adequate reserve funds;

g. In failing to establish an adequate depreciation schedule and adequately fund known building component repair and replacement; and

h. In failing to advise the homeowners of the various conflicts of interest inherent in a developer-controlled POA, and in failing to provide for independent representation of non-developer homeowners both

> with respect to POA actions, and also regarding property management and maintenance.
>
> 27. As a direct and proximate result of the negligence, recklessness, willfulness and wantonness of the Defendants as set out above, the Plaintiffs Homeowners will be required to expend considerable sums for the repair and refit of this property, all to their damage. WHEREFORE, the Plaintiffs pray that they have judgment against the Defendants as follows:
>
> 1. Actual damages.
>
> 2. Actual and punitive damages on their cause of action for negligence and breach of fiduciary duty.
>
> 3. Such other and further relief as this Court deems just and proper.

The circuit court granted Respondents' motion and denied Travelers' motion. It found the complaint alleged KPOA had breached certain fiduciary duties that related to the initial design and construction defects. The circuit court reasoned allegations relating to the initial defective design or construction would not be considered "property damage" under *Crossman Communities of North Carolina, Inc v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and would not be excluded from coverage under the policy. The circuit court further reasoned "property damage" did include damages to other property flowing from the defective design or construction and such allegations would be excepted from coverage under the "property damage" exclusion in section (I)(D)(1) of the D&O Endorsement. The order concluded "damages for correction of initial defective construction are covered. Other property damage caused by such defective construction is not." This appeal followed.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co., v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009).

"When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Id.* "Where the action presents a question of law . . . this Court's review is plenary and without deference to the trial court." *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011).

LAW/ANALYSIS

I. Property Damage Exclusion in D&O Endorsement[3]

Travelers asserts the circuit court erred in relying on *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) to determine what constituted "property damage" within the D&O Endorsement exclusion. We agree in part and disagree in part.

The D&O Endorsement, which covers "wrongful acts"[4] states the following:

> (I.)(D.) The insurance provided by this endorsement does not apply to:
>
> (1) "Bodily injury," "property damage," "personal injury," or "advertising injury."
>
> (2) Punitive or exemplary damages.
>
> (V.)(F.) "Property Damage" means:
>
> Physical injury to tangible property, including all resulting use of that property;

[3] Because this issue is a threshold question, we will address it first.

[4] "'Wrongful act' means any actual or alleged error, mistake, omission or neglect or breach of duty by any insured."

> Loss of use of tangible property that is not physically injured; or
>
> Diminution of property value.

In *Crossman*, the Supreme Court of South Carolina addressed allegations of initial construction defects and whether they were covered "property damage" within the context of a commercial general liability (CGL) policy. As in this case, the policy in *Crossman* defined "property damage" as "physical injury to tangible property." *Id.* at 48, 717 S.E.2d at 593. The court stated:

> With respect to the first quoted definition of "property damage," the critical phrase is "physical injury," which suggests the property was not defective at the outset, but rather was initially proper and injured thereafter. We emphasize the difference between a claim for the costs of repairing or removing defective work, which is not a claim for "property damage," and a claim for the costs of repairing damage caused by the defective work, which is a claim for "property damage."

Id. at 49, 717 S.E.2d at 593 (citations and quotation marks omitted).

The case *sub judice* required the circuit court to consider allegations relating to initial defects and further resulting damage, although under a different type of policy. In addressing those issues, it was not improper for the circuit court to look to *Crossman* for guidance.[5] Nevertheless, we conclude the application of the

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[5] Travelers relies in part on *Eastpointe Condominium I Ass'n v. Travelers Casualty & Surety Co. of America*, 379 Fed. Appx. 906 (11th Cir. 2010) (applying Florida law) to support its position. In *Eastpointe*, the court was considering a declaratory judgment action regarding defense of claims alleged against the condominium association. *Id.* at 906. A unit owner claimed the association failed to adequately maintain and repair the roof and air conditioning system of the condominium building before, between, and after two hurricanes, resulting in water intrusion, mold, and other damages. *Id.* at 906-07. The plaintiff's claims were for negligence, breach of fiduciary duty, and breach of contract. *Id.* The court determined an exclusion for claims "arising out of property damage" prevented

principles set forth in *Crossman* do not correlate adequately to the facts and the policy in this case to support the circuit court's conclusion in its entirety.

In *Crossman*, the Court concluded the cost to repair or replace initial design or construction defects was not covered under the CGL policy as "property damage." The circuit court here also concluded the cost to repair and replace construction defects did not constitute "physical injury to tangible property," thus leading to the contrary result that coverage was *not* excluded. However, reviewing the allegations of the complaint and the D&O Endorsement, we arrive at two ineluctable conclusions. First, Respondents do not contend KPOA completed construction or made repairs to Kensington Place in 1994 and 1995 as KPOA did not exist at that time. Consequently, no reasonable interpretation of the allegations in the complaint can support a finding that KPOA was being sued for initial construction or repair defects. Second, any further deterioration of the faulty construction or repairs from 1997 to 2006 that could arguably be attributed to KPOA's inaction would at most constitute diminution in the value of Respondents' property — a harm specifically included in the definition of "property damage." Therefore, we conclude the circuit court erred in determining damages for correction of defective construction are covered under the D&O Endorsement.[6]

However, our analysis cannot end there. Respondents assert two more allegations not addressed by *Crossman* or *Eastpointe*. They allege KPOA failed to establish a reserve fund and breached a fiduciary duty to warn of the inherent conflict in developer-controlled associations. The duty to establish a reserve fund, while related to the property damage, did not result in physical damage to tangible property as required by the policy. The failure to establish a reserve fund resulted in Respondents having to expend more from their own pockets to make the repairs

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coverage for the claims even though the claims were grounded in the association's breach of its fiduciary duty. *Id.* at 907-08. The circuit court's analysis in this case is not inconsistent with *Eastpointe*. Assuming the unit in *Eastpointe* was not defective prior to the water intrusion, the plaintiff's claim was to repair a physical injury to her tangible property – an injury that would also be considered "property damage" under *Crossman*.

[6] Because this analysis disposes of the question of coverage for construction defects, we decline to address Travelers's remaining arguments relating to that issue.

than they might have otherwise had to expend — economic damage. *See Builders Mut. Ins. Co. v. Lacey Constr. Co.* No. CIV.A. 3:11-cv-400-CMC, 2012 WL 1032539, at *9 (D.S.C. Mar. 7, 2012) ("To the extent damages sought in the [underlying action] are for inadequate reserves or failure to record a deed, they do not involve physical injury and, consequently, cannot satisfy the definition of property damage.").[7] Likewise, allegations that KPOA breached its fiduciary duty by failing to warn of conflicts of interest in a developer-controlled POA do not allege physical injury to tangible property constituting property damage. Of course, the burden to prove damages for the covered causes of action will be on Respondents at trial.

II. Additional Policy Exclusions

Travelers argues several other D&O Endorsement exclusions prevent coverage for Respondents' claims. Because we have determined the allegations for failure to establish a reserve fund and warn of conflicts of interest are not excluded as "property damage," we will address each exclusion in turn as it relates to those claims.

First, we recognize the circuit court did not explicitly rule on these additional exclusionary provisions. However, these issues were raised in Travelers' Memo In Support of Summary Judgment and in its Motion to Alter or Amend the Judgment. Consequently, they are preserved for appellate review. *See Pye v. Estate of Fox*, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510-11 (2006) (indicating once an issue has been raised to the trial court and is still not ruled upon after such a request in a Rule 59(e) motion, the issue is sufficiently preserved for appellate review).

Section I(D)(3)(b) of the D&O Endorsement excludes coverage for damages resulting from "[a]ny dishonest, fraudulent, criminal or malicious act, error or omission committed by or with the knowledge of any insured." In this case, Respondents allege KPOA "placed the interest of the developer ahead of the owners" when it failed to properly inspect or maintain the property or establish a reserve fund. While the act of placing the developer's interests before the owners may constitute a breach of fiduciary duty, it does not allege any dishonest,

[7] *Lacey* was considering "property damage" in a CGL policy in which the definition of "property damage" included physical damage to tangible property. *Id.* at *6.

fraudulent, criminal, or malicious action. Therefore, this provision does not bar coverage for the remaining claims.

Section I(D)(3)(f) excludes coverage for damages resulting from "[t]he failure of any insured to enforce the rights of the Named Insured against the builder, sponsor or developer of the property designated in the Declaration." Again, this exclusion was brought to the circuit court's attention but was not specifically ruled upon. Travelers contends this exclusion applies because, in essence, Respondents' complaint alleges KPOA failed to enforce the owners' rights against the developers by putting the developers' interests ahead of the owners' interests. We disagree. The complaint does not allege KPOA failed to enforce any rights or compel the developer to perform a particular action. The complaint alleges a failure establish the reserve fund and to warn of conflicts of interest. Consequently, this argument is without merit.

Finally, section I(D)(3)(i) excludes coverage for damages resulting from "[a]ny claim or 'suit' made by any insured against another insured." Travelers argues seven of Respondents who have in the past served as boardmembers of KPOA, are insureds under the D&O Endorsement and cannot participate in the underlying lawsuit. The D&O Endorsement defines who is an insured.

> WHO IS AN INSURED
>
> B. Your directors, trustees or officers are also insureds, but only while acting within the scope of their duties for you. This includes:
>
> 1. Those who currently are directors, trustees or officers;
>
> 2. Those who were directors, trustees or officers when the "wrongful act" took place;
>
> 3. Those who become directors, trustees or officers after the effective date of the insurance, but only for subsequent "wrongful acts."

> C. Your employees and members are insureds, but only while acting at your direction and within the scope of their duties for you.

The wrongful acts alleged against KPOA occurred from 1997-2006. According to the Record on Appeal, none of the members were on the board at the time the alleged wrongful acts took place.[8] Therefore, this argument is without merit.

III. Punitive Damages

Travelers argues the circuit court erred in failing to rule on the issue of coverage for punitive damages under the D&O Endorsement. We agree.

The policy clearly excludes punitive damages in Section I(D)(2). Because punitive damages have been pled, the issue will be a part of the underlying trial and should be addressed so as to avoid any potential conflict regarding coverage for such exemplary damages. *See Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (addressing an issue in the interest of judicial economy). We exercise our discretion to rule on this issue and conclude the D&O Endorsement does not cover punitive damages.

CONCLUSION

Based on all of the foregoing, we conclude the D&O Endorsement provides coverage for Respondents' allegations against KPOA for breach of fiduciary duty in failing to establish a reserve fund and warn of the potential conflicts in a developer-controlled POA. We find the circuit court properly held claims alleging damage to other property as a result of defective design or construction were excluded as "property damage." We further conclude the circuit court erred in finding the D&O Endorsement provided coverage for correction of initial defective

[8] Deborah Pulliam - April 24, 2007- Feb. 2008; Elena Manfredini - two months in 2008; Vincent Dionna - 2007; Helen Cook - May 2007-Feb. 2008; Mikel Marcuse- July 2007-Feb. 2008; Kathleen Kramer - Nov. 2007-Feb. 2008, April 2008-present; David Osborne - Dec. 2007-April 2008.

construction. Finally, we hold the D&O Endorsement does not cover claims for punitive damages. Therefore the ruling of the circuit court is

AFFIRMED IN PART and REVERSED IN PART.

HUFF and WILLIAMS, JJ., concur.