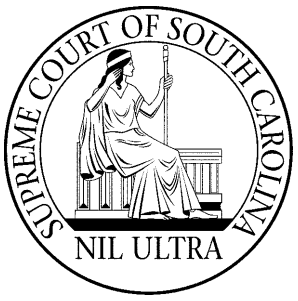

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
July 7, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5815-Kenneth L. Barr v. Darlington Cty. School District	Pending
5816-State v. John Ernest Perry, Jr.	Pending
5818-Opternative v. S.C. Board of Medical Examiners	Pending
5819-In Re: Venture Engineering	Denied 06/25/21
5820-State v. Eric Dale Morgan	Denied 06/25/21
5822-Vickie Rummage v. BGF Industries	Pending
5823-Stacy Singletary v. Kelvin Shuler	Pending
5824-State v. Robert Lee Miller	Pending
2021-UP-013-Federal National Mortgage Assn. v. Richard C. Ivey	Pending
2021-UP-045-Kenneth Davis v. Cole Dunn	Pending
2021-UP-099-Boyd Rashaeen Evans v. State	Denied 06/25/21
2021-UP-112-John Cross and Steven Cross v. Gregory Weaver	Pending
2021-UP-121-State v. George Cleveland, III	Pending
2021-UP-125-Rico Dorsey v. Allwaste Services, Inc.	Pending
2021-UP-129-State v. Warren Tremaine Duvant	Pending
2021-UP-141-Evelyn Hemphill v. Kenneth Hemphill	Pending
2021-UP-146-State v. Santonio T. Williams	Pending
2021-UP-147-Gavin V. Jones v. State	Pending
2021-UP-151-Elvia Stoppiello v. Williams Turner	Pending

2021-UP-158-Nathan Albertson v. Amanda Byfield	Pending
2021-UP-161-Wells Fargo Bank, N.A. v. Albert Sanders (2)	Pending
2021-UP-162-First-Citizens Bank v. Linda Faulkner	Pending
2021-UP-163-In the interest of Channon P.	Pending
2021-UP-166-Thelma R. Garrick v. Dr. George H. Khoury	Pending
2021-UP-171-Anderson Brothers Bank v. Dazarhea Monique Parson (3)	Pending
2021-UP-176-State Ethics Commission v. Charles Houston	Pending
2021-UP-180-State v. Roy Gene Sutherland	Pending
2021-UP-182-State v. William Lee Carpenter	Denied 06/25/21
2021-UP-191-Quality Lawn Care v. Coogler Construction	Pending
2021-UP-196-State v. General T. Little	Pending
2021-UP-204-State v. Allen C. Williams, Jr.	Denied 06/29/21
2021-UP-206-Wilmington Savings Fund v. Leroy Hooks, II	Pending
2021-UP-220-State v. Johnnie L. McKnight	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5691-Eugene Walpole v. Charleston Cty.	Pending
5725-In the matter of Francis A. Oxner	Pending
5726-Chisolm Frampton v. SCDNR	Pending
5731-Jericho State v. Chicago Title Insurance	Pending

5735-Cathy J. Swicegood v. Polly A. Thompson	Pending
5736-Polly Thompson v. Cathy Swicegood	Pending
5749-State v. Steven L. Barnes	Pending
5751-State v. Michael Frasier, Jr.	Pending
5755-Stephen A. Connelly v. The Main Street America Group	Pending
5758-State v. Deshanndon M. Franks	Pending
5759-Andrew Young v. Mark Keel	Pending
5764-State Farm v. Myra Windham	Pending
5769-Fairfield Waverly v. Dorchester County Assessor	Pending
5773-State v. Mack Seal Washington	Pending
5783-SC Dep't of Commerce, Division of Public Railways v. Clemson	Pending
5784-Arrowpointe Federal Credit Union v. Jimmy Eugene Bailey	Pending
5790-James Provins v. Spirit Construction Services, Inc.	Pending
5792-Robert Berry v. Scott Spang	Pending
5797-In the interest of Christopher H.	Pending
5798-Christopher Lampley v. Major Hulon	Pending
5800-State v. Tappia Deangelo Green	Pending
5802-Meritage Asset Management, Inc. v. Freeland Construction	Pending
5805-State v. Charles Tillman	Pending
5806-State v. Ontavious D. Plumer	Pending
5807-Road LLC and Pinckney Point, LLC v. Beaufort County	Pending

5808-State v. Darell O. Boston (2)	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2020-UP-148-State v. Ronald Hakeem Mack	Pending
2020-UP-178-State v. Christian A. Himes	Pending
2020-UP-196-State v. Arthur J. Bowers	Pending
2020-UP-198-State v. Sidney Moorer	Pending
2020-UP-219-State v. Johnathan Green	Pending
2020-UP-236-State v. Shawn R. Bisnauth	Pending
2020-UP-241-State v. Mimi Joe Marshall	Pending
2020-UP-244-State v. Javon Dion Gibbs	Pending
2020-UP-245-State v. Charles Brandon Rampey	Pending
2020-UP-269-State v. John McCarty	Pending
2020-UP-271-State v. Stewart Jerome Middleton	Pending
2020-UP-272-State v. Heyward L. Martin, III	Pending
2020-UP-275-Randall Seels v. Joe Smalls	Pending
2020-UP-290-State v. Phillip Wesley Walker	Pending
2020-UP-307-State v. Craig C. Busse	Pending
2020-UP-310-Christine Crabtree v. Donald Crabtree (3)	Pending
2020-UP-323-John Dalen v. State	Pending
2020-UP-336-Amy Kovach v. Joshua Whitley	Pending

2021-UP-009-Paul Branco v. Hull Storey Retail	Pending
2021-UP-029-State v. Tyrone A. Wallace, Jr.	Pending
2021-UP-032-Reginald Swain v. Daniel Allen Bollinger	Pending
2021-UP-156-Henry Pressley v. Eric Sanders	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William E. Hopkins, Jr., Respondent.

Appellate Case No. 2021-000261

Opinion No. 28042
Submitted June 17, 2021 – Filed July 7, 2021

DISBARRED

Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel William C. Campbell, both of Columbia, for the Office of Disciplinary Counsel.

Joseph Preston Strom, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to any sanction set forth in Rule 7(b), RLDE. We accept the Agreement and disbar Respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

I.

Respondent admits he transferred money from his trust account to cover payroll and operating expenses for his law firm from November 30, 2017, to July 13, 2018, in the total amount of $95,981.46. Respondent acknowledges he was using client money to keep his law firm afloat and states he always intended to repay the money. Respondent began to repay the trust account on June 26, 2018, and

completely repaid the account on September 30, 2018.[1] The trust account has been reconciled, and all monies are accounted for. Respondent has turned over all accounting and bookkeeping functions to a licensed Certified Public Accountant and has given all trust account responsibilities to another lawyer in the firm. Respondent has also completed the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School.

Respondent admits his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (safekeeping property) and Rule 8.4 (misconduct). Respondent further admits he failed to comply with Rule 417, SCACR (financial recordkeeping). Respondent admits his conduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (misconduct).

II.

We accept the Agreement and disbar Respondent from the practice of law in this state. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and he shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Within thirty days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct.

DISBARRED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur. JAMES, J., not participating.

[1] Respondent's total repayment is in the amount of $96,945.07. The difference of $963.61 is for payment made to Medicare for interest on a lien which should have been paid out of operating funds rather than trust funds.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Daniel Edward Johnson, Respondent.

Appellate Case No. 2021-000262

Opinion No. 28043
Submitted June 17, 2021 – Filed July 7, 2021

DISBARRED

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

Daniel Edward Johnson, of Blythewood, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to disbarment, and agrees to pay costs. We accept the Agreement and disbar Respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

I.

On September 18, 2018, Respondent was indicted by a federal grand jury on twenty-six counts of wire fraud, mail fraud, conspiracy, and theft of federal funds. In addition, on September 20, 2018, Respondent was indicted by the State Grand Jury on three counts of misconduct in office and embezzlement of public funds. At the time of these indictments, Respondent was the Solicitor for the Fifth Judicial

Circuit, and the charges stem from Respondent misusing office funds for personal expenses.

On February 26, 2019, Respondent pleaded guilty to one count of wire fraud in federal court. The remaining federal charges were dismissed. On June 4, 2019, Respondent was sentenced to one year and a day in federal prison to be followed by supervised release for three years. Respondent was ordered to pay $19,270.80 in restitution to the Kershaw County Solicitor's Office. Respondent was released from federal prison in May 2020. Respondent's state criminal charges are still pending. Respondent has pleaded not guilty to all of the pending state charges.

Respondent admits that his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and Rule 8.4(d) (conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent also admits his conduct constitutes grounds for discipline under Rule 7(a)(1), Rule 413, SCACR (violation of the Rules of Professional Conduct).

In the Agreement, Respondent consents to disbarment and requests this sanction be imposed retroactively. Respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (Commission) and that he will complete the Legal Ethics and Practice Program Ethics School prior to seeking reinstatement.

II.

We accept the Agreement and disbar Respondent from the practice of law in this state. We decline to impose this sanction retroactively. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and he shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Within thirty days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Prior to seeking readmission, Respondent shall complete the Legal Ethics and Practice Program

Ethics School and demonstrate that he has completed all conditions of his federal criminal sentence and any state criminal sentence, including restitution. *See* Rule 33(f)(10), RLDE, Rule 413 SCACR.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Suzanna Rachel MacLean, Respondent.

Appellate Case No. 2021-000292

Opinion No. 28044
Submitted June 17, 2021 – Filed July 7, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel Ericka M. Williams, both of Columbia, for the Office of Disciplinary Counsel.

Suzanna Rachel MacLean, of San Antonio, Texas, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of any sanction contained in Rule 7(b), RLDE, Rule 413, SCACR, and agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (Commission) in investigating and prosecuting this matter. We accept the Agreement and suspend Respondent from the practice of law in this state for three years, retroactive to the date of her interim suspension. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

Following a traffic stop on July 11, 2018, Respondent was arrested and charged with four counts of possession of a controlled substance. Items located in Respondent's vehicle included a plastic bag with 5 suspected ecstasy pills; a plastic bag with five white pills believed to be hydrocodone pills; a plastic bag with an amount of suspected "molly"; and two plastic bags containing approximately 8 grams of an item suspected to be cocaine. Also located in the vehicle was a marijuana pipe containing a small amount of marijuana and a white pill bottle containing suspected marijuana. The charges were dismissed by the Solicitor's office on June 12, 2019, due to concerns regarding the legality and constitutionality of the stop and search.

Respondent failed to notify the Commission in writing within fifteen days of being arrested and charged. Although the charges ultimately resulted in dismissal, Respondent admits her conduct violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 8.3(a) (requiring a lawyer to report being charged with a serious crime within fifteen days); Rule 8.4(b) (criminal act that reflects adversely on her fitness as a lawyer); and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Matter B

Respondent practiced bankruptcy law in the United States Bankruptcy Court for the District of South Carolina. The United States Trustee Program, a component of the Department of Justice, supervises the administration of bankruptcy cases and private trustees under Title 11 of the United States Code. ODC received a complaint from an Assistant United States Trustee (Trustee) alleging that Respondent had failed to respond to attempts to contact her from several clients, the Trustee's office, and the Bankruptcy Court. The Trustee filed motions pursuant to 11 U.S.C. §§ 526(c), 329(b), and 105(a), seeking to terminate Respondent as counsel in 18 cases and to require that Respondent forfeit any remaining attorney's fees to be paid to her under the debtors' confirmed Chapter 13 plans. Respondent failed to respond to any of the motions, failed to attend any of the hearings, and failed to contact the Trustee's office. Respondent was removed from all cases pending in the Bankruptcy Court by orders that either terminated her services or

substituted other counsel. Four days after the Trustee's complaint was submitted to ODC, Respondent was placed on interim suspension. *In re MacLean*, 424 S.C. 279, 818 S.E.2d 214 (2018).

Respondent admits her conduct violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.16(a) (withdrawing from representation); Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); 8.4(a) (violation of the Rules of Professional Conduct); and 8.4(e) (conduct prejudicial to the administration of justice).

II.

Respondent admits her conduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules of Professional Conduct) and Rule 7(a)(5) (conduct tending to pollute the administration of justice, bring the courts or legal profession into disrepute, or demonstrate an unfitness to practice law).

In the Agreement, Respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (Commission) in investigating and prosecuting this matter. She also requests that any sanction be made retroactive to the date of her interim suspension, and ODC does not oppose that request. Additionally, Respondent agrees to cooperate with a referral to Lawyers Helping Lawyers for an alcohol and drug abuse assessment and to cooperate with any treatment deemed necessary as a result of the assessment. Respondent further agrees to provide quarterly reports to the Commission from any treatment providers recommended by Lawyers Helping Lawyers following the assessment.

III.

We accept the Agreement and suspend Respondent from the practice of law in this state for a period of three years, retroactive to August 24, 2018, the date of Respondent's interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR. Within thirty days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Also within thirty days of

the date of this opinion, Respondent shall cooperate with Lawyers Helping Lawyers and undergo a drug and alcohol abuse assessment. Upon seeking reinstatement to the practice of law, Respondent shall demonstrate she has cooperated with any and all treatment recommended following the drug and alcohol abuse assessment and that she has submitted all quarterly reports to the Commission on Lawyer Conduct.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jon Smart, Appellant.

Appellate Case No. 2017-001754

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

Opinion No. 5830
Submitted May 14, 2020 – Filed July 7, 2021

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Sherrie Butterbaugh, and Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Ernest Adolphus Finney, III, of Sumter, all for Respondent.

WILLIAMS, J.: In this criminal appeal, Jon Smart appeals the trial court's sentence of life imprisonment without the possibility of parole (LWOP) for an offense committed as a juvenile following a resentencing hearing pursuant to *Aiken*

v. Byars.[1] Smart argues the trial court erred in its consideration of the factors required by *Miller v. Alabama*[2] and *Byars*. We affirm.

FACTS/PROCEDURAL HISTORY

On August 12, 1999, Smart and Stephen Hutto murdered Tracey Pack (Victim). At the time of the murder, Smart—who was sixteen years old—and Hutto were in the custody of the Department of Juvenile Justice (DJJ) at the Rimini Marine Institute (Rimini) in Clarendon. Victim's family had a farm with chicken houses (the Farm) near Rimini, and the family allowed juveniles at Rimini to work on the Farm. Smart and Hutto regularly worked with Victim but would occasionally break machinery in the chicken houses in order to sneak off and huff gasoline.

Two days before the murder, a juvenile at Rimini overheard a conversation between Smart and Hutto. He heard Smart tell Hutto that he did not think Hutto had "the guts to do it" and that Smart "would do it if Hutto" could not. He also heard Smart and Hutto remark that "in a couple of days[,] there would be no more chicken house." Another juvenile observed a second conversation between Smart and Hutto in which Smart said he did not think Hutto had "the guts to do it." He also heard a conversation between Victim, Smart, and Hutto wherein Smart and Hutto asked what would happen if they killed Victim and took his truck.

Smart testified that two days before the murder, while he and Hutto were huffing gasoline, Hutto produced a box cutter and suggested they cut Victim's throat and take his truck. Smart stated he believed Hutto was joking, but the State provided a statement from Hutto's cellmate regarding the same conversation. According to the cellmate, Hutto said they were going to kill Victim with the box cutter but abandoned the plan because Victim's family arrived. Hutto also told the cellmate that he and Smart wanted to see what it was like to kill someone.

On the day of the murder, Smart and Hutto were working with Victim in the chicken houses. While Victim was on a ladder attempting to fix machinery that Smart and Hutto broke, Smart inhaled from a gasoline-soaked rag, and Hutto gave Smart a four-foot metal pipe. Hutto encouraged Smart to hit Victim, and Smart struck Victim with the pipe and beat him to death. Smart tried to wash away Victim's blood, and he and Hutto wrapped Victim in a tarp and hid Victim's body and the pipe in a nearby wood line.

---

[1] 410 S.C. 534, 765 S.E.2d 572 (2014).
[2] 567 U.S. 460 (2012).

Smart and Hutto took Victim's truck and drove to Hutto's home in Bamberg where they changed clothes, consumed alcohol, and obtained a shotgun. Smart and Hutto drove to a store, and Smart entered and robbed it with the shotgun while Hutto stayed in the truck. Afterwards, they purchased marijuana and drove to Myrtle Beach. Police officers stopped Smart and Hutto for a traffic violation and learned the truck was stolen after checking the truck's license plate. Hutto and Smart fled and led officers on a high-speed chase for thirty miles. During the chase, Smart fired the shotgun at the pursuing officers. Hutto eventually lost control of and wrecked the truck, and Smart fled into nearby trees. Officers found and arrested Smart the following morning.

Initially, Smart told officers he struck Victim after Hutto and Victim started arguing and shoving each other. However, while Smart and Hutto were in custody, Smart sent Hutto two letters: one urging him to "stick to this story" and another describing the murder but adding that he was hallucinating when he hit Victim. Smart later admitted he fabricated this story because it sounded good. At his initial sentencing hearing, Smart admitted to the facts of Victim's murder and his and Hutto's subsequent actions as described above.

On May 25, 2001, Smart pled guilty to Victim's murder, armed robbery, grand larceny of a motor vehicle, criminal conspiracy, and escape and promised to testify against Hutto in exchange for the State declining to seek the death penalty. On August 9, 2001, the trial court held a sentencing hearing for Smart and Hutto. Following the State's presentation, Smart's family addressed the court. They told the court Smart had an issue with drugs and inhaling substances but they did not have the means to get help. They also said Smart was in DJJ's custody because after Smart burglarized their neighbors' house, they convinced the neighbors to press charges with the hope that Smart would get help while in DJJ's custody. The trial court issued an LWOP sentence for Smart on the murder charge and ordered it to run concurrently with his sentences for the other charges.

On May 26, 2016, Smart moved for reconsideration of his sentence pursuant to *Byars*. On June 7, 2016, our supreme court granted Smart's motion. *Smart v. State*, 416 S.C. 583, 787 S.E.2d 845 (2016).

On May 24, 2017, the trial court held a resentencing hearing (Resentencing Hearing). The court heard arguments by Smart and the State, and it heard testimony from multiple witnesses, including Smart's sister (Sister) and Dr. David Price. Sister testified regarding Smart's childhood and family environment, and

Dr. Price testified as to his psychological evaluation of Smart. The court also admitted without objection the transcripts of the plea and sentencing hearings. On August 10, 2017, the court found Smart's LWOP sentence was appropriate and denied his motion for resentencing. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in applying the *Byars* factors and imposing an LWOP sentence?

II. Did the trial court err in failing to place on the State the burden of proof that Smart was irreparably corrupt?

STANDARD OF REVIEW

"When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law." *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019). This court will not overturn a sentence absent an abuse of discretion. *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). A trial court commits an abuse of discretion when it commits an error of law, makes a factual finding that lacks evidentiary support, or fails to exercise any of its vested discretion. *See State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). When interpreting the Constitution, state courts must faithfully apply the Supreme Court's precedent without expanding its protections. *See State v. Slocumb*, 426 S.C. 297, 306, 827 S.E.2d 148, 153 (2019) ("[A] long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set."); *id.* at 307, 827 S.E.2d at 153 ("[W]hile we are duty-bound to enforce the Eighth Amendment consistent with the Supreme Court's directives, our duty to follow binding precedent is fixed upon case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding.").

LAW/ANALYSIS

In *Miller*, the United States Supreme Court held state laws that mandate LWOP sentences violate the Eighth Amendment's prohibition of "cruel and unusual punishment" when applied to juvenile offenders. 567 U.S. at 465; *see also* U.S. Const. amend VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The Court stated

juveniles differ from adults in that they have greater prospects for reform and diminished culpability due to their lack of maturity and a developed sense of responsibility, vulnerability to peer pressure, limited control over their environment, and malleable character. 567 U.S. at 471. The Court held mandatory LWOP sentences violate the Eighth Amendment because they fail to distinguish "between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479–80 (first quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005); then quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). However, the Court did not "foreclose a [court's] ability to make that judgment in homicide cases, [but] require[d] it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

Following *Miller*, our supreme court in *Byars* held juveniles serving an LWOP sentence were eligible for reconsideration. *See* 410 S.C. at 539–45, 765 S.E.2d at 575–78. Our court held an LWOP sentence may nevertheless be appropriate for a juvenile offender but only after the juvenile "receive[d] an individualized hearing where the mitigating hallmark features of youth [were] fully explored." *Id.* at 545, 765 S.E.2d at 578. The court enumerated five factors from *Miller* that a sentencing court is required to consider:

> (1) [T]he chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence[s]";
>
> (2) the "family and home environment" that surrounded the offender;
>
> (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him;
>
> (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and

(5) the "possibility of rehabilitation."

Id. at 544, 765 S.E.2d at 577 (third and fourth alterations in original) (quoting *Miller*, 567 U.S. at 477–78). The court also stated in addition to the factors from *Miller*, "the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile [LWOP] sentencing hearings." *Id.* at 544–45, 765 S.E.2d at 577. However, it specified that its ruling did "not go so far as . . . [to] suggest that the sentencing of a juvenile offender subject to a[n LWOP] sentence should mirror the penalty phase of a capital case." *Id.* at 544, 765 S.E.2d at 577. *See generally* S.C. Code Ann. § 16-3-20(B)–(C) (2015) (stating the death penalty can only be imposed following a hearing wherein the factfinder, after hearing evidence related to statutory aggravating and mitigating circumstances, finds a statutory aggravating circumstance beyond a reasonable doubt and recommends death). The court instructed trial courts to "weigh the factors discussed" in its opinion but declined to establish a specific process for the courts to follow, noting that "[t]he United States Supreme Court did not establish a definite resentencing procedure." 410 S.C. at 545 n.10, 765 S.E.2d at 578 n.10.

In *Montgomery v. Louisiana*, the United States Supreme Court noted that *Miller* did not require that states follow a particular procedure for the sentencing hearings or that courts make a formal finding that the juvenile offender was irreparably corrupt. 577 U.S. 190, 211 (2016); *see id.* ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (alterations in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986))). Rather, "*Miller* established that [an LWOP sentence] is disproportionate under the Eighth Amendment" for a juvenile offender "whose crime reflects transient immaturity." *Id.* The Court recently reiterated "that a separate factual finding of permanent incorrigibility is *not required* before a [court] imposes a[n LWOP] sentence on a [juvenile] murderer." *Jones v. Mississippi*, 141 S. Ct. 1307, 1318–19 (2021) (emphasis added).

I. Mitigating Factors under *Miller* and *Byars*

Smart argues the trial court erred in applying the *Miller* and *Byars* factors, specifically the factors relating to (1) his drug use and its effect on his age and youthful characteristics, (2) his family and home environment, and (3) his possibility for rehabilitation. We disagree.

A. Drug Use

First, Smart argues the trial court erred when it failed to consider Dr. Price's testimony that Smart's drug use caused him to suffer from a neurocognitive disorder that resulted in a younger cognitive age. Smart also asserts the court failed to consider Smart's voluntary intoxication as a mitigating circumstance. Smart further contends the trial court disregarded Dr. Price's testimony that Smart's drug use influenced his ability to appreciate the wrongfulness of his actions. We find the trial court did not abuse its discretion.

As to Smart's argument that the trial court erred in failing to consider his cognitive age, we disagree. *Miller* and *Byars* do not require consideration of a juvenile's cognitive age. Under those cases, the court must consider the "*chronological age* of the offender" and the "immaturity, impetuosity, and failure to appreciate the risks and consequence[s]" flowing from the offender's youth, not whether the offender has reached full cognitive functioning. *Byars*, 410 S.C. at 544, 765 S.E.2d at 577 (emphasis added) (quoting *Miller*, 567 U.S. at 477). Therefore, the trial court did not abuse its discretion and we affirm. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court's ruling is based on factual conclusions without evidentiary support or is based on an error of law).

As to Smart's argument that the trial court considered his drug use as an aggravating factor instead of a mitigating circumstance when it said his drug use "was not a defense," we disagree. *See Byars*, 410 S.C. at 544–45, 765 S.E.2d at 577 (stating the mitigating circumstances considered in a death penalty sentencing hearing are relevant when considering whether to sentence a juvenile to LWOP); *see also* § 16-3-20(C)(b)(2), (6) (stating in a death penalty sentencing hearing, the fact finder must consider, among other facts, whether the murder was committed while the defendant was under the influence of an emotional or mental disturbance or whether the defendant's capacity to appreciate the wrongfulness of his or her actions or to conform his or her conduct to the law was substantially impaired); *State v. Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 710–11 (1986) ("Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment."), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The trial court's statement that Smart's drug use "was not a defense" does not indicate the court viewed the drug use as an aggravating factor. Rather, it indicates the court did not find it to be a compelling mitigating circumstance when considered with the other factors.

Moreover, the record shows the trial court considered Dr. Price's testimony regarding Smart's drug use and his ability to appreciate the wrongfulness of his actions. *See Byars*, 410 S.C. at 544, 765 S.E.2d at 577 ("[A] sentencing court [must] consider . . . the chronological age of the offender and the hallmark features of youth, including 'immaturity, impetuosity, and failure to appreciate the risks and consequence[s]' . . . ." (quoting *Miller*, 567 U.S. at 477)). While discussing its reasoning, the trial court stated that Dr. Price offered an opinion regarding the negative effect Smart's drug habit had on his mental health. However, the trial court noted Dr. Price also testified that Smart appreciated the wrongfulness of his actions. The court further discussed (1) Smart's attempt to conceal the crime, (2) his conflicting statements to law enforcement and letters to Hutto trying to fabricate a version of Victim's murder, and (3) the evidence that Hutto and Smart previously considered killing Victim. Therefore, the trial court did not abuse its discretion regarding this factor, and we affirm this issue. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court's ruling is based on factual conclusions without evidentiary support or is based on an error of law).

B. Family Environment

Smart also argues that the trial court erred by considering his family's statements as evidence and disregarding Sister's and Dr. Price's testimony regarding Smart's family and home environment. We disagree.

Smart argues the trial court erred in considering his family's statements at the plea hearing as "testimony" and comparing it to Sister's testimony given at the Resentencing Hearing. We find this argument is unpreserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (per curiam) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."). At the beginning of the Resentencing Hearing, the trial court noted it reviewed a copy of the prior hearings' transcripts and both the State and Smart had complied with the court's request for a copy to be entered into the record. Smart did not object when the court asked if either party objected to the admission of the transcripts. Furthermore, when the court explained the reasoning for its sentence and referenced Smart's family's statements, Smart did not argue it was error to compare their statements to Sister's testimony when the family did not appear as witnesses or give sworn testimony. Instead, Smart tried to distinguish the family's statements by asserting the family would not have been forthright with the court because they would not have admitted to their drug use.

State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (stating a party may not argue one ground at trial and then an alternative ground on appeal). Accordingly, this argument is unpreserved.

As to Smart's argument that the trial court did not consider Sister's and Dr. Price's testimony regarding Smart's family environment, we disagree. During Dr. Price's testimony, the court questioned Dr. Price and stated he and Sister "ha[d] given [it] some information to consider" regarding Smart's family and home environment. When reciting its reasoning, the trial court referred to Dr. Price's testimony concerning Smart's family environment. Furthermore, Sister and Dr. Price offered similar testimony detailing Smart's family and home environment: (1) Smart and Sister's parents were neglectful, (2) Smart and Sister's parents abused drugs, and (3) Smart began using drugs at an early age. Although the trial court did not specifically mention Dr. Price when it discussed Smart's family and home environment, it referenced Sister's testimony and referred to the three facts listed above. Therefore, we find the trial court sufficiently considered Smart's family and home environment. Accordingly, we affirm this issue. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court's ruling is based on factual conclusions without evidentiary support or is based on an error of law).

C. Irreparable Corruption

Smart argues the trial court erred in imposing an LWOP sentence when it did not make a finding that he was irreparably corrupt. Smart also asserts the trial court disregarded Dr. Price's opinion that Smart could be a productive member of society and made a conflicting ruling in denying his motion for resentencing despite noting there was a possibility for rehabilitation.

As to Smart's argument that the trial court erred in failing to make a specific finding of irreparable corruption, we disagree. Neither *Miller* nor *Byars* requires that the trial court make a specific finding that the juvenile is irreparably corrupt; rather, they require that the hallmark characteristics of youth be considered to determine if the crime is a reflection of the juvenile's transient immaturity. *See Miller*, 567 U.S. at 480 ("Although we do not foreclose a [court's] ability to [sentence a juvenile to LWOP] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."); *Byars*, 410 S.C. at 545, 765 S.E.2d at 578 ("*Miller* requires that before a[n LWOP] sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark

features of youth are fully explored."); *see also Jones*, 141 S. Ct. at 1318–19 ("[T]the Court has unequivocally stated that a separate factual finding of [irreparable corruption] is not required before a [court] imposes a[n LWOP] sentence on a [juvenile] murderer.").

Further, we find the trial court properly considered Smart's possibility of rehabilitation. The record shows that the trial court concluded—based on all the evidence presented to it, including Dr. Price's testimony—an LWOP sentence was appropriate because Smart's actions did not reflect the "transient immaturity" attendant to youth and rehabilitation was unlikely. After stating there is always a possibility for rehabilitation, the court noted "[b]ut there [are] also impossibilities . . . as well." The trial court noted Dr. Price's opinion regarding Smart's mental improvement and chance to become a productive member of society, but it also noted Smart's disciplinary history following his incarceration, which included five convictions for assaultive violations and forty convictions for non-assaultive violations. The court reviewed transcripts containing testimony of the events and considered that Smart, while already in the custody of DJJ, continued to huff gasoline, planned an escape and the murder of Victim with Hutto, bludgeoned Victim to death, concealed Victim's body, robbed a store, and shot at police officers during a high-speed chase. The court also noted Smart had not participated in any rehabilitative or educational programs.[3] We find these facts support the trial court's conclusion. Accordingly, the trial court did not abuse its discretion when applying *Miller*'s "possibility of rehabilitation" factor, and we affirm this issue. *See Allen*, 370 S.C. at 94, 634 S.E.2d at 656 (stating an abuse of discretion occurs when the trial court's ruling is based on factual conclusions without evidentiary support or is based on an error of law).

[3] Smart argues the court erred in considering his failure to participate in rehabilitative or educational programs because some prisons withhold such programs from inmates ineligible for parole. However, the record contains no evidence that the South Carolina Department of Corrections engages in such a policy or that Smart's LWOP sentence precluded his participation. *See* Rule 210(h), SCACR ("Except as provided by Rule[s] 212 and . . . 208(b)(1)(C) and (2), [SCACR,] the appellate court will not consider any fact which does not appear in the Record on Appeal."); *State v. Serrette*, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007) (per curiam) ("[T]he burden is on the appellant to provide the appellate court with an adequate record for review.").

II. Presumption against LWOP

Smart argues there is a presumption against LWOP sentences for juvenile offenders that the State must overcome and the trial court erred in placing the burden of proof on him. We disagree.

Initially, whether there is a presumption against LWOP sentences is not preserved for our review because Smart failed to raise this argument to the trial court. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Regarding Smart's argument that the trial court erred as to the burden of proof, we disagree. First, the Supreme Court did not establish a particular burden in *Miller*. *See Montgomery*, 577 U.S. at 211 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (alterations in original) (quoting *Ford*, 477 U.S. at 416–17)). Other states interpreting the Supreme Court's rulings have reached different results. *Compare Commonwealth v. Batts*, 163 A.3d 410, 416 (Pa. 2017) (holding there is a presumption against LWOP sentences that the prosecution must overcome by proof beyond a reasonable doubt), *with State v. Valencia*, 386 P.3d 392, 396 (Ariz. 2016) (noting the Supreme Court in *Montgomery* stated prisoners "must be given the opportunity to show their crime did not reflect irreparable corruption" and holding the defendant bore the burden of showing by the preponderance of the evidence that his or her crime reflected transient immaturity (quoting *Montgomery*, 577 U.S. at 213)). Second, our supreme court has not addressed whether a particular party bears the burden. Although the court referenced our death penalty sentencing procedure—in which the State bears the burden of proof—it specifically stated that it was not requiring the resentencing hearings to mirror death penalty hearings and declined to establish a particular procedure. *See Byars*, 410 S.C. at 544–45, 545 n.10, 765 S.E.2d at 577, 578 n.10; *see also* § 16-3-20(B)–(C). We decline to extend federal constitutional protections beyond the bounds established by the Supreme Court and our supreme court. *Slocumb*, 426 S.C. at 306, 827 S.E.2d at 153 ("[A] long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set."); *id.* at 307, 827 S.E.2d at 153 ("[W]hile we are duty-bound to enforce the Eighth Amendment consistent with the Supreme Court's directives, our duty to follow binding precedent is fixed upon

case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding."). Accordingly, based on our review of the record, we find the hearing was consistent with the *Byars* requirements. Therefore, we affirm the trial court on this issue.

CONCLUSION

Based on the foregoing, Smart's sentence is

AFFIRMED.[4]

KONDUROS and HILL, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allison A. Taylor nka Allison M. Aldridge, Appellant,

and

Melissa F. Brown, Third-Party Appellant,

v.

David G. Taylor, Respondent,

and

Kendra Christmas, Third-Party Respondent.

Appellate Case No. 2017-001816

Appeal From Charleston County
Jocelyn B. Cate, Family Court Judge

Opinion No. 5831
Heard March 18, 2020 – Filed July 7, 2021

AFFIRMED IN PART AND REVERSED IN PART

J. Michael Taylor, of Taylor/Potterfield, of Columbia, for Appellant Melissa F. Brown.

Leslie Therese Sarji, of Charleston, for Appellant Allison A. Taylor.

Rene Stuhr Dukes, of Rosen Hagood LLC, of Charleston, for Respondent Kendra Christmas.

Deborah Kay Lewis, of Charleston, for Respondent David G. Taylor.

WILLIAMS, J.: Allison M. Aldridge (Mother) appeals the family court's order finding her in contempt for violating the visitation provisions of her divorce order (Divorce Decree). Mother and Melissa F. Brown, Mother's counsel in the contempt proceedings, (collectively, Appellants) jointly appeal the family court's order quashing subpoenas they issued. Appellants also appeal the family court's orders finding the subpoenas imposed an undue burden and expense and ordering Appellants to pay David G. Taylor's (Father) and Kendra Christmas's, Father's girlfriend, attorney's fees as a sanction. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Mother and Father (collectively, Parents) married on April 1, 2006, and had a child (Son). Parents filed for a divorce in 2011 and entered into a settlement agreement that established custody and a visitation plan. In 2013, the family court granted Parents a divorce on the ground of one year's continuous separation and incorporated the settlement agreement into the Divorce Decree. The Divorce Decree established joint custody of Son, granting Mother primary placement and establishing summer and alternating weekend visitation for Father. The Divorce Decree also provided that Parents would mutually agree on holiday visitation and established a default visitation schedule in the event Parents failed to reach an agreement. The Divorce Decree also stated that the default schedule could be altered by Parents.

In late November 2016, Father filed an affidavit (Affidavit) with the family court, alleging Mother violated the Divorce Decree by denying him visitation for Thanksgiving and Son's birthday that year. He asked the court to "modify [his] parenting time (visitation) with [Son] for all weekends, holidays[,] and summer in consideration of" Mother's violations of the Divorce Decree and to award him attorney's fees. On December 2, 2016, the court issued a rule to show cause and set a hearing date for January 31, 2017.

Father served Mother with the rule to show cause and his Affidavit on January 15, 2017. Mother retained Brown on January 25, and she filed a return on January 26. In her return, Mother denied willfully violating the Divorce Decree and requested attorney's fees.

On January 26, Brown served subpoenas on Father, Christmas, and Julie Tillman, and on January 27, she served a subpoena on April Shores.[1] The subpoenas commanded each individual to appear at the hearing on January 31 to testify and produce certain documents. Brown mailed and emailed Father a copy of all the subpoenas on the same day she served them. On January 27, Father filed a motion to quash the subpoenas and requested sanctions and attorney's fees. On the date of the hearing, Mother filed a return to Father's motion to quash asserting the requested documents were relevant to Father's requested relief and his ability to pay attorney's fees.

At trial, the family court first addressed Father's motion to quash. Christmas, who had retained counsel, orally joined Father's motion. After reviewing the pleadings and hearing additional argument, the family court orally quashed the subpoenas as to the requested production of documents. The court briefly noted its reasoning on the record and stated it would later reduce its ruling to writing. The court initially dismissed the nonparty witnesses as part of its quashing but ultimately recalled them after realizing the subpoenas additionally requested their presence to testify. Christmas and Shores returned, but Tillman could not be reached.

Father stipulated he was capable of paying Mother's attorney's fees should she prevail on the issue of contempt, and Mother accepted his stipulation. The parties then presented evidence on the issue of contempt. Near the end of the day, the family court assured Mother it would not grant Father visitation for every weekend, holiday, and all of summer break even if he were to prevail. Mother informed the court that because of this assurance and Father's stipulation for attorney's fees, she no longer needed to question the nonparty witnesses, and the court released them. The remainder of the trial occurred on April 11 and July 10.

On August 1, 2017, the family court issued an order (the Final Order) finding Mother in contempt for willfully violating the Divorce Decree by denying Father

[1] Father is a lawyer, and Shores is a secretary at his firm. Tillman is a certified public accountant (CPA) whom Father used.

visitation for Thanksgiving and Son's birthday in 2016. The family court awarded Father $11,742.50 in attorney's fees under the *E.D.M. v. T.A.M.*[2] and *Glasscock v. Glasscock*[3] factors and as a compensatory contempt award under *Miller v. Miller*.[4] The family court also awarded Father five days of make-up visitation and made three modifications to the Divorce Decree: the first modified the visitation provision regarding Son's birthday; the second required any agreed alteration of visitation to be in writing, such as in text messages or emails; and the third established that the alternating weekend visitation would reset after each holiday. The family court sentenced Mother to thirty days' incarceration but provided her the ability to purge the sentence by paying Father's attorney's fees and by cooperating with Father in completing his make-up visitation days.

In the same order, the family court provided its written ruling on Father's motion to quash and his request for sanctions. The family court listed five grounds for quashing the subpoenas: (1) Brown violated Rule 45, SCRCP, by failing to give Father notice of the subpoenas at least ten days before the time specified for compliance; (2) the subpoenas were issued in contravention of Rule 25, SCRFC, which, at that time, prohibited discovery in family court unless the parties consented or the court issued an order of discovery;[5] (3) the subpoenas imposed an undue burden and expense on the witnesses; (4) the subpoenas failed to allow reasonable time for compliance; and (5) the subpoenas required the witnesses to perform affirmative acts. On the same day, the family court also issued a separate order (the Christmas Order) finding the subpoena imposed an undue burden and expense on Christmas. Because it found the subpoenas imposed an undue burden and expense on Father and Christmas, the family court ordered Appellants to pay Father's and Christmas's attorney's fees of $3,186.25 and $3,465.00, respectively, as a sanction. The award to Christmas also included $140.00 in compensation for childcare Christmas obtained so she could gather the requested material.

On August 11, 2017, Mother filed a Rule 59, SCRCP, motion to alter or amend the Final Order and the Christmas Order, and Brown filed a motion joining Mother's motion. On August 15, the family court denied Appellants' motions with the

---

[2] 307 S.C. 471, 415 S.E.2d 812 (1992).
[3] 304 S.C. 158, 403 S.E.2d 313 (1991).
[4] 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007).
[5] Rule 25 was subsequently amended and this prohibition was removed.

exception of Mother's request that Father exercise his make-up visitation before August 1, 2018. This appeal followed.[6]

ISSUES ON APPEAL

I. Did the family court err in finding Mother in contempt for violating the Divorce Decree?

II. Did the family court err in quashing the subpoenas issued by Appellants?

III. Did the family court err in finding the issued subpoenas imposed an undue burden and expense on Father and Christmas?

STANDARD OF REVIEW

On appeal from the family court, the appellate court reviews factual and legal issues de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). Thus, the appellate court has the authority to find 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). However, this broad scope of review does not require the appellate court to disregard the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Id.* at 385, 392, 709 S.E.2d at 651–52, 655. Therefore, the appellant bears the burden of convincing the appellate court that the family court committed error or that the preponderance of the evidence is against the family court's findings. *Id.* at 392, 709 S.E.2d at 655.

However, a ruling on a motion to quash a subpoena is a procedural ruling, which is reviewed under the abuse of discretion standard. *See Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2 (providing the standard of review for procedural matters is abuse of discretion). "An abuse of discretion occurs when the ruling is controlled

---

[6] On August 31, 2017, Mother moved (1) pursuant to Rule 62, SCRCP, and Rule 241, SCACR, to stay the effect of the Final Order's financial portions because it was not automatically stayed by the notice of appeal and (2) to deposit with the court pursuant to Rule 67, SCRCP, the money ordered payable to Father and Christmas because the fees were disputed on appeal. On October 31, 2017, the family court granted the motion.

by an error of law, or when based on factual conclusions, is without evidentiary support." *Landry v. Landry*, 430 S.C. 153, 160, 843 S.E.2d 491, 494 (2020).

LAW/ANALYSIS

I. Contempt

Father asserts the matters of Mother's contempt and the modification of the Divorce Decree are moot because of Mother's compliance with the modifications and the make-up visitation. Father argues because the family court only stayed the financial portions of its order and Mother has complied with other portions, there is no justiciable controversy for this court to resolve. *See Jordan v. Harrison*, 303 S.C. 522, 524, 402 S.E.2d 188, 189 (Ct. App. 1991) ("[When] one held in contempt for violation of a court order complies with the order, [the] compliance renders the issue of contempt moot and precludes appellate review of the contempt proceeding."). However, the record on appeal does not contain any evidence of Mother's alleged compliance. *See* Rule 210(h), SCACR ("Except as provided by Rule 212[, SCACR,] and Rule 208(b)(1)(C) and (2), [SCACR,] the appellate court will not consider any fact which does not appear in the Record on Appeal."). Accordingly, we decline to find Mother's appeal of the contempt moot.

Mother argues the family court erred in finding her in contempt for violating the Divorce Decree's visitation provisions for Thanksgiving (the Thanksgiving Provision) and Son's birthday (the Birthday Provision). We agree.

"Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001); *see also* S.C. Code Ann. § 63-3-620 (Supp. 2020) ("An adult who wil[l]fully violates, neglects, or refuses to obey or perform a lawful order of the court, . . . , may be proceeded against for contempt of court."). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done . . . .'" *Widman*, 348 S.C. at 119–20, 557 S.E.2d at 705 (quoting *Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988) (per curiam)). Contempt can be criminal or civil depending on the purpose for exercising the power, the nature of the relief, and the purpose of the sentence imposed. *Poston v. Poston*, 331 S.C. 106, 111,

502 S.E.2d 86, 88 (1998). Civil contempt has a remedial purpose and serves to coerce the contemnor to comply with the court order. *See id.* Its sanctions can include a fee paid to the complainant or a prison sentence that may be purged upon compliance with a court order. *See id.* at 111–12, 502 S.E.2d at 88–89. "Civil contempt must be [shown] by clear and convincing evidence." *Id.* at 113, 502 S.E.2d at 89.

"Contempt is an extreme measure; this power vested in a court is not lightly asserted." *Noojin v. Noojin*, 417 S.C. 300, 306, 789 S.E.2d 769, 772 (Ct. App. 2016) (quoting *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975)). "One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do. The language of the commands must be clear and certain rather than implied." *Phillips v. Phillips*, 288 S.C. 185, 188, 341 S.E.2d 132, 133 (1986) (quoting *Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973)). "A court need go no further in reviewing the evidence in a contempt action when there is uncertainty in the commands of an order." *Id.*

A. Thanksgiving Provision

Mother asserts the family court erred in finding she violated the Thanksgiving Provision because the provision gave her visitation for Thanksgiving in 2016. We agree.

The Divorce Decree provides that Parents are to mutually agree on holiday visitation. If Parents are unable to agree, the Divorce Decree provides default visitation arrangements. The default provision for Thanksgiving is for Mother to have Son from 6:00 P.M. on Wednesday to 6:00 P.M. on Sunday in even-numbered years and for Father to have Son for the same time period in odd-numbered years "[u]nless this rotation is altered at some point." The Divorce Decree neither explains how the rotation may be altered nor provides that such an alteration automatically occurs if Parents mutually agree for one parent to have Son for the entire holiday.

The record establishes that Parents regularly agreed on visitation, without triggering the default provisions, until 2016. That year, Parents failed to agree on Thanksgiving visitation thereby triggering the default rotation. At trial, Father asserted Parents altered the rotation in 2015 and Mother violated the Divorce

Decree by not giving him Son for the entire 2016 Thanksgiving holiday. As the complainant, Father bore the burden of proving this assertion. *See Abate v. Abate*, 377 S.C. 548, 553, 660 S.E.2d 515, 518 (Ct. App. 2008) ("A party seeking a contempt finding for violation of a court order must show the order's existence and facts establishing the other party did not comply with the order."). Parents offered conflicting testimony as to the 2015 Thanksgiving visitation. Mother argued they simply agreed on a visitation arrangement for that year alone, and Father asserted they agreed to alter the rotation. The family court found that Parents agreed to alter the rotation in 2015 and that Mother violated the Divorce Decree by withholding Son from Father for Thanksgiving in 2016.

Based on our de novo review, we find the family court erred. The basis for Father's claim that Parents altered the rotation is a series of text messages Parents exchanged prior to Thanksgiving in 2015. Initially, we note the text messages show the parties were attempting to come to an agreement regarding visitation. Father stated he would like to have Son "the entire time" but then asked to have Son Wednesday through Friday. Mother proposed Thursday through Sunday so that Son could visit an older family member in poor health Wednesday night. Father then asked if Parents would begin rotating Thanksgiving going forward. In response, Mother asked to split the 2015 holiday and stated "'rotation' can start next year with you," offering to exchange Son with Father on Thursday and allowing Father "a long weekend even though" the weekend was hers under the Divorce Decree's weekend rotation. Father then responded, "[Son] can stay with you Thanksgiving and through the weekend. If I am going to be alone, I am going to leave town." He did not state if he accepted Mother's offer or whether he understood the arrangement to be a mutual agreement on visitation for Thanksgiving 2015 or an agreement to alter the Thanksgiving rotation going forward.

This exchange could be interpreted as one of two results: (a) Parents failed to come to an agreement on how to facilitate visitation, relied on the Divorce Decree's default rotation, and agreed to alter the rotation so that Mother had odd-numbered years and Father had even-numbered years going forward or (b) Parents reached an agreement on how to conduct visitation for *that* year and did not invoke the default rotation. We find the messages themselves are inconclusive. Thus, we look to Parents' conduct following the messages.

Father's conduct following the text messages does not show an understanding that Parents agreed to alter the Thanksgiving rotation. This is clear when reviewing Parents' communication in September 2016. Parents were discussing visitation for the Labor Day holiday, and Mother informed Father she wanted to follow the Divorce Decree for the upcoming holidays. Father asked what that was because they had "never followed that agreement," and he stated he wanted to discuss and agree on a schedule for the upcoming holidays. A couple of weeks later, Parents were again discussing the upcoming holidays, and Father stated he wanted to set a schedule. Mother asked what was wrong with the Divorce Decree's plan, and Father responded,

> *I do not know what the court plan is*. It is based on sequential events (e.g., one year with you, one year with me, etc.). *We have never followed that*. . . . If you have time, read over the agreement. Maybe I am wrong. I have not read it. But I can go back and read it too.

(emphases added). Father did not assert the rotation had been altered until a week before Thanksgiving in 2016. Notwithstanding the family court's superior position to adjudge the credibility of the witnesses and assess conflicting evidence, we find Father's statement that he did not know the specifics of the Divorce Decree's visitation plan, his two statements indicating Parents had never followed the Divorce Decree's visitation plan, and Mother's testimony show Parents did not believe in 2015 that the text messages altered the Divorce Decree's default rotation.

Based on the foregoing, we find the preponderance of the evidence does not clearly and convincingly show that Parents agreed to alter the Thanksgiving rotation such that Father was entitled to the entire 2016 Thanksgiving holiday. *See Stoney*, 422 S.C. at 596, 813 S.E.2d at 487 (providing that appellate courts exercise de novo review of the family court's factual and legal findings); *Lewis*, 392 S.C. at 384, 709 S.E.2d at 651 (stating the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence in appeals from the family court); *Poston*, 331 S.C. at 113, 502 S.E.2d at 89 ("Civil contempt must be [shown] by clear and convincing evidence."). Therefore, we hold the family court erred in finding Mother in contempt, and we reverse the family court on this issue.

B. Birthday Provision

Mother also argues the family court erred in finding her in contempt for violating the Birthday Provision in 2016 because the provision does not provide how the visitation is to occur when Son's birthday falls on a weekend. We agree.

The Birthday Provision is contained within the holiday provisions and is subject to the requirement that Parents mutually agree on visitation. It provides that in the absence of an agreement, in even-numbered years, Mother "shall have [Son] from after school the night before [Son's] birthday and [Father] shall have [Son] from after school on his birthday until the following morning." In odd-numbered years, Mother's and Father's time with Son is reversed.

In 2016, Son's birthday fell on a Saturday. Mother organized a party for Son on his birthday and Father attended. Following the party, Parents, Son, other family members, and friends returned to Mother's house for Son to open presents. Mother also organized for some of Son's friends who did not live in town to spend the night. Father asserted Mother violated the Divorce Decree by denying him visitation with Son from the afternoon of Son's birthday until the following morning.

In the Final Order, the family court found Mother willfully violated the Birthday Provision by denying Father overnight visitation on Son's birthday and held her in contempt. The family court stated it was unreasonable to believe Parents would have agreed to sharing time with Son on his birthday only when it fell on a weekday. Noting that "this provision should have been more articulately drafted," the family court interpreted the provision's words "after school" as "defining words" referencing time, rather than "limiting words." The family court found that because Mother testified Son's school ended at 3:00 P.M., the Divorce Decree required her to relinquish Son to Father at that time if Son's birthday fell on a weekend.

We hold the family court erred in finding Mother willfully violated the Birthday Provision. The Birthday Provision does not provide how Parents are to conduct visitation with Son when his birthday falls on a weekend, and both parties acknowledged this. Therefore, the family court erred in finding Mother in contempt for failing to deliver Son to Father at 3:00 P.M. on Son's birthday. *See*

Phillips, 288 S.C. at 188, 341 S.E.2d at 133 ("One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do. The language of the commands *must be clear and certain rather than implied*." (emphasis added) (quoting *Welchel*, 260 S.C. at 421, 196 S.E.2d at 498)). Accordingly, we reverse the family court on this issue. *See id.* ("A court need go no further in reviewing the evidence in a contempt action when there is uncertainty in the commands of an order.").

II. Motion to Quash the Subpoenas

Appellants argue the family court erred in quashing the subpoenas. We disagree.

The family court listed five reasons for quashing Brown's subpoenas, one of which was Brown's failure to serve the subpoenas on Father at least ten days before the time specified for compliance.[7] Appellants argue the notice provision applies only to subpoenas that require production of documents before trial—which Appellants label "discovery subpoenas"—and does not apply to subpoenas requesting the individual's presence at trial to testify and to produce the requested documents at that time—which Appellants label "trial subpoenas." This distinction between a "trial subpoena" and a "discovery subpoena" is not explicitly stated in Rule 45, but Appellants claim it exists based on Rule 45(a)(2). However, we find this subsection does not include such a distinction; it merely vests courts with the authority to issue a subpoena depending on what the subpoena commands and to whom the subpoena is directed.[8]

---

[7] At the time of trial, Rule 45(b)(1) included the following sentence: "Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)[, SCRCP,] at least 10 days before the time specified for compliance." Rule 45 was recently amended to move this language to a new subsection (a)(4). The amendment retained the notice requirement but eliminated the court's ability to waive or shorten the notice period.

[8] Rule 45(a)(2) ("A subpoena commanding attendance at a trial or hearing shall issue from the court for the county in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the county designated by the notice of deposition as the county in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a

Our supreme court has rejected the argument that the Rule 45 notice requirement is not required for a subpoena that requests the witness to produce certain documents and appear at a scheduled hearing with the requested documents. *See In re Fabri*, 418 S.C. 384, 389, 793 S.E.2d 306, 309 (2016) (per curiam). In that case, the supreme court stated Rule 45 requires "that notice be given to the opposing party *anytime* a party issues a subpoena commanding the production of documents, *regardless of when the documents are commanded to be produced*." *Id.* (first emphasis added). Because Brown's subpoenas requested witnesses to produce certain documents at the hearing, she was required to serve Father notice of the subpoenas ten days before the requested production date.

Appellants assert Brown could not have provided Father notice ten days before the hearing on January 31 because Father served Mother with the rule to show cause on January 15 and Brown was retained on January 25. However, Father's service was timely. *See* Rule 14, SCRFC ("The rule to show cause, and the supporting affidavit or verified petition, shall be served, in the manner prescribed herein, not later than ten days before the date specified for the hearing . . . ."). Brown could have requested the court waive or shorten the notice period pursuant to the former Rule 45(b)(1), but she failed to give the court that opportunity, stating at trial that she did not believe a hearing would be scheduled in time. *See Fabri*, 418 S.C. at 388, 793 S.E.2d at 308–09 ("*Unless otherwise ordered by the court*, prior notice in writing of any commanded production of documents and things . . . shall be served on each party . . . at least 10 days before the time specified for compliance." (emphasis added and original emphasis removed) (quoting former Rule 45(b)(1))). Accordingly, we find Appellants were required to comply with the notice requirement.

Appellants also argue the family court erred in quashing the subpoenas because Father was not prejudiced by the untimely notice as he promptly moved to quash the subpoenas. Appellants assert our rule is modeled after Rule 45 of the Federal Rules of Civil Procedure and the comment to the Federal rule states the purpose of the notice provision is to allow other parties an opportunity to object to the production or request additional documents. *See* Fed. R. Civ. P. 45 cmt. to 1991 Amendment ("The purpose of such notice is to afford other parties an opportunity

---

subpoena for production or inspection shall issue from the court for the county in which production or inspection is to be made.").

to object to the production or inspection, or to serve a demand for additional documents or things."); Rule 45, SCRCP, Note to 1993 Amendment ("Rule 45 is amended to conform to federal Rule 45, as amended in December 1991."). However, unlike the federal rule, our Rule 45 includes a time provision in its notice requirement. *Compare* Fed. R. Civ. Pro. 45(a)(4) ("If the subpoena commands the production of documents, . . . , then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party."), *with* Rule 45(a)(4), SCRCP ("If the subpoena commands the production of documents, . . . , then before it is served on the person to whom it is directed, a copy of the subpoena must be served on each party in the manner prescribed by Rule 5(b) *at least ten days before the time specified for compliance*." (emphasis added)). Moreover, our courts have not imposed a prejudice requirement, and we find doing so would nullify the time provision of our Rule 45's notice requirement. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (providing statutes must be interpreted so that no part is nullified); *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (providing the rules of statutory construction apply to procedural rules). Accordingly, we decline to impose such a requirement in the instant case.

Based on the foregoing, we find the family court did not abuse its discretion in quashing the subpoenas, and we affirm. *See Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2 (stating the family court's procedural rulings are reviewed for an abuse of discretion). Because our finding is dispositive, we decline to address Appellants' remaining arguments regarding the family court's quashing of the subpoenas save for Appellants' assertion that the subpoenas did not impose an undue burden. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive). We review this ground below because it is the foundation for the family court's award of sanctions against Appellants.

III. Undue Burden

Appellants argue the family court erred in finding that the subpoenas imposed an undue burden and expense on Father and Christmas. We agree.

In its Final Order and the Christmas Order, the family court found the subpoenas issued by Appellants imposed an undue burden and expense on Father and

Christmas. The family court ordered Appellants to pay Father's and Christmas's attorney's fees as a sanction.

Rule 45(c)(1) imposes a duty on the party or "attorney responsible for the issuance and service of a subpoena [to] take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Our courts have interpreted "undue burden" as requesting materials irrelevant to the matter before the court. *Ex parte Smith*, 407 S.C. 422, 422–23, 756 S.E.2d 386, 386 (2014). The rule also requires the court to "enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee." Although procedural rulings are reviewed for an abuse of discretion, whether a duty is breached is a question of fact, and we review the family court's factual findings de novo. *Compare Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2 (stating the abuse of discretion standard is used to review the family court's procedural ruling), *with id.* at 596, 813 S.E.2d at 487 (stating the de novo standard is used to review the family court's factual findings), *and Estate of Cantrell by Cantrell v. Green*, 302 S.C. 557, 560, 397 S.E.2d 777, 779 (Ct. App. 1990) ("The defendant's breach of the duty of care is a question of fact.").

The subpoenas served on Father, Tillman, and Shores requested (1) copies of Father's tax returns for 2013 through 2015; (2) evidence of any travel reimbursements from Father's law firm; (3) a list of all banks where Father deposited funds in escrow and operating funds along with statements for each account; (4) copies of Father's law firm's tax returns for 2014 and 2015; and (5) Father's 2015 and 2016 (a) profit and loss sheets, (b) year-end balance sheets, and (c) year-end income statement. The subpoena served on Christmas requested production of (1) a calendar listing every trip she took with Father and Son in the previous year, (2) a list of all individuals accompanying them on those trips and their contact information, and (3) any and all proof of travel expenses for each trip. Father argues that because he stipulated at trial that he could pay any attorney's fees awarded to Mother, his financial information was not relevant.

We find the family court erred in ruling the subpoenas imposed an undue burden and expense on Father and Christmas. *See Smith*, 407 S.C. at 422–23, 756 S.E.2d at 386 (stating a subpoena imposes an undue burden when it requests information irrelevant to the proceedings). When viewed in the context of the issues that arose out of the contempt action, we find the information requested by Mother was

relevant. Mother and Father both sought attorney's fees in their pleadings; therefore, Father's financial information and whether Father or Christmas paid for their vacations was relevant to that issue. Although Father later stipulated at trial that he could pay any attorney's fees awarded to Mother, the requested financial information only became irrelevant after the stipulation. Therefore, we find the requested financial information was relevant at the time the subpoenas were issued.

As to the subpoenas' requests for Father's personal and work travel history, we find this information was relevant to Father's requested relief of a visitation modification. The Note to Family Court Rule 14(b) states that under a rule to show cause, the family court can consider reasonable requests, such as a visitation modification, if it is in the child's best interest. In his Affidavit, Father asked the court to "modify [his] parenting time (visitation) with [Son] for *all weekends, holidays*[,] *and summer* in consideration of" Mother's alleged contemptuous conduct. (emphasis added). At trial, Father asserted that he did not request every weekend and holiday, but this testimony contradicts the plain language of his Affidavit. *See Murdock v. Murdock*, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999) (stating pleadings in family court are liberally construed). Mother testified Father had an extensive travel schedule and information regarding Father's work and personal travel practices was relevant to the family court's consideration of Son's best interest in determining whether a visitation modification was warranted. *See Smith*, 407 S.C. at 422–23, 756 S.E.2d at 386 (stating a subpoena imposes an undue burden when it requests information irrelevant to the proceedings). Additionally, modification of the number of days Son is with Mother would potentially impact the amount of child support owed pursuant to the South Carolina Child Support Guidelines. Although the information became irrelevant once the family court assured Mother that it would not make such a sweeping modification, this assurance also occurred after the subpoenas were issued. Accordingly, we find the requested information was relevant at the time of the subpoenas' issuances.

Moreover, the family court's finding of undue burden is not supported by the record. The family court based its ruling on counsels' arguments. *See Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("[T]he family court may not base necessary findings of fact . . . solely on counsel's statements of fact or arguments."). Father, Shores, and Tillman presented no evidence showing the cost of complying with the subpoenas, that the subpoenas imposed an undue burden, or that compliance caused them to incur undue expenses. *See* Rule 45(c)(1)

(providing a party or "an attorney responsible for the issuance and service of a subpoena" has a duty to "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena"). Christmas provided checks, and her attorney testified that Christmas paid $140 for childcare while she looked for the requested documents; however, we find this is not an excessive amount. Christmas also offered no evidence that complying with the subpoenas imposed an undue burden. Therefore, we hold the family court erred in finding the subpoenas imposed an undue burden and expense on the served individuals, and we reverse the family court on this issue. *See Stoney*, 422 S.C. at 596, 813 S.E.2d at 487 (stating the de novo standard is used to review the family court's factual findings).

IV. Remedies

Because we reverse the family court's findings of contempt, we also reverse the imposed sanctions and modifications to the Divorce Decree. Further, based on our de novo review, we find neither party is entitled to attorney's fees. *See Scheibner v. Wonderly*, 279 S.C. 212, 214, 305 S.E.2d 232, 233 (1983) (reversing the family court's contempt ruling and finding, based on the preponderance of the evidence, neither party should receive attorney's fees). The record reflects that both Mother's and Father's conduct preceding and present throughout the case contributed to the case's difficult circumstances and complicated its resolution. Therefore, each party shall be responsible for his or her attorney's fees. *See Brown v. Brown*, 408 S.C. 582, 587, 758 S.E.2d 922, 924 (Ct. App. 2014) (providing a party's conduct is a proper consideration in determining whether to award attorney's fees); *see generally Lewis v. Lewis*, 400 S.C. 354, 372, 734 S.E.2d 322, 331 (Ct. App. 2012) (noting parties' uncooperative behavior that prolongs litigation can justify holding each responsible for his or her attorney's fees); *Patrick v. Britt*, 364 S.C. 508, 514, 613 S.E.2d 541, 544 (Ct. App. 2005) (considering how a party's behavior complicated the litigation). Additionally, because we reverse the family court's findings that the subpoenas imposed an undue burden, we also reverse the family court's sanctions of Father's and Christmas's attorney's fees against Appellants.

CONCLUSION

Accordingly, the family court's orders are

AFFIRMED IN PART AND REVERSED IN PART.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Adam Rowell, Appellant.

Appellate Case No. 2018-000022

Appeal From Greenwood County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5832
Heard September 22, 2020 – Filed July 7, 2021

AFFIRMED

Billy J. Garrett, Jr., of The Garrett Law Firm, PC, Carson McCurry Henderson, of The Henderson Law Firm, PC, Jane Hawthorne Merrill, of Hawthorne Merrill Law, LLC, and Clarence Rauch Wise, all of Greenwood, all for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

LOCKEMY, C.J.: Adam Rowell appeals his convictions for felony driving under the influence (DUI) resulting in death and felony DUI resulting in great bodily

injury. On appeal, Rowell argues the trial court abused its discretion in admitting blood samples into evidence without the proper chain of custody and because the samples were taken (1) after 50% of Rowell's blood volume was replaced, and (2) after 150% of Rowell's blood volume was replaced. Rowell also asserts the trial court erred in failing to conduct an evidentiary hearing with a juror who failed to disclose his pending charges during voir dire. We affirm.

FACTS/PROCEDURAL HISTORY

On November 15, 2014, Rowell was in a head-on automobile accident, which seriously injured Matthew Sanders and killed Jeremy Cockrell. Cockrell was driving a red pickup truck with Sanders in the passenger seat, and Rowell was in a dark blue pickup truck. Following the collision, Rowell was indicted for felony DUI resulting in death and felony DUI resulting in great bodily injury.

During voir dire, the trial court asked, "[Has] any member of the jury panel or any member of your immediate family members or close personal friends ever been arrested and charged with any criminal offense through whatever state, local or federal law enforcement agency?" The trial court asked another nine questions before asking the jurors to approach the bench if any of the questions applied to them. Juror 164 did not respond and was seated on the jury.

At trial, Sanders testified he and Cockrell were driving to Greenwood when Rowell's truck crashed into them. Cockrell died from blunt force trauma at the scene. Officer Kelly Anderson, a member of the Multidisciplinary Accident Investigation Team (MAIT), explained the collision occurred because Rowell's truck drifted into Cockrell's lane. According to the MAIT investigation, one second prior to the collision, Rowell was traveling at sixty-nine miles per hour and Cockrell's truck was traveling at twenty-four miles per hour.

Emergency responders testified they could smell alcohol when they arrived. Open and unopened beers were in Rowell's truck, spilled alcohol was on Rowell's floorboard, and multiple beer cans were on the ground near the collision. Rowell, who was also seriously injured in the collision, received 2000 milliliters of intravenous (IV) fluid and a 500 milliliter blood transfusion on site, and was airlifted to Greenville Memorial Hospital. The flight records show the helicopter arrived at the hospital at 8:59 p.m.

The trial court held an in camera chain of custody hearing to address whether blood drawn from Rowell when he arrived at the hospital (Sample A) was admissible. Angela Waites, the flight nurse, stated it took twenty-four minutes to get Rowell to Greenville Memorial Hospital. She testified she observed Amanda Baker, an emergency room (ER) nurse, draw Sample A and believed it was drawn from Rowell's right arm because Baker was standing on Rowell's right-hand side.

Nurse Baker testified she did not recall Rowell as a patient because she cares for and draws blood samples from hundreds of patients. She explained that Rowell's medical documentation indicated Dr. Bradley Snow took Sample A from a central line and handed it to her. Nurse Baker testified that after blood is drawn from a central line, a technician takes it to the lab. Bill Evans was the technician listed on the medical records. Rowell's medical records indicated his blood was drawn at 9:08 p.m.; however, the hospital's audit trail indicated it was drawn at 8:54 p.m.

Robert Smith, the lab technician at Greenville Memorial Hospital, testified that according to the audit trail for Sample A, he received it in the lab at 9:24 p.m. Smith did not remember receiving this sample specifically because of the large number of specimens he regularly tested. He testified it was hospital policy to hand-deliver ER specimens to the lab and test them right away.

Dr. John Reddic, an expert in clinical chemistry from Greenville Memorial Hospital, testified the hospital's audit trail showed Nurse Baker drew Sample A and Robert Smith received it for testing. According to Reddic, Sample A showed a blood alcohol concentration (BAC) between .175 and .189. Dr. Reddic noted Sample A was controlled and handled within the hospital's normal protocol.

Rowell argued the conflicting time reports in the medical records suggested there were two separate blood draws, one at 8:54 p.m. and one at 9:08 p.m. However, the State asserted there was only one audit trail for blood and the records did not reflect a second draw. The trial court ruled the State established the chain of custody, the audit trail reflected an 8:54 p.m. blood draw, and a discrepancy in the notation of the time of the blood draw did not render the evidence inadmissible. During trial, the relevant medical witnesses testified similarly to their in camera testimony.

Dr. Reddic testified that a "clock slop" time discrepancy of several minutes can occur where records have been created based on clocks that were not synced. He also explained there is a lag time between when a doctor orders a blood draw, the

drawing of the blood, and the subsequent transport of the blood draw to the lab, and "thirty minutes is appropriate."

Dr. Snow, Rowell's surgeon, testified that during surgery, Rowell received 3,150 milliliters of blood, 360 milliliters of plasma, 3,000 milliliters of saline, and 3,000 milliliters of Plasma-Lyte. He stated 53% of Rowell's blood was replaced and he would have died without the transfusion.

After Rowell's surgery, Officer Smith acquired a search warrant for Rowell's blood (Sample B). Rowell objected to the admission of Sample B, arguing that when it was taken, 52% of his blood had been replaced and a BAC test of that blood would be unreliable. The trial court held another in camera hearing.

Dr. Jimmie Valentine, a defense expert, testified that when Sample B was drawn from Rowell, he had received fluids that totaled 161.7% of his blood volume. He explained Sample B was not an accurate indication of what Rowell's blood was like during the collision. He stated that "any value that one would find or try to attach to [Sample B] has very little scientific meaning because of th[e] volume that [went] into him." Dr. Valentine explained Sample B included 4.9 milligrams per liter of Benadryl, which was a toxic dose, and Rowell's medical records indicated the hospital did not give him Benadryl. Further, he explained Sample B had acetones, which was indicative of someone who was diabetic and Rowell's medical records did not indicate he had diabetes. Dr. Valentine testified the methodology and science used in the BAC testing was reliable; however, he questioned the validity of the results.

Dr. Valentine stated the BAC from Sample B was consistent with Rowell's blood having been diluted by transfusions. He explained a person with a BAC of .18 would normally have a BAC of .12 after four hours and that the dilution of the blood due to a transfusion could explain why Sample B's BAC was .09. Dr. Valentine agreed that Sample B would have included a percentage of Rowell's blood that had remained in his system after the transfusion.

The trial court held that because Dr. Valentine did not attack the validity of the methodology of the test, Sample B was admissible. Specifically, the trial court clarified it did not find the results reliable, only that the methodologies and procedures used in the testing were reliable.

Rowell testified he did not have diabetes, nor did he use Benadryl. He stated he drank twenty-four ounces of beer approximately four hours before the accident. The jury convicted Rowell of felony DUI resulting in death and felony DUI resulting in great bodily injury. The trial court sentenced him to thirteen years' imprisonment. After trial, Rowell learned Juror 164 had been arrested and charged with a crime in Greenwood County shortly before his trial. Rowell moved for a new trial, arguing—among other things—that Juror 164 failed to disclose his arrest during voir dire. However, Rowell did not request that the trial court conduct an evidentiary hearing.

At the hearing on Rowell's motion for a new trial, he argued he would not have seated Juror 164 on the jury had he known of his arrest because the juror could have had an incentive to help the State. Rowell stated he did not contact Juror 164 because Juror 164 was represented by counsel, who told them Juror 164 would not be speaking with them. Rowell did not request a separate evidentiary hearing on the juror issue and did not subpoena Juror 164. Following the hearing and before the trial court issued an order, Rowell sent an email to the trial court requesting a hearing with the juror.

The trial court denied Rowell's motion for a new trial. The trial court stated that on its face, the question asked during voir dire was comprehensible to the average juror; however, the court noted that it was the first of ten questions the juror had to remember and the amount of time between question and answer "could be confusing to the average juror." The trial court further opined because an arrest is a public arrest record, the juror did not conceal his arrest. This appeal followed.

ISSUE ON APPEAL

1. Did the trial court err by admitting Sample A into evidence because the chain of custody was insufficient?

2. Did the trial court err by admitting Sample A into evidence because 50% of Rowell's blood had been replaced when Sample A was taken?

3. Did the trial court err by admitting Sample B into evidence because 150% of Rowell's blood had been replaced when Sample B was taken and the sample contained Benadryl and acetones?

4. Did the trial court err by failing to conduct an evidentiary hearing regarding a juror who failed to disclose his pending criminal charges?

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only . . . ." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). "Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion." *Id*. "The denial of a motion for a new trial will not be reversed absent an abuse of discretion." *State v. South*, 310 S.C. 504, 507, 427 S.E.2d 666, 668 (1993).

LAW/ANALYSIS

I. Chain of Custody for Sample A

Rowell argues the inconsistency between the time that he landed at Greenville Memorial Hospital and the time Sample A was taken established it was factually impossible for Sample A to be Rowell's blood. He asserts the chain of custody was not complete because Bill Evans walked Sample A from Nurse Baker to the lab but never testified. Rowell also asserts an unidentified person brought the blood from the ER to the lab and the sample was unaccounted for during a period of thirty minutes. We disagree.

Our supreme court has held, "a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as *practicable*." *State v. Pulley*, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) (emphasis added) (quoting *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011)). "Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." *Hatcher*, 392 S.C. at 94, 708 S.E.2d at 754.

Our supreme court has stated it has "never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case." *Id.* at 93, 708 S.E.2d at 754 (quoting *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005)). "[W]e have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases." *Id.* at 95, 708 S.E.2d at 755.

"Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." *Id.* at 94, 708 S.E.2d at 754 (quoting *Cochran*, 364 S.C. at 629 n.1, 614 S.E.2d at 646 n.1). "The trial [court's] exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *Id.* at 94-95, 708 S.E.2d at 754-55 (omission in original) (quoting *United States v. De Larosa*, 450 F.2d 1057, 1068 (3d Cir. 1971)).

"In examining issues regarding the chain of custody, a mere suggestion that substitution could possibly have occurred is not enough to establish a break in the chain of custody." *Id*. at 94, 708 S.E.2d at 754.

We hold the trial court did not err in admitting Sample A. During the in camera hearing, the State presented evidence that (1) Sample A was drawn by Dr. Snow via a central line; (2) it was handed to Nurse Baker; (3) Bill Evans was on duty and walked Sample A to the lab, and (4) Robert Smith, the lab technician, received the blood and facilitated the testing. This evidence identified who was in possession of Sample A. Although Evans did not testify and most of the witnesses in the chain did not recall these specifics, the State established through testimony and documentation Sample A's chain of custody as far as practicable given the circumstances.

Further, the circumstances surrounding the preservation and custody of Sample A diminished the likelihood it was tampered with. *See Hatcher*, 392 S.C. at 94-95, 708 S.E.2d at 754-55 ("The trial [court's] exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." (omission in original) (quoting *De Larosa*, 450 F.2d at 1068)). Here, Sample A was collected for medical purposes to save Rowell's life and not for any investigative purpose, which makes it unlikely it was tampered with. *Id.* at 95, 708 S.E.2d at 755 ("The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be."); *cf. Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 250, 565 S.E.2d 293, 297 (2002) ("The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment.").

As to the timing of the draw for Sample A, the inconsistency within the medical records and flight records regarding the landing time and the time of the blood

draw did not establish either a break in the chain of custody or that the blood was from someone else. The factual circumstances of this case reflect that the exact syncing of times between medical and flight personnel records was unlikely. A brief time discrepancy between organizations does not alter the chain of custody analysis because each person who possessed the sample was identified. *See Hatcher*, 392 S.C. at 94, 708 S.E.2d at 754 ("Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." (quoting *Cochran*, 364 S.C. at 629 n.1, 614 S.E.2d at 646 n.1)); *State v. Patterson*, 425 S.C. 500, 508, 823 S.E.2d 217, 222 (Ct. App. 2019) ("Minor discrepancies in the chain of custody implicates the credibility of the evidence, but does not render the evidence inadmissible."). This discrepancy, as well as the discrepancy of thirty minutes between drawing the blood and delivery to the lab, goes to weight and credibility of the evidence, not its admissibility. *See State v. Johnson*, 318 S.C. 194, 196, 456 S.E.2d 442, 444 (Ct. App. 1995) (holding a two-day discrepancy in the chain of custody regarding the dates an investigator turned in drug evidence to the evidence custodian did not establish the drugs were inadmissible); *id.* ("A reconciliation of this [two-day] discrepancy was not necessary to establish the chain of custody, but merely reflected upon the credibility of the evidence rather than its admissibility."). Therefore, the trial court did not abuse its discretion in admitting Sample A into evidence.

II. Blood Transfusion and Testing of Sample A

Rowell argues the trial court erred in admitting Sample A into evidence because roughly half his blood was replaced with liquids prior to the hospital's blood draw. He asserts the State failed to establish the reliability of the BAC test after he received a transfusion. We find this issue unpreserved for our review.

Rowell never raised to the trial court the issue that a blood transfusion caused Sample A's BAC testing results to be unreliable. At trial, Rowell extensively challenged the chain of custody for Sample A; however, he never objected to Sample A's admission on the basis that the test was unreliable because he had previously received 500 milliliters of blood and 2000 milliliters of IV fluids. Thus, this issue was not preserved for appellate review because this argument was not raised to and ruled on by the trial court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

III. Blood Transfusion and Testing of Sample B

Rowell argues the trial court erred in admitting Sample B into evidence because more than 150% of his blood had been replaced by blood and other fluids before Sample B was drawn. Even if the admission of Sample B was so unreliable that its admission was error, this error was harmless. The jury received clear evidence of Rowell's intoxication from Sample A, the evidence of open containers in his truck, the alcohol spilled on the floor of his truck, and testimony that his breath smelled of alcohol at the accident scene. *See State v. Black*, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) ("An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result."); *State v. Howard*, 296 S.C. 481, 485, 374 S.E.2d 284, 286 (1988) ("Where guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than that the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result.").

IV. Jury Voir Dire

Rowell argues the trial court erred in denying his request for an evidentiary hearing with Juror 164 when he failed to disclose his criminal charges during voir dire. He asserts that by failing to have a hearing, the trial court abused its discretion because it did not know the basis for Juror 164's failure to answer truthfully. We disagree.

> When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). "Whether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis." *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004). "The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred." *State v. Kelly*, 331 S.C. 132, 147, 502 S.E.2d 99, 106 (1998) (quoting *Thompson v. O'Rourke*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986)). In *Woods*, our supreme court held,

> intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

345 S.C. at 588, 550 S.E.2d at 284.

Rowell failed to provide a sufficient record to support reversal because he failed to subpoena Juror 164 for the post-trial hearing at which the trial court addressed the juror concealment issue. *See* S.C. Code Ann. § 19-7-60 (2014) (providing criminal defendants have a compulsory process for obtaining witnesses to testify in their favor); *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008) (providing section 19-7-60 "allow[s] criminal defendants to compel witnesses to appear in their favor and to produce witnesses and evidence at trial"); *State v. Tyndall*, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999) ("An appellant has a duty to provide this [c]ourt with a record sufficient for review of the issues on appeal."). Rowell was afforded the opportunity for a hearing, yet he failed to subpoena Juror 164 to attend. Without Juror 164's testimony or some other supporting evidence, the record is insufficient to overturn the trial court's order denying Rowell's motion for a new trial.

CONCLUSION

Based on the foregoing, we find the trial court did not err in admitting Sample A into evidence and any potential error as to Sample B was harmless. Further, we find Rowell failed to provide a sufficient record to overturn the trial court's consideration of Juror 164's failure to disclose his pending charges. Accordingly, Rowell's convictions are

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Zurich American Insurance Company of Illinois,
Respondent,

v.

Palmetto Contract Services, Inc., Appellant.

Appellate Case No. 2018-000692

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5833
Heard November 3, 2020 – Filed July 7, 2021

AFFIRMED

William A. Scott, of Pedersen & Scott, PC, of Charleston, for Appellant.

Larry D. Cohen, of Larry D. Cohen LLC, and Carolyn H. Blue, both of Charleston, for Respondent

---

GEATHERS, J.: In this breach of contract action, Appellant Palmetto Contract Services, Inc. (Palmetto) appeals the circuit court's order granting Respondent Zurich American Insurance Company's (Zurich) motion to strike Palmetto's jury trial demand. Palmetto argues it revived its right to a jury trial when it raised counterclaims for the first time in its amended answer and counterclaim. Additionally, Palmetto asserts its counterclaims raised new issues of fact that also revived its right to a jury trial. We affirm.

FACTS/PROCEDURAL HISTORY

In February 2012, Palmetto entered into a contract with Zurich for workers' compensation and employers' liability insurance coverage. After a premium audit, Zurich determined Palmetto owed it additional premiums in the amount of $158,744.

On December, 11, 2015, Zurich sued Palmetto for breach of contract, seeking to recoup the unpaid premiums, accrued and post-judgment interest, costs, and any other relief to which it may have been entitled. Palmetto answered on February 16, 2016, denying Zurich's allegations and asserting the following defenses: failure to mitigate damages; waiver, estoppel, laches; and fraud. Neither party demanded a jury trial in its initial pleading.

On July 12, 2016, Palmetto filed a motion to amend its answer and assert counterclaims. Palmetto's proposed amended answer and counterclaim added the following: a defense of full accord and satisfaction; a defense of setoff—asserting Zurich's claims must be reduced by the amount paid for the value of the work performed; a counterclaim for negligent representation and fraud; and a counterclaim for breach of contract.

As to the counterclaims for negligent representation and fraud, Palmetto asserted Zurich previously classified some of Palmetto's employees under National Council on Compensation Insurance (NCCI) code 3040. However, Palmetto contended, as a result of Zurich's audit, Zurich determined that those employees should have been listed under code 6824F. This caused Zurich to invoice Palmetto for the unpaid premiums. Palmetto argued the following: (1) the representation that Zurich would properly classify employees under code 3040 and bill Palmetto accordingly was false and material; (2) Zurich "knew the representations . . . were false" and "intended that the representations be acted upon"; (3) "Palmetto did not know that the representations were false[] and relied on the representations"; (4) Zurich had a pecuniary interest in making the false representations; (5) Zurich had a duty of care to provide truthful information to Palmetto—which it breached by failing to properly communicate information regarding class codes to Palmetto; (6) "Palmetto had a right to rely on the representations in the agreement"; and (7) as a result of the negligent misrepresentations and fraud, Palmetto incurred actual, incidental, and unspecified damages. As to the counterclaim for breach of contract, Palmetto asserted "Zurich breached the contract by failing to classify operations properly and improperly billing Palmetto." Palmetto did not request a jury trial at

the time it filed its motion to amend. Zurich opposed Palmetto's motion to amend its answer.

A hearing on the motion was held on September 19, 2017. Zurich argued it was prejudiced by the potential amendment because it would not be able to seek a jury trial if it so desired. Zurich clarified, however, that it was not requesting a jury trial at that time. The court granted Palmetto's motion to amend and instructed Palmetto to "put it in the order that [it] consent[ed] to a jury trial if [Zurich] desires a jury trial . . . ." The court found no prejudice in granting the motion because Palmetto's original answer included "issues of fraud and misrepresentation" and Palmetto consented to a jury trial if Zurich requested one.

Subsequently, on September 27, 2017, Palmetto filed its amended answer and counterclaim, designated "(Jury Trial)" below the document's title. Thereafter, the clerk's office placed the case on the jury roster. Zurich objected to the transfer to the jury roster and moved to strike Palmetto's jury trial demand, arguing Palmetto waived its right to a jury trial when it did not demand a jury trial following its initial answer and that the amended answer and counterclaim did not revive the right to a jury trial because it was not based upon new issues of fact pursuant to *King v. Shorter*.[1] Zurich contended Palmetto's allegations were based upon the same issues and facts raised in Zurich's complaint and Palmetto's initial answer. Zurich further noted that the court's order granting Palmetto's motion to amend its answer stated Palmetto raised the same issues as previously pled.

A hearing on Zurich's motion to strike was held before the circuit court on March 6, 2018. At the hearing, Palmetto argued that the counterclaims asserted in the amended answer were new issues of fact not in the original pleading, and therefore, it was allowed to demand a jury trial under *King*. Additionally, Palmetto noted that Zurich had previously argued against Palmetto's motion to amend by stating Zurich would not have the ability to seek a jury trial.

On March 8, 2018, the circuit court issued an order granting Zurich's motion to strike Palmetto's jury trial demand pursuant to Rule 38(d), SCRCP and *King*. The circuit court found Palmetto's amended answer and counterclaim did not create new issues of fact. This appeal followed.

---

[1] 291 S.C. 501, 503, 354 S.E.2d 402, 403 (Ct. App. 1987) (finding the circuit court did not abuse its discretion by allowing the defendant to amend his pleading, while simultaneously denying his motion to transfer the case to the jury calendar, because the amended pleading did not create new issues of fact).

ISSUE ON APPEAL

Did the circuit court err by finding Palmetto's amended answer did not entitle it to a jury trial?

STANDARD OF REVIEW

As an initial matter, the parties disagree on the appropriate standard of review for this appeal. Unlike a jury trial request under Rule 39(b), SCRCP,[2] the decision of whether to order a jury trial under Rule 38 is not discretionary with the circuit court. *See Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) ("Rule 38 concerns trial by jury as of right. Rule 39(b), on the other hand, allows the [circuit] court discretion to order a jury or non-jury trial."). In *Dawson*, the supreme court found that because the decision of whether to order a jury trial pursuant to a Rule 38 request was *not* discretionary, the appellant's failure to immediately appeal the circuit court's denial of his request for a jury trial under Rule 38 barred his appeal of the issue. *Id.* at 266–67, 491 S.E.2d at 241–42. Like the appellant in *Dawson*, Palmetto is challenging the circuit court's denial of its pretrial jury demand under Rule 38. *See id*. Here, the issue is not whether Palmetto waived its right to a jury trial; rather, the sole issue is whether the amended answer and counterclaim revived Palmetto's previously waived right to a jury under Rule 38. Because this is a question of law, the proper standard of review is de novo. *See Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010) ("Whether a party is entitled to a jury

---

[2] Rule 39 states in relevant part

> **(a) By Jury.** . . . The trial of all issues so demanded shall be by jury, unless . . . the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.
> **(b) By the Court.** Issues of law and issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court or may be referred to a master as provided in Rule 53; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, *the court in its discretion upon motion may order a trial by jury of any or all issues.*

(Emphasis added).

trial is a question of law."); *California Scents v. Surco Prod., Inc.*, 406 F.3d 1102, 1105 (9th Cir. 2005) ("Entitlement to a jury trial is a question of law reviewed de novo.").[3]

LAW/ANALYSIS

Rule 38(b), SCRCP, provides that

> [a]ny party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and *not later than 10 days after the service of the last pleading* directed to such issue. Such demand may be endorsed upon a pleading of the party.

(emphasis added). Subsection (d) further states that "[t]he failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury." Rule 38(d), SCRCP. Accordingly, a party's right to a jury trial is waived if a demand is not served within ten days of service of "the last pleading directed to such issue." Rule 38(b). Because Rule 38 is substantially the same as Fed. R. Civ. P. 38, this court has analyzed federal case law interpreting the federal rule when deciding on issues related to our state rule. *See King*, 291 S.C. at 503, 354 S.E.2d at 403.

Palmetto concedes it did not demand a jury trial within ten days after the service of its initial answer. However, it contends its right to a jury trial was revived because it asserted affirmative claims against Zurich *for the first time* in its amended answer and counterclaim. Palmetto maintains that based on this assertion, which distinguishes it from *King*, the circuit court erred in finding it was not entitled to a jury trial pursuant to *King*. Furthermore, Palmetto contends that there are different

---

[3] In *King*, the court of appeals stated that the circuit court "did not abuse [its] discretion in either allowing [defendant]'s amended pleading or in denying his motion to transfer the case to the jury calendar." 291 S.C. at 503, 354 S.E.2d at 403. However, that ruling was in the context of the circuit court's discretion to allow the defendant to amend his pleading—which is unarguably reviewed for an abuse of discretion. *See id.*; *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 22, 431 S.E.2d 587, 590 (1993) ("It is well established that a motion to amend is addressed to the sound discretion of the [circuit court]. . . .").

issues and facts in its amended answer and counterclaim that also revived its right to a jury trial. We disagree.

In *King*, the plaintiff brought suit over a note he co-signed as endorser and had to pay for the defendant. 291 S.C. at 502, 354 S.E.2d at 402. The defendant answered, asserting fraud and coercion defenses, and counterclaimed for (1) malpractice, (2) fraud and deceit, and (3) breach of trust and fiduciary relationship. *Id.* The defendant did not make a demand for a jury trial. *Id.* Thereafter, the defendant amended his answer and added an additional counterclaim for outrage. *Id.* at 502, 354 S.E.2d at 402–03. After the plaintiff abandoned a motion to amend his complaint, which he had previously served on the defendant, the defendant yet again moved to amend his answer and counterclaim to assert an action for unfair trade practices and to transfer the case to the jury calendar. *Id.* The circuit court denied the motion to transfer but allowed the defendant to amend his answer and counterclaim. *Id.*

In affirming the circuit court's ruling, the court of appeals noted that under federal cases on the issue, "a litigant's entitlement to a jury trial on *the issues presented by an amended pleading*, when no prior demand for a jury trial has been made, turns on whether the amended pleadings *create new issues of fact*." *Id.* at 503, 354 S.E.2d at 403 (emphases added). The court did not provide any caveats to the rule—and certainly no caveats intimating that the new issues presented by the amended pleadings could in fact be issues of *law* and not *fact*. *See id.* Instead, by its incorporation of *Trixler Brokerage Co. v. Ralston Purina Co.*, the court of appeals confirmed that the presentation of a new theory of recovery in an amended pleading does not constitute the presentation of a new issue on which a jury trial should be granted. *See id.* at 503, 354 S.E.2d at 403; *Trixler Brokerage Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974) ("The theory of a case relates to the ultimate basis of liability[] rather than to an issue created by the pleadings."); *id.* ("When read in context, the word issue must have been intended by the Supreme Court to mean nothing other than an issue of fact. Obviously, appellant would not be demanding a jury trial on an issue of law."); *see also New Hampshire Fire Ins. Co. v. Perkins*, 28 F.R.D. 588, 590 (D. Del. 1961) ("The authorities are uniform that when a [party] has waived a jury trial and subsequently files an amendment to the [pleading] which does not change the nature of the case or introduce new issues, such amendment does not entitle the [party] to demand a jury trial as a matter of right and over objection[] pursuant to Rule 38(b)." (quoting *Reeves v. Pennsylvania R. Co.*, 9 F.R.D. 487, 488 (D. Del. 1949))). This rule applies equally to amendments by plaintiffs and defendants. *See Perkins*, 28 F.R.D. at 590–91.

Given the jury's role as the finder of fact, it is logical "that the jury trial right extends only to disputed factual conclusions." *See Rosen v. Dick*, 639 F.2d 82, 94 (2d Cir. 1980). Once a party denies an allegation, both parties are then made aware that an issue of fact exists. *See id.* ("Rule 38(b) [] allows a party to wait for a responsive pleading which shows whether an issue of fact exists before making the jury demand."); *Trixler Brokerage Co.*, 505 F.2d at 1050 ("An issue of fact does not exist unless there is an allegation and a responsive denial."). If a party does not demand to exercise its jury right on this triable issue within ten days, the party effectively waives the right to a jury trial on this issue of fact. Fed. R. Civ. P. 38(d); Rule 38(d), SCRCP. To that end, a party's right to a jury trial is not revived based solely on the fact that the party asserts a counterclaim for the first time in an amended pleading, without also introducing new factual issues that were *not* previously in dispute. *See Trixler Brokerage Co.*, 505 F.2d at 1050.

Our conclusion is supported by federal case law in which the presiding courts were faced with essentially the same procedural scenario as the current matter. *See Pyramid Co. of Holyoke v. Homeplace Stores Two, Inc.*, 175 F.R.D. 415, 416–17 (D. Mass. 1997). In *Pyramid Co.*, the plaintiff, a company that owned a retail facility in a mall, sued the defendant, a retail company, for breach of contract resulting from a letter of intent to lease plaintiff's facility. *Id.* at 416. The defendant contended "it was understood that [the defendant] would be the only store in the mall selling high-end bath fixtures," but after signing the letter of intent, it became aware of the opening of a company it considered to be a direct competitor in the mall. *Id.* In its complaint, the plaintiff sought specific performance or treble damages for the breach. *Id.* In its answer, the defendant denied the plaintiff's claims and asserted as an affirmative defense that it was fraudulently induced to sign the letter of intent. *Id.* The defendant did not request a jury trial at that point. *Id.* The defendant subsequently uncovered a letter written by its competitor's parent company to plaintiff, notifying plaintiff of its intention to open a new store in the mall. *Id.* at 416–417. The defendant then sought to amend its answer to assert three counterclaims and a jury trial demand. *Id.* at 416.

The district court granted the defendant leave to amend the pleading to assert the counterclaims but struck its demand for a jury trial, finding the proposed counterclaims failed to raise any issues not encompassed by its original answer. *Id.* at 419–20 ("Each of the three counts is premised on the same factual claim: that [the plaintiff] allegedly misrepresented that the store which [the plaintiff] had identified as 'Lechmere' would in fact be a Home Image store."). The court was not persuaded by the defendant's argument that the counterclaims were new issues for Rule 38 purposes. *Id.* at 418. The court characterized this argument as an attempt by the

defendant to bypass the issue analysis, stating: "Were the Court to follow HomePlace's lead, any defendant could automatically resuscitate a waived jury demand simply by amending its original answer and adding a counterclaim." *Id.* (emphasis added).

We find the district court's reasoning persuasive. We do not think it terribly difficult to envision a scenario in which a party may try to circumvent Rule 38(b)'s ten-day time limit in such a manner. *See id.* In light of the fact that courts routinely grant litigants leave to amend their pleadings,[4] defendants may increasingly find it advantageous to wait and demand a jury trial pursuant to an amended pleading. As such, we find the act of asserting counterclaims for the first time in an amended pleading does not automatically revive the right to a jury trial.

Having rejected Palmetto's argument that its right to demand a jury trial was revived based on the mere fact that it asserted counterclaims for the first time in its amended answer and counterclaim, we now consider whether the substance of its counterclaims and request for damages created new issues of fact that revived the jury right. *See King*, 291 S.C. at 503, 354 S.E.2d at 403. Both the breach of contract and negligent misrepresentation counterclaims involve essentially the same facts as previously pled, as does the request for damages. *See id.* All of Palmetto's new allegations involve the effect of Zurich's audit on Palmetto's contract with Zurich. Further, Palmetto's claims could have easily been anticipated at the time of its original pleading. *See Pyramid Co.*, 175 F.R.D. at 420 ("Where a claim asserted in an amendment could have been 'anticipated' in that manner at the time of the original pleading, the later amendment will not revive a right to a jury trial."). The circuit court allowed Palmetto to amend its answer because its original answer included "issues of fraud and misrepresentation," and thus, would not prejudice Zurich. Accordingly, the circuit court did not err by finding Palmetto's amended answer and counterclaim did not entitle it to a jury trial under Rule 38.

CONCLUSION

Based on the foregoing, the circuit court's order is

---

[4] *See* Rule 15(a), SCRCP ("[L]eave shall be freely given when justice so requires and does not prejudice any other party."); *Patton v. Miller*, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017) ("This rule strongly favors amendments[,] and the court is encouraged to freely grant leave to amend." (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005))).

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.