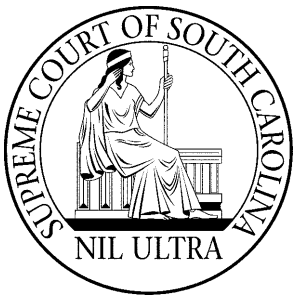

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
September 8, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alan Wilson, Attorney General, ex rel. State of South Carolina, Petitioner,

v.

City of Columbia, Respondent.

Appellate Case No. 2021-000889

ORIGINAL JURISDICTION

Opinion No. 28056
Heard August 31, 2021 – Filed September 2, 2021

JUDGMENT DECLARED

Attorney General Alan Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Petitioner.

Teresa A. Knox and Patrick L. Wright, Richard A. Harpootlian, Christopher Phillip Kenney all of Columbia, for Respondent.

W. Allen Nickles III, of Nickles Law Firm, LLC, of Columbia, for Amicus Curiae South Carolina Education Association.

B. Eric Shytle, of the Municipal Association of South Carolina, and James H. Goldin, of Jamey Goldin, Esq.,

both of Columbia, for Amicus Curiae Municipal Association of South Carolina.

Wilbur E. Johnson and Julia P. Copeland, of Charleston, and Kathleen F. Monoc, of Monoc Law, LLC, of Charleston, all for Amicus Curiae City of Charleston.

Elizabeth A. McLean, of Columbia, and Danny C. Crowe, of Crowe LaFave, LLC, of Columbia, both for Amicus Curiae Richland County.

JUSTICE KITTREDGE: South Carolina Attorney General Alan Wilson brings this declaratory judgment action in our original jurisdiction. This is the second case involving legislation passed by our General Assembly concerning the use of facemasks in the public schools of South Carolina during the coronavirus pandemic. Recently, we construed Proviso 117.190 of the 2021-2022 Appropriations Act,[1] which related to public institutions of higher learning, and determined from the language in that proviso that the University of South Carolina was not precluded from issuing a universal mask mandate that applied equally to vaccinated and unvaccinated students and faculty alike. *Creswick v. Univ. of S.C.*, Op. No. 28053 (S.C. Sup. Ct. filed Aug. 17, 2021) (per curiam).

Just as *Creswick* was easily resolved purely as a function of statutory interpretation, so too is this case. This case involves a different proviso from the 2021-2022 Appropriations Act, Proviso 1.108, relating to public schools serving students grades kindergarten through 12 (K-12). Unlike the proviso in *Creswick*, Proviso 1.108 manifestly sets forth the intent of the legislature to prohibit mask mandates funded by the 2021-2022 Appropriations Act in K-12 public schools. The Attorney General contends the City of Columbia passed ordinances—in direct opposition to Proviso 1.108—mandating masks in all K-12 public schools in the City of Columbia. We appreciate that the South Carolina legislature and the City of Columbia have differing views on whether parents of school children should decide whether their children must wear masks at school or whether the government should mandate that decision. Each legislative body has clearly

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[1] H. 4100, 124th Leg., 1st Reg. Sess. (S.C. 2021), *available at* https://www.scstatehouse.gov/sess124_2021-2022/appropriations2021/tap1b.htm#s117.

expressed its respective position through legislative enactments, and both legislative bodies have acted in good faith. While allowing school districts flexibility to encourage one policy or the other, the state legislature has elected to leave the ultimate decision to parents. Conversely, the City of Columbia has attempted to mandate masks for all school children by following guidance from the Centers for Disease Control, which has the effect of disallowing parents a say in the matter.[2] For the reasons set forth below, we uphold Proviso 1.108 and declare void the challenged ordinances of the City of Columbia insofar as they purport to impose a mask mandate in K-12 public schools.[3]

I.

By prior order of this Court, we accepted this case in our original jurisdiction, for it involves a justiciable matter of significant public interest. Rule 245(a), SCACR.

II.

Proviso 1.108—enacted into law on June 22, 2021, and directed to the South Carolina Department of Education for South Carolina's K-12 public schools—provides with unmistakable clarity:

> (SDE: Mask Mandate Prohibition) No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.

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[2] Justice Hearn characterizes the role of parental choice in the legislative policy debate as "political gloss." This characterization is completely and utterly incorrect. The role of parental choice in that debate is a fact. As noted above, we find the state legislature and the City of Columbia have demonstrated good faith. We even go further and recognize, as explained below, the possibility that a local government could impose a mask mandate without contravening Proviso 1.108. That potential result would, of course, hold true regardless of the presence or absence of parental involvement in the masking decision.

[3] No other issue concerning the ordinances is before the Court, and we offer no opinion on the validity of the balance of the ordinances.

The City of Columbia (the City) later enacted ordinances mandating masks in all K-12 public schools within the City, specifically Ordinances 2021-068[4] and 2021-069.[5] One ordinance is an "Emergency Order by the Mayor Declaring a State of Emergency," and the second ordinance ratifies and mirrors the Mayor's declaration of an emergency. Based on the City's policy judgment on how best to deal with the coronavirus, the ordinances mandate facemasks for "all faculty, staff, children over the age of two (2), and visitors, in all buildings at public and private schools or daycares."

By letter dated August 11, 2021, Attorney General Wilson notified the City of the conflict between Proviso 1.108 and the City's ordinances:

> It is the opinion of my office that these ordinances are in conflict with state law and should either be rescinded or amended. Otherwise, the city will be subject to appropriate legal actions to enjoin their enforcement. Encouragement of facemask wearing by city officials and even requirements for facemasks in city buildings and other facilities would not be in violation of the proviso. Also, parents, students, and school employees may choose to wear facemasks anywhere at any time.
>
> My office has previously opined that budget provisos have the full force and effect of state law throughout the fiscal year for which a budget is adopted. . . .
>
> . . . .
>
> . . . While we appreciate the efforts of city leaders around the state to protect their populace from the spread of the COVID-19 virus and variants of it, these efforts must conform to state law.

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[4] https://www.columbiasc.net/uploads/headlines/08-04-2021/emergency-meeting-ordinance/Ordinance_2021_068_Emergency_Order_Declaring_State_of_Emergency_Facial_Coverings.pdf.

[5] https://www.columbiasc.net/uploads/headlines/08-05-2021/citycouncil-ratifies-state-of-emergency-ordinance/Ordinance_2021_069_Ratifying_Ordinance_2021_068_Declaring_State_of_Emergency_Facial_Coverings.pdf.

On the same day, the City responded to the Attorney General:

> In the matter at hand, the issue is whether a Proviso that acts as a "Mask Mandate Prohibition" for schools and school districts[] is germane to fiscal issues, raising and spending taxes, which is the sole purpose of the appropriations act[.] The clear answer, using the sound logic of our Supreme Court[,] is that it is not. A mask mandate prohibition is clearly not a matter that is germane to fiscal issues[,] which is the only issue allowed to be taken up in the general appropriations act[,] and therefore it is unconstitutional and unenforceable.

As we will explain, the City's legal opinion is incorrect. Moreover, the City claims that it has the legal authority to impose and enforce the mask mandate ordinances, for there is allegedly no conflict with state law.

III.

We first address what is perhaps the most important underlying issue in the case: the Court's authority to decide the better policy decision between competing determinations made by the South Carolina General Assembly and a local government. We, of course, have no such authority to countermand a constitutional policy judgment of our state legislature, just as we have no power to impose our own policy judgment on the state legislature or local legislative bodies.

In *Creswick*, we noted that we were "simply construing [Proviso 117.190] as it [was] written," and that our holding was "not an approval or disapproval of a [mask] mandate, nor [was] it an approval or disapproval of an attempt by the General Assembly to prohibit a [mask] mandate." The same holds true today, as we emphatically remind the parties and the public that the wisdom or efficacy of mandating school children to wear facemasks to combat the coronavirus is not before us. As noted above, the South Carolina General Assembly and the City have expressed their respective positions through legislative enactments. The state legislature has elected to leave the decision to parents; the City believes it should make the decision without parental involvement.

We fully recognize that strong and passionate opinions exist on both sides of this debate. Yet, we must remind ourselves, the parties, and the public that, as part of the judicial branch of government, we are not permitted to weigh in on the merits of the facemask debate. Rather, we are a court that is constitutionally bound by the

rule of law—specifically, separation of powers—to interpret and apply existing laws; we do not, and cannot, set public policy ourselves. Instead, the people of South Carolina, through their elected state representatives, set the state's policy.

Where, as here, the General Assembly establishes policy via legislation, it is our solemn duty to uphold that law absent a clear constitutional infirmity. More to the point, the policy of the state legislature to leave to parents the masking decision is most assuredly well within the broad parameters of the legislature's constitutional boundaries. *See Elliott v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 925 (1958) ("All considerations involving the wisdom, policy, or expediency of an act are addressed exclusively to the General Assembly. We are only concerned with the power of that body to enact a law.").[6]

IV.

A.

We next address the City's constitutional challenge to Proviso 1.108, namely, that the proviso violates the one-subject rule. Given the deferential standard of review, we respectfully disagree. *See, e.g.*, *Doe v. State*, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017) (describing the "limited" standard of review).

"All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); *see also Sojourner v. Town of St. George*, 383 S.C. 171, 175, 679 S.E.2d 182, 185 (2009) ("Every presumption [must be] made in favor of a statute's constitutionality."). "A legislative act will not be declared

[6] We emphasize the Court's limited role in this case because the City's Answer and Counterclaim appears to invite this Court into making a legislative and policy decision based on our own individual views of facemask mandates for school children. For example, the City of Columbia asserts, "Transmission rates of the SARS-CoV-2 virus, including the highly contagious delta variant, are rising in Columbia and surrounding communities." Even giving credence to that statement, we find, as we must, that the wisdom of the state legislature to allow parents to decide whether their children wear masks—instead of mandating masks for all school children—is for others to debate, not for this Court to decide.

unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs.*, 383 S.C. at 640, 528 S.E.2d at 650.

The one-subject rule of the South Carolina Constitution provides: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. art. III, § 17. Thus, an act must relate to only one subject, "with topics in the body of the act being kindred in nature and having a legitimate and natural association with the subject of the title," and the title of the act must "convey reasonable notice of the subject matter to the legislature and the public." *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 64, 467 S.E.2d 739, 741 (1995). A provision in a general appropriations act does not violate the one-subject rule if it "reasonably and inherently relates to the raising *and spending* of tax monies." *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 35, 484 S.E.2d 104, 107 (1997) (emphasis added).

Proviso 1.108 is reasonably and inherently related to the spending of tax money. It was included as part of the Department of Education's budget and prohibits funds appropriated by the act from being spent on mask mandates in K-12 public schools. The title of the 2021-2022 Appropriations Act is:

> AN ACT TO MAKE APPROPRIATIONS AND TO PROVIDE REVENUES TO MEET THE ORDINARY EXPENSES OF STATE GOVERNMENT FOR THE FISCAL YEAR BEGINNING JULY 1, 2021, *TO REGULATE THE EXPENDITURE OF SUCH FUNDS*, AND TO FURTHER PROVIDE FOR THE OPERATION OF STATE GOVERNMENT DURING THIS FISCAL YEAR AND FOR OTHER PURPOSES.

(Emphasis added.) This title "convey[s] reasonable notice of the subject matter to the legislature and the public." *Westvaco Corp.*, 321 S.C. at 64, 467 S.E.2d at 741. Likewise, Proviso 1.108 has a legitimate and natural association with the title of the Appropriations Act, as it regulates the expenditure of appropriated funds by K-12 public schools. Proviso 1.108 therefore does not violate the one-subject rule.[7]

[7] We note that numerous amici briefs have been filed which seek to raise additional issues, including constitutional challenges wholly distinct from that asserted by the City (i.e., the one-subject rule). The parties, through their pleadings, determine the issues before the Court. The issues before the Court may not be expanded through

B.

The City next suggests its ordinances do not conflict with state law because the City will itself fund and enforce the mandate in the City's public schools, rather than using any state-appropriated funds to do so. We find this second argument similarly without merit. The notion that City employees would infiltrate the schools and, without any assistance from school personnel and without a penny of state funds, would be able to mandate masks and impose civil penalties for violations strains credulity and, in fact, is demonstrably false, as proven by the terms of the ordinances themselves.

Expressly contrary to Proviso 1.108, the ordinances require school personnel to enforce the City's mask mandate or face monetary and other legal sanctions. The City ordinances would impose a $100 fine for each "civil infraction." In addition to the fine, "repeated violations of this Ordinance by a person who owns, manages, operates or otherwise controls a school" are subject to a host of legal sanctions. The ordinance then defines a "person" as "any individual associated with the school . . . who has control and authority . . . such as a principal, vice principal, administrator, staff, owner, manager or supervisor." The ordinance further expands the definition of a "person" in breathtaking fashion to "also include an employee or other designee that is present at the business but does not have the title of principal, administrator, manager or supervisor, etc., but has the authority and ability to ensure that the requirements of this Ordinance are met while the school or business is open." By making "etc." responsible for enforcing the mask mandate, the City has made clear that every school employee is in the crosshairs. Simply put, whether intentionally or inadvertently, the City threatens all school personnel with far-reaching and unknown legal liability unless all school personnel ensure obedience to the ordinances. Thus, the ordinances force school personnel—all of whom have an obvious connection to state-appropriated funds—to choose between violating state law (Proviso 1.108) or city law (the ordinances). We therefore reject the City's argument that the ordinances can be harmonized with state law.

We do not outright reject the possibility that a local government could impose a mask mandate without contravening Proviso 1.108. Here, however, the enforcement provisions of the City's ordinances make clear that school

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amici briefs, and we therefore decline to address the merits of any additional constitutional challenges.

personnel—paid at least in part with "funds appropriated or authorized pursuant to [the 2021-2022 Appropriations Act]"—are responsible for enforcing the City's mask mandate. That is in direct conflict with Proviso 1.108.

C.

This brings us to the real point of contention—may the City enact ordinances in direct conflict with state law? The answer is unsurprisingly and unequivocally "no." *See McAbee v. S. Ry. Co.*, 166 S.C. 166, 168, 164 S.E. 444, 444 (1932) ("The government of a municipality is created by the laws of the State of South Carolina, and the creature cannot be greater than its creator, and the laws of a municipality to be good must not be inconsistent with the laws of the State.").

"It is well settled that where there is a conflict between a State statute and a city ordinance, as where an ordinance permits that which a statute prohibits, the ordinance is void." *State v. Solomon*, 245 S.C. 550, 575, 141 S.E.2d 818, 831 (1965). This Court has never wavered in its adherence to this bedrock principle. *See, e.g.*, *id.* at 574–75, 141 S.E.2d at 831 ("The trial judge held that the City [of Charleston's] ordinance was in direct conflict with the prior State statute and void for that reason. The effect of his ruling was that the City ordinance could not make legal that which the State statute declared unlawful. We think that the trial judge ruled correctly."). As we explained in *City of North Charleston v. Harper*,

> Local governments derive their police powers from the state. The state has granted local governments broad powers to enact ordinances respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities. This is in recognition that more stringent regulation often is needed in cities than in the state as a whole. *However, the grant of power is given to local governments with the proviso that the local law not conflict with state law.*

306 S.C. 153, 156, 410 S.E.2d 569, 571 (1991) (emphasis added) (internal citations omitted) (internal quotation marks omitted).

The City premises its authority to enact the ordinances under the Home Rule Act, S.C. Code Ann. §§ 5-7-10 to -310 (2004), merely upon its unilateral declaration of a state of emergency and an alleged need to preserve the "health, peace, order and good government of its citizens." We find such an argument specious and wholly unsupported by law. The Home Rule doctrine in no manner serves as a license for

local governments to countermand a legislative enactment by the General Assembly, nor has this Court ever construed it in that manner. *See, e.g.*, *City of N. Charleston*, 306 S.C. at 156, 410 S.E.2d at 571 (noting a grant of police power to local governments is given with the caveat that the locality may not enact ordinances that conflict with state law); *see also Williams v. Town of Hilton Head Island*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) (explaining Home Rule "bestow[s] upon municipalities the authority to enact regulations . . . so long as such regulations are not inconsistent with the Constitution and general law of the state"). A declaration of an emergency does not alter this settled principle, for otherwise local governments could arbitrarily and unilaterally ignore—effectively overrule—legislative enactments by the General Assembly. *Cf. Moye v. Caughman*, 265 S.C. 140, 143, 217 S.E.2d 36, 37 (1975) (finding, in the context of public education, that Home Rule does not apply to local governments "because public education is not the duty of [local governments], but of the General Assembly," and the "General Assembly has not been mandated by any constitutional amendment to enact legislation to confer upon [local governments] the power to control the public school system").

The City's ordinances are in conflict with state law. Resolving a conflict between state law and a city (or county) ordinance invokes the principle of preemption.

> Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible. *See Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 530, 476 S.E.2d 477, 480 (1996) ("To determine whether the ordinance has been preempted by Federal or State law, we must determine whether there is a conflict between the ordinance and the statutes and whether the ordinance creates any obstacle to the fulfillment of Federal or State objectives."); . . . 56 Am. Jur. 2d *Municipal Corporations* [§] 392 [(2000)] ("[Implied] conflict preemption occurs when an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute[.]") . . . .

S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 400–01, 629 S.E.2d 624, 630 (2006).

The conflict here is express, and, thus, Proviso 1.108 preempts the ordinances because "compliance with both is impossible." *Id.* at 400, 629 S.E.2d at 630. Moreover, even in the absence of an express conflict, the ordinances cannot stand,

for the ordinances frustrate the purpose of the proviso and are therefore preempted. 5 McQuillin *Municipal Corporations* § 15:19 (3d ed. Aug. 2020 Update) ("[E]ven when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose.").

V.

In sum, the City's challenged ordinances cannot stand. We reiterate that we address and decide only the legal question before the Court. The supreme legislative power in this state is vested in the South Carolina General Assembly, not a local government. Absent a constitutional infirmity (and we find the City has not shown one), Proviso 1.108 is accorded supremacy and preempts the contrary ordinances of the City. Accordingly, we uphold Proviso 1.108 and declare void the challenged ordinances of the City insofar as they purport to impose a mask mandate in K-12 public schools.

JUDGMENT DECLARED.

FEW and JAMES, JJ., concur. JAMES, J., concurring in a separate opinion. HEARN, J., concurring in result only in a separate opinion, in which BEATTY, C.J., concurs.

JUSTICE JAMES: I wholeheartedly concur with the majority. I write separately to emphasize the limited role of the judiciary in deciding the issues before us.

As the majority states, we are not permitted to weigh in on the policy debate of whether mask mandates are appropriate or inappropriate in schools or elsewhere. Indeed, the parties to this action acknowledged during oral argument that this Court is not called upon to declare what the "right science" is or to declare whether the proviso reflects either sound public health policy or a complete lack of common sense on the part of the General Assembly. It cannot be said enough that we are not permitted to substitute our policy judgment for a constitutional legislative enactment, nor are we permitted to add to or take away from a constitutional legislative enactment. "We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996).

Some oppose mask mandates no matter what the setting, especially for people who have been vaccinated. Some favor mask mandates in all settings, even for people who have been vaccinated. Others fall somewhere in between. Some say masks should be required to protect those who have not been vaccinated or to ward off variants of the original virus. Some say mask mandates are vehicles for virtue-signaling and government overreach. Some say mandates are responsible governance. The list goes on, and everything on the list represents an issue we have no authority to rule upon.

The vast majority of people on all sides of the virus debate want what is best for their loved ones and their communities. They simply disagree with each other and do so respectfully. The exchange of arguments between the Attorney General and the City has been zealous but professional. Oral argument was a pleasure to watch. However, in other settings, respectful and productive public debate has been drowned out by people who cast those with opposing views in pejorative terms too numerous to list. Some leaders—past and present—who publicly advance the need for mask-wearing are seen maskless at large gatherings. Some leaders refuse to endorse any form of mask protection. Some medical professionals cast opposing medical opinions as moronic, deadly, or evil. Most medical professionals calmly and respectfully express their disagreements with opposing opinions. Some speakers against mask mandates scream and curse during public school board meetings; for the most part, school boards treat them respectfully. Social media platforms suspend the posting of views they deem dangerous or misleading but do not acknowledge when those views turn out to be correct. Those who post their

views on social media do not acknowledge when those views turn out to be demonstrably wrong. Some teachers and college professors will not tolerate opposing views expressed in their classrooms. Many television commentators, radio commentators, and bloggers of all ideological persuasions dwell in echo chambers and blow a gasket when discussing mask mandates but at the same time profess to present calm and reasoned opinions on the subject.

These differing viewpoints and the sad state of public debate do not affect our decision-making; actually, they help define the limited role of the judiciary. In spite of the explosion of public opinion on masks and mask mandates and the sometimes unfortunate manner in which these opinions are expressed, our focus and our authority are limited to applying the law. I repeat—it is not within our power to decree which side of the public health debate regarding masks or mask mandates is correct. Likewise, we have no authority to issue a policy decision "in favor of" or "against" mask mandates in schools. We did not do so in *Creswick*,[8] and we do not do so here.

[8] *Creswick v. Univ. of S.C.*, Op. No. 28053 (S.C. Sup. Ct. filed Aug. 17, 2021) (Howard Adv. Sh. No. 28 at 32) (per curiam).

JUSTICE HEARN: While I wholeheartedly agree with the result, I feel the majority unnecessarily departs from the stated goal of remaining neutral on the policy decisions of both the General Assembly and the City of Columbia (the City).

Our General Assembly, in Proviso 1.108, decided that this year's *appropriated funds* must not be used to implement or enforce a requirement that K-12 students and employees wear a facemask. To be clear, this proviso does not prohibit mask mandates in K-12 schools—counsel for the Attorney General admitted as much at oral argument.

Subsequent to the enactment of Proviso 1.108, the City instituted a conflicting ordinance that does not clearly set forth an enforcement plan that would not invoke funding from the 2021 Appropriations Act. The majority characterizes this conflict as a debate between parental choice and government mandates. Nowhere in the Appropriations Act is the verbiage "parental choice," the Attorney General mentions the concept only once, and yet the majority uses it five times. Neither the Attorney General nor this Court has the authority to create legislative policy. This Court should not, through its language, construct a binary which, in my view, puts an unnecessary political gloss on the issue before the Court.

Some may see the City's actions through this same lens, but still others may view it merely as an earnest attempt to follow health guidelines. Indeed, Justice James correctly identifies these differences by recounting the multitude of views this topic ignites. Regardless of the motivations or how one frames the policy issue, the Court's sole responsibility in this case is to decide whether the City's ordinances conflict with Proviso 1.108, which they unmistakably do.[9] Our responsibility stops there.

Accordingly, I concur in result only.

BEATTY, C.J., concurs.

[9] Because the ordinances are expressly preempted, it is also unnecessary to reach whether they frustrate the purpose of the proviso.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gunjit Rick Singh, Petitioner,

v.

Simran P. Singh, Respondent.

Appellate Case No. 2020-000457

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Gordon B. Jenkinson, Family Court Judge
Judy L. McMahon, Family Court Judge
Jocelyn B. Cate, Family Court Judge
Jack A. Landis, Family Court Judge
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 28057
Heard June 17, 2021 – Filed September 8, 2021

AFFIRMED AS MODIFIED

Robert N. Rosen, of Rosen Law Firm, LLC, of Charleston, Sheila McNair Robinson, of Moore Taylor Law Firm, P.A., of West Columbia, and Katherine Carruth Goode, of Winnsboro, for Petitioner.

O. Grady Query, Michael W. Sautter, Michael Holland Ellis, Jr., and Alexander Woods Tesoriero, all of Query Sautter & Associates, LLC, of Charleston, for Respondent.

JUSTICE HEARN: The question presented in this case is whether South Carolina law permits issues relating to child custody and visitation to be submitted to binding arbitration with no oversight by the family court and no right of review by an appellate tribunal. We believe the answer is clearly and unequivocally no.

FACTS/PROCEDURAL HISTORY

After nearly seventeen years of marriage, Respondent Simran Singh (Mother) and Petitioner Gunjit Singh (Father) separated in January of 2012. They subsequently entered into a settlement agreement later that year which resolved all issues arising from their marriage, including custody and visitation matters involving their two children, then aged eleven and two.[1] Pursuant to that agreement, Mother received primary custody, and the parties consented to submit any future disputes regarding child support or visitation to a mutually agreed-upon arbitrator, specifically providing that his or her decision would "be binding and non-appealable." The family court approved the agreement and granted the parties a divorce in February of 2013.

Approximately nine months later, Father filed an action in family court seeking modification of custody, visitation, and child support, alleging Mother had violated a provision of the agreement when she failed to return to South Carolina with the children after embarking on a cross-country tour as a motivational speaker. From January through August of 2014, four family court judges issued decisions—one dismissing Father's complaint due to the parties' decision to arbitrate; a second issuing a consent order to arbitrate; and two approving amended agreements to arbitrate. The agreements contained the following provision: "The parties fully understand that the decision of the Arbitrator is final and binding upon them and that they do not have the right to apply to this Court or to any other Court for relief if either is unsatisfied with the Arbitrator's decision."[2]

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[1] The parties' older child is now emancipated.

[2] Our review of the settlement agreement and the subsequent agreements to arbitrate reveals that each amended version strengthened the arbitration provisions. For

The two judges who ruled on the amended agreements found them to be "fair and equitable" as well as enforceable by the court. The arbitrator—a well-respected Charleston family law attorney and mediator—issued a "partial" arbitration award in August, finding a substantial and material change of circumstance affecting the welfare and custody of the minor children, and awarding Father temporary custody. A thirty-two-page final arbitration award was issued the next month, awarding custody to Father. A fifth family court judge issued an order in January of 2015 confirming both the partial and final arbitration awards.

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example, the settlement agreement approved by the family court in February 2013 provided for arbitration of future disputes pertaining to child support, relocation, and visitation, but it did not specifically address custody. Further, the family court judge stated this on the record during the hearing on the approval of the settlement agreement:

> [A]s to that part of your agreement which deals with your two children, I want you to understand that even if I approve this agreement, if there happens to be some change in circumstances in the future, either of you may be able to come back before me, or another judge, and ask the court to make changes in that part of the agreement.

In January of 2014, following the Father's request for modification of custody, the family court approved an agreement to arbitrate the issues—including custody—and additionally stated that the arbitrator's decision was final and not appealable. In March, the parties amended their agreement to arbitrate, which was approved by the family court, by reiterating the finality of the arbitrator's decision and adding a $10,000 monetary penalty as a consequence of challenging that decision. In August, the family court approved a supplemental amended agreement to arbitrate, which retained the aspects above in addition to a new provision acknowledging the arbitration rules do not expressly authorize arbitration of children's issues, but releasing any potential claims against the arbitrator or the parties' attorneys for exceeding "their authorization and/or the authorization of the applicable ADR rule of the Family Court." Thus, both the scope of the issues subject to arbitration and the parties' implicit recognition of the uncharted legal territory of arbitrating children's issues expanded from the time of the settlement agreement to the supplemental amended agreement to arbitrate.

However, within days of the arbitrator's final award and months before the family court approved it, Mother—represented by new counsel—filed a motion for emergency relief, asking the court to vacate the arbitration awards and the prior court orders approving the parties' agreements to arbitrate. Following a hearing on that motion, the court issued an order confirming both the partial and final arbitration awards "with finality" and denied the motion seeking to vacate the awards as premature. It thus appears that four different family court judges approved—at times apparently without a hearing—the parties' agreements to arbitrate the issues involving the children, and a fifth judge confirmed the validity of the arbitration award.

Thereafter, Mother filed five separate Rule 60(b)(4), SCRCP, motions to vacate all the orders approving the parties' agreements to arbitrate. Although Mother requested the motions be consolidated for a hearing before a single judge in the interest of judicial economy, that motion was denied. Five separate hearings ensued, all of which ultimately resulted in orders denying mother's motions. Mother thereafter filed five notices of appeal from orders denying her motions, and the court of appeals consolidated them. The court of appeals issued its unanimous decision in December of 2019, holding that the parties could not divest the family court of jurisdiction to determine issues relating to custody, visitation, and child support. *Singh v. Singh*, 429 S.C. 10, 30, 837 S.E.2d 651, 662 (Ct. App. 2019).[3] One month prior thereto, another panel of the court of appeals issued a decision in *Kosciusko v. Parham*, 428 S.C. 481, 505, 836 S.E.2d 362, 375 (Ct. App. 2019), holding the family court did not have subject-matter jurisdiction to approve the binding arbitration of children's issues.[4] We granted certiorari in this case because the court of appeals based its decisions on slightly different grounds, and affirm as modified.

ISSUE

Did the court of appeals err in concluding the family court could not delegate its exclusive jurisdiction to determine the best interest of the child?

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[3] We note the court of appeals concluded the $10,000 penalty provision was "astonishing." Because neither party has challenged the monetary penalty before us on appeal, we express no opinion as to whether that provision is enforceable.

[4] Following the issuance of the court of appeals' decision in *Kosciusko*, the parties in that case apparently settled their differences and no petition for certiorari was filed.

STANDARD OF REVIEW

Generally, appellate courts review the decision of the family court de novo, with the exception of evidentiary and procedural rulings. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011); *Stoney v. Stoney*, 422 S.C. 593, 595 n.2, 813 S.E.2d 486, 487 n.2 (2018) ("*Lewis* did not address the standard for reviewing a family court's evidentiary or procedural rulings, which we review using an abuse of discretion standard."). While this consolidated appeal results from multiple orders denying Mother's Rule 60(b) motions, the underlying question stems from the family court's legal authority to delegate its jurisdiction to an arbitrator, which is a question of law for the Court to review de novo.

DISCUSSION

We begin our analysis with the recognition that family courts are statutory in nature and therefore possess only that jurisdiction specifically delegated to them by the South Carolina General Assembly, which was granted authority over these issues in Article V, section 12 of the South Carolina Constitution. Pursuant to that constitutional grant of authority, the General Assembly created the family courts and established the parameters of their jurisdiction. S.C. Code Ann. § 63-3-530 (2010 & Supp. 2020) (stating the family court has exclusive jurisdiction over forty-six matters listed); *State v. Graham*, 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000) ("The family court is a statutory court created by the legislature and, therefore, is of limited jurisdiction."). Accordingly, the family court's jurisdiction is "limited to that expressly or by necessary implication conferred by statute." *Graham*, 340 S.C. at 355, 532 S.E.2d at 263. Significantly, subsection 63-3-530(39) provides the family court with exclusive jurisdiction:

> [T]o require the parties to engage in court-mandated mediation pursuant to Family Court Mediation Rules or to issue consent orders authorizing parties to engage in any form of alternate dispute resolution *which does not violate the rules of the court or the laws of South Carolina*; provided however, the parties in consensual mediation must designate any arbiter or mediator by unanimous consent subject to the approval of the court[.]

S.C. Code Ann. § 63-3-530(39) (2010) (emphasis added). While this provision envisions arbitration in some areas, our court rules and jurisprudence confirm that children's matters are not within the ambit of issues subject to arbitration.

Our Alternative Dispute Resolution Rules (ADR) contemplate both mediation and arbitration of family court matters, but implicitly limit binding arbitration to issues of property and alimony. *See* Rule 3(a), SCADR (requiring "all contested issues in domestic relations actions filed in family court" be subject to mediation unless the parties agree to conduct arbitration); Rule 4(d)(1), SCADR (providing "[i]f there are unresolved issues of *custody or visitation*, the court may . . . order an *early mediation* of those issues upon motion of a party or upon the court's own motion") (emphasis added); Rule 4(d)(2), SCADR (stating "the parties may submit the issues of property and alimony to binding arbitration in accordance with subparagraph (5)"); Rule 4(d)(5), SCADR (noting "[i]n lieu of mediation, the parties may elect to submit issues of property and alimony to binding arbitration in accordance with the Uniform Arbitration Act, S.C. Code Section 15-48-10 et. seq., or submit all issues to early neutral evaluation pursuant to these rules"). We agree with the court of appeals' decision in *Kosciusko*, 428 S.C. at 498, 836 S.E.2d at 371, which applied the canon of construction *expressio unius est exclusio alterius*, meaning to express or include one thing implies the exclusion of another. Accordingly, because the drafters of Rule 4(d), SCADR, expressly included arbitration of property and alimony but only addressed custody and visitation in the context of early mediation, it can be fairly implied that the rule does not permit binding arbitration of children's issues.[5] Thus, to the extent that the court of appeals' opinion in this case suggests our ADR rules do not prohibit arbitration of children's issues, we modify that portion accordingly.

Further, our construction of the ADR rules mirrors the jurisprudence of this state, which has consistently recognized the authority of the family courts over issues regarding children. In the seminal decision of *Moseley v. Mosier*, this Court stated

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[5] We acknowledge that the Uniform Family Law Arbitration Act contemplates arbitration of children's issues while also granting the family court the power to vacate an unconfirmed arbitration award if the moving party demonstrates the award is not in the best interest of the child. *See* Unif. Family Law Arbitration Act § 19(b) (Nat'l Conference of Comm'rs on Unif. State Laws 2016). In determining the best interests of the child, the drafter's of this model legislation provided two choices for reviewing the arbitration award—either de novo or limited to "the record of the arbitration hearing and facts occurring after the hearing." *Id.* at § 19(d). Only four states have enacted this legislation, and South Carolina is not one of them. *See Family Law Arbitration Act*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed (last visited Sept. 7, 2021).

that "family courts have continuing jurisdiction to do whatever is in the best interests of the child regardless of what the separation agreement specifies." 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983). Following *Moseley*, the court of appeals decided *Ex parte Messer* involving a separation agreement which contained an arbitration provision. 333 S.C. 391, 395, 509 S.E.2d 486, 487-88 (Ct. App. 1998). The court held the provision invalid as not meeting the requirement of conspicuousness, but it reiterated that "*Moseley* makes it clear that *except for matters relating to children*, over which the family court retains jurisdiction to do whatever is in their best interest, parties to a separation agreement may 'contract out of any continuing judicial supervision of their relationship by the court.'" *Id.* (quoting *Moseley*, 279 S.C. at 353, 306 S.E.2d at 627) (emphasis added). Approximately a year after *Messer*, the court of appeals again emphasized the distinction between arbitrating issues pertaining to children versus property and alimony matters. In *Swentor v. Swentor*, the court declined to set aside an arbitration award concerning the equitable apportionment of the marital estate, but specifically limited its decision to property and alimony issues. 336 S.C. 472, 486 n.6, 520 S.E.2d 330, 338 n.6 (Ct. App. 1999) ("Our holding, of course, is limited to arbitration agreements resolving issues of property or alimony, and *does not apply to agreements involving child support or custody*.") (emphasis added).

Accordingly, we reject Father's contention that the General Assembly has in any way authorized family courts to approve agreements to arbitrate children's issues. Instead, our reading of the statutes and court rules is consistent with the analysis of the court of appeals in *Kosciusko*: by specifically providing for the arbitration of property and alimony issues in the ADR rules, the General Assembly intended that children's issues not be subject to arbitration. We likewise reject Father's contention that the statements in *Messer* and *Swentor* placing children's issues in a different category from property and alimony matters was mere dicta; rather, that language was integral to those decisions because it delineated the scope of permissible arbitration in family court.

Moreover, apart from the ADR rules and our case law, children's fundamental constitutional rights are at stake here. *See Ex parte Tillman*, 84 S.C. 552, 560, 66 S.E. 1049, 1052 (1910) ("[T]here is a liberty of children above the control of their parents, which the courts of England and this country have always enforced."). As the court of appeals so aptly stated: "Longstanding tradition of this state places the responsibility of protecting a child's fundamental rights on the court system." *Singh*, 429 S.C. at 23, 837 S.E.2d at 658. We agree with the court of appeals that the family

court cannot delegate its authority to determine the best interests of the children based on the *parens patriae* doctrine.[6] Parents may not attempt to circumvent children's rights to the protection of the State by agreeing to binding arbitration with no right of judicial review. This has never been the law in South Carolina, and our decision today unequivocally holds arbitration of children's issues is not permitted.[7]

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[6] *Parens patriae* is Latin for "parent of the country." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 n.8 (1982). This doctrine recognizes that it is the State's duty to protect those who cannot protect themselves, including minor children in this context. *Id.* at 600 (discussing the origins and development of *parens patriae*).

[7] In denying Mother's Rule 60(b) motions, two of the five family court judges found Mother was estopped from challenging the validity of the court orders and the arbitration award. Father contends Mother did not appeal the estoppel finding, rendering it the law of the case and invoking the two issue rule. We believe Mother sufficiently challenged the estoppel findings both before the family court and on appeal. While Mother did not use the term "estoppel" in her opening brief before the court of appeals, she did argue the family court erred by focusing on the parents' conduct rather than the children's constitutional rights. *Buist v. Buist*, 410 S.C. 569, 575, 766 S.E.2d 381, 383-84 (2014) (noting that a party need not use the precise legal term to preserve an issue, but "the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error"). Further, Mother specifically argued that parents cannot waive the type of constitutional rights at issue, and while waiver and estoppel are distinct concepts, the doctrines sometime "merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992) (citation omitted). *See also Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) ("[*L*]*ack* of subject matter jurisdiction in a case may not be waived and ought to be taken notice of by an appellate court."). Accordingly, the procedural doctrines Father relies on do not apply. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (stating preservation rules are not a "gotcha" game aimed at embarrassing attorneys or harming litigants and noting it is "good practice" to reach the merits when preservation is unclear).

CONCLUSION

Consistent with the reasoning herein, we affirm as modified the opinion of the court of appeals vacating the arbitration award and the underlying orders approving the parties' right to arbitrate issues involving their children. Custody of the minor child will continue to remain with Father until otherwise ordered by the Charleston County Family Court.

AFFIRMED AS MODIFIED.

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

The Supreme Court of South Carolina

In the Matter of David Mark Foster, Respondent.

Appellate Case No. 2021-000956

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent consents to the issuance of an order of interim suspension in this matter.

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

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
September 7, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kelaher, Connell & Conner, P.C., Appellant,

v.

South Carolina Workers' Compensation Commission, Respondent.

Appellate Case No. 2018-001265

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

Opinion No. 5860
Heard February 2, 2021 – Filed September 8, 2021

AFFIRMED

Gene McCain Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach, for Appellant.

Douglas Charles Baxter, of Richardson Plowden & Robinson, PA, of Myrtle Beach, and Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA of Columbia; Chelsea Lane Monroe, of Motley Rice, LLC of Mount Pleasant; and James Keith Roberts, of the South Carolina Workers' Compensation Commission, of Columbia, all for Respondent.

LOCKEMY, C.J.: In this negligence action, Kelaher, Connell & Conner, P.C. (KCC) appeals the circuit court's order granting the South Carolina Workers' Compensation Commission's (the Commission's) motion to dismiss under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. On appeal, KCC argues the circuit court erred in (1) granting the Commission's motion to dismiss based on the South Carolina Tort Claims Act[1] (the Act), (2) finding the Commission's actions were a judicial act, (3) failing to find the Commission was grossly negligent for its failure to notify KCC of the hearing, and (4) failing to hold KCC had a constitutional right to be heard. We affirm.

FACTS/PROCEDURAL HISTORY

In its complaint, KCC alleged the following set of facts. On July 31, 2007, Bruce Nadolny retained KCC to represent him in a worker's compensation claim against AVX Corporation and Liberty Mutual Insurance Company. KCC, on behalf of Nadolny, entered into mediation on his claim. From that mediation, Nadolny agreed to accept a $120,000 settlement. The day after mediation, Nadolny informed KCC he no longer needed its representation, and KCC was relieved as counsel. KCC informed Nadolny that it had expended multiple hours and expenses working on his case and would file a claim for attorney's fees.

KCC asserted it filed a Form 61 fee petition on August 29, 2012, which it alleged the Commission denied receiving. KCC alleged it filed additional fee petitions on September 11, 2012, and September 18, 2012. On November 9, 2012, KCC requested the Commission place a lien on the settlement. On December 13, 2012, the Commission informed KCC it would need to file another Form 61 to put a lien on the case. KCC filed an alleged fourth Form 61 on December 28, 2012. In 2016, Nadolny died. On November 3, 2016, the Commission approved the settlement to Nadolny's widow without notifying KCC of the hearing. KCC alleged Nadolny's widow moved out of South Carolina after receiving the settlement.

KCC asserts the Commission was negligent, reckless, and willful in the following:

a. In failing to notify Plaintiff of a hearing;
b. In failing to recognize and protect Plaintiff's lien;

[1] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2020).

c. In mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions;
d. In failing to follow generally accepted practices in notifying Plaintiff after he had been relieved;
e. In failing to send written notice to the Plaintiff;
f. In failing to handle notice to the Plaintiff on a potential hearing in a businesslike manner;
g. In failing to abide by its employees' emails and notes which indicated that if Plaintiff filed a Form 61 with an Order and cost sheet they would hold until the end of the case.

The Commission filed a motion to dismiss, arguing the circuit court lacked subject matter jurisdiction and that the Commission was immune under the Act. Specifically, the Commission asserted it was immune under section 15-78-60(2)-(3) of the South Carolina Code (2005). The circuit court ruled it had jurisdiction to hear this action but that the Commission was immune from suit based on the exception found in section 15-78-60(2). The circuit court stated that, because a government entity was not liable for administrative actions or inactions of quasi-judicial nature, the Commission was immune from suit for the alleged acts of negligence regarding the fee petition. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by granting the Commission's motion to dismiss on the grounds it was immune pursuant to the Act because its actions were ministerial?

2. Did the circuit court err by finding the Commission's actions or inactions were quasi-judicial because they were ministerial acts?

3. Did the circuit court err by failing to hold the Commission's failure to notify KCC of the hearing was grossly negligent?

4. Did the circuit court err by failing to hold KCC had a constitutional right to be heard?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the [circuit] court." *Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). "That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (quoting *Rydde*, 381 S.C. at 646, 675 S.E.2d at 433). "If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper." *Id*.

LAW/ANALYSIS

I. Immunity

KCC argues the circuit court erred in finding the Commission was immune under the Act. KCC asserts the Commission's failure to notify KCC of the hearing was a ministerial act and therefore neither the Act nor judicial immunity immunized the Commission. We find the issue of whether the Commission's alleged action or inaction was ministerial is not preserved for appellate review.

In its response to the Commission's motion to dismiss, KCC asserted the Commission was not immune because the Commission's act was not a judicial or quasi-judicial act because it was simple negligence. KCC did not raise the issue of whether the Commission's act was a ministerial act—and thus an exception to the Act's immunity—until its Rule 59(e), SCRCP, motion. Because KCC failed to raise this issue at the hearing or in its response to the Commission's motion to dismiss, we find this issue is unpreserved for appellate review. *See Portman v. Garbade*, 337 S.C. 186, 189-90, 522 S.E.2d 830, 832 (Ct. App. 1999) (holding an issue not raised to the circuit court in a Rule 12(b)(6), SCRCP, motion, was not preserved for appellate review). Thus, KCC failed to preserve this issue for appellate review. *See Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

II. Gross Negligence

KCC asserts the court should extend a gross negligence standard to the exceptions relied on by the Commission because the Commission asserted it was immune under section 15-78-60(12) of the South Carolina Code (2005). KCC argues the Commission's gross negligence was evidenced by their failure to document the fee petition four times. We disagree.

Section 15-78-60(12) states:

> The governmental entity is not liable for a loss resulting from . . . licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.

Our supreme court has held that "when an *applicable* exception to the waiver of immunity contains a gross negligence standard, that gross negligence standard must be read into all other applicable exceptions that do not contain a gross negligence standard." *Repko v. County of Georgetown*, 424 S.C. 494, 504, 818 S.E.2d 743, 749 (2018). However, "the immunity provision containing the gross negligence standard must actually *apply* to the case before it can be read into another immunity provision." *Id*. If a particular immunity exception does not apply to the facts of the case, "the gross negligence standard contained in that immunity is not to be read into applicable immunity subsections that do not contain a gross negligence standard." *Id.* at 507, 818 S.E.2d at 750.

The substance of section 15-78-60(12) is inapplicable here. *See* § 15-78-60(12). The record shows this case did not deal with licensing powers found in section 15-78-60(12) but instead with the Commission's alleged failure to notify KCC of a hearing. Because section 15-78-60(12) does not apply to this case, the circuit court did not err in failing to extend the gross negligence standard to the exceptions that did apply.

III. Right to be Heard

KCC argues constitutional law requires that the Commission allow KCC to be heard and by failing to provide notice of the hearing, the Commission failed to provide sufficient due process. We disagree.

Here, KCC did not allege a violation of its constitutional due process rights in its complaint. Although KCC's complaint mentioned the failure to provide notice, it only raised the failure to provide notice as a claim of the tort of negligence. KCC did not argue a constitutional deprivation in its complaint. *See Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011) ("It is a well-settled principle that in resolving a Rule 12(b)(6) motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of the complaint."). Because KCC did not allege a constitutional violation of due process in its complaint and the circuit court was limited to allegations as contained in the complaint, the circuit court did not err in granting the Commission's Rule 12(b)(6) motion to dismiss.

CONCLUSION

For the foregoing reasons, the circuit order granting the Commission's Rule 12(b)(6) motion is

AFFIRMED.

HUFF and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Randy Collins, Appellant.

Appellate Case No. 2018-002056

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5861
Heard May 4, 2021 – Filed September 8, 2021

REVERSED AND REMANDED

E. Brandon Gaskins, of Moore & Van Allen, PLLC, of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, both for Appellant.

Attorney General Alan McCrory Wilson, and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

HUFF, J.: Appellant, Randy Collins, appeals from his first-degree arson and conspiracy convictions, asserting the trial court erred in (1) ruling his confession was voluntarily given and (2) refusing to require further evaluation of him for

competency to stand trial. Because we find the trial court erred in finding his confession was voluntarily given, we reverse and remand for a new trial.

FACTUAL/PROCEDURAL HISTORY

This case involves the tragic death of a twelve-year-old boy (Child) as a result of an intentionally set fire. The State's theory of the case was that Child's mother, Marissa Cohen, obtained an insurance policy on the contents of a rented mobile home, she offered Appellant $5,000 to burn the mobile home, and Appellant enlisted the help of his nephew, James Miller (Miller), to carry out the plan. The vast majority of the crucial evidence admitted against Appellant was the challenged recorded statement he gave to law enforcement.

In the early morning hours of March 29, 2014, Andrews Fire Department and Georgetown County Fire EMS personnel responded to a mobile home fire in Andrews, South Carolina, after receiving a call around 1:15 a.m. Although they received information the home was vacant, once the fire was extinguished and the firefighters forced entry into the locked home, they discovered Child was dead inside the structure. The State produced evidence that Cohen obtained a $25,000 property insurance policy on the contents of the mobile home on February 20, 2014. On March 24, 2014, Cohen rented a storage unit and, shortly before the fire at the mobile home, she moved furniture and household appliances from the mobile home to the storage unit. One of the men who had earlier helped Cohen move her household items, Benjamin "Mano" Brown (Mano), testified that after he helped her move, Cohen told him she intended to burn the home. A couple of days before the fire Cohen moved with her children into the home of Frank Washington at Arbor Place Apartments. On the day of the fire, Cohen purchased $20 worth of kerosene from a convenience store in Andrews. On the night of the fire, Cohen's older son, Devon, and her younger child were at the Arbor Place apartment with Cohen but Child was not there, having gone to a birthday party at a recreation center around 8:30 p.m. on March 28, 2014. When Child and his friend left the party around 12:00 or 12:30 a.m., Child asked his friend if he could spend the night with him. Child said he was going to check on his mother and retrieve some clothes. The friend understood Child was going to the mobile home that they had moved out of earlier in the week. Child never returned.

Investigators quickly determined the fire had been intentionally set with the use of an accelerant poured on the floor of the home. Testing subsequently revealed the

presence of heavy petroleum distillate—common in kerosene—in the home. SLED Agent Scott Hardee, an arson investigator, assisted Georgetown County Investigator Melvyn Garrett in the investigation of this case. Based on an anonymous tip, Agent Hardee discovered the insurance policy that had been taken out by Cohen, and Investigator Garrett discovered Cohen purchased kerosene the day before the fire. This tip also indicated Appellant and Mano were involved. Investigator Garrett testified he spoke with Mano, who stated he was not there and did not know anything about the incident, which the investigator stated he was able to confirm. Investigator Garrett then spoke with Appellant on April 9, at which time Appellant told him he did not have anything to do with the fire and that he was at a club with his nephew, Miller, from 9:00 p.m. until 3:00 a.m. that night. The investigator also talked to Miller, who gave a statement likewise claiming he was with Appellant at a club from 9:00 p.m. until 3:00 a.m. on the night of the fire. Thereafter, Andrews Police Officer Oliver Nesmith served warrants on Appellant, obtaining his two cell phones. Agent Hardee noted phone records showed Cohen's and Appellant's phones had made contact with each other three times on March 28th, 2014—at 12:11 p.m., 3:27 p.m., and 9:07 p.m.—and three more times on March 29, 2014—at 2:50 a.m., 3:01 a.m., and 3:24 a.m.

On June 4, 2014, when Appellant arrived at Town Hall to retrieve his phones from Officer Nesmith,[1] Agent Hardee and Investigator Garrett used the opportunity to obtain an interview from Appellant. The officers read Appellant his rights and obtained a signed waiver of rights form from him at 10:20 a.m.[2] Agent Hardee then set up his personal camcorder to record the interview. Agent Hardee testified Appellant initially denied any involvement in the fire and denied he had any contact with Cohen, but when confronted, he changed his story and admitted contact with her. Agent Hardee testified Appellant ultimately told them that Cohen asked him to burn down her trailer and she would pay him $5,000; he went with Miller to the location; and he put all the blame on Miller as far as starting the fire

[1] Agent Hardee acknowledged they used Officer Nesmith, who Appellant had known for a long time, to get Appellant to come retrieve his phones with Agent Hardee and Investigator Garrett present. He agreed that, in essence, they tricked Appellant to get him to Town Hall.

[2] The officers proceeded to question Appellant until 1:51 p.m. Roughly an hour and a half into the interview, the battery died on the camcorder and, because the officers did not realize this, some of the interview was not recorded.

but admitted he was there. The officers thereafter obtained arrest warrants for Appellant,[3] Cohen, and Miller.[4]

Like Agent Hardee, Investigator Garrett testified Appellant initially maintained that he was not involved with the fire but, as they confronted him with inconsistencies, he changed his story. According to Investigator Garrett, Appellant stated that Cohen offered him $5,000 to burn down the trailer, he told Miller about the offer, and he put himself at the crime scene when the fire started. Subject to Appellant's *Jackson v. Denno*[5] objection, the solicitor played Appellant's redacted interview for the jury.

Numerous individuals testified concerning Cohen's strange behavior and lack of concern regarding Child's death. Additionally, the State presented evidence concerning Cohen's nefarious intentions regarding Appellant and Mano after the fire. In particular, one of Cohen's cousin's testified Cohen told her she needed her to "help [her] get rid of Mano because [he was] the only one [who could] get [her] locked up." The State also presented evidence of a letter Cohen sent to her son, Devon, dated November 11, 2014. In the letter, Cohen wrote, "I heard [Appellant] has a bond. I wish that I had some backup and [Appellant] did have a bond just to deal with him. . . . I need a gun and meet up with [Appellant] and Mano."

The jury found Appellant guilty of arson in the first degree and criminal conspiracy. The trial court sentenced Appellant to thirty years' imprisonment on the arson charge and gave him a concurrent five-year sentence on the conspiracy charge.

ISSUES

1. Did the trial court err in ruling Appellant's confession was voluntarily given?

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[3] Appellant's warrants were filed the next day, June 5, 2014.

[4] The record reveals, although Miller was arrested in this matter, he died on April 26, 2015—before Appellant's trial—apparently at the hands of Child's brother, Devon.

[5] 378 U.S. 368 (1964).

2. Did the trial court err in refusing to require further evaluation of Appellant for his competency to stand trial based on indications that he suffered from intellectual disabilities?

LAW/ANALYSIS

I. Voluntariness of Statement

A. *Jackson v. Denno* Hearing and the Recorded Statement

Prior to the trial, the court conducted a hearing on the voluntariness of Appellant's statements to law enforcement. Investigator Garrett, Agent Hardee, and Appellant testified during this hearing, and the recording of the Appellant's interview was played at this time.

In regard to Appellant's recorded statement, Investigator Garrett testified that after the officers executed a search warrant on Appellant's phones, they utilized Andrews Police Officer Nesmith—who Appellant was familiar with and possibly related to—to facilitate this matter by having Officer Nesmith return Appellant's phones in his and Agent Hardee's presence at Town Hall. When Appellant arrived, Investigator Garrett and Agent Hardee asked him to speak with them about the incident. Appellant agreed and they went into a conference room at Town Hall. Agent Hardee went over Appellant's *Miranda*[6] rights, having Appellant initial beside each right, and Appellant signed the waiver of rights form at 10:20 a.m. on June 4, 2014. The conference room was not set up for recording purposes, but Agent Hardee had a video camera he was able to set up in the room. Investigator Garrett testified they were there approximately three hours, and during that time Appellant had a soda with him and was allowed to use the bathroom and smoke cigarettes a few times. He stated that at no time did they put any handcuffs or restraints on Appellant, at no time was he told he could not leave, they did not make any threats to get Appellant to talk, they took adequate breaks when Appellant requested them, and he had a phone with him that he could use if he desired. When asked if there were any promises made to Appellant to get him to talk, Investigator Garrett acknowledged that he told Appellant "that no matter what he told [him] . . . he was going to go home that particular day." Asked if they gave

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

any hopes of assistance in the prosecution of the case, the officer replied, "Well, certainly, if he gave any information that led to the case being solved, then we would certainly ask for leniency of any type if we could," but there were no promises of leniency made. The State thereafter played the recorded interview. Concerning the part of the interview that was not recorded, Investigator Garrett stated that was not done with any purposeful intent, and no threats, coercions or promises were made during that time. He also stated he "kept [his] end of [the] bargain" concerning his discussion in the interview about talking with the solicitor. At the end of the interview, Investigator Garrett wrote a statement for Appellant, which Appellant signed.

Agent Hardee testified Appellant appeared to understand his rights and he was not handcuffed and was free to leave. He used his personal battery-powered camera to record the interview, which was visible, on the table, to Appellant. Appellant never asked to stop the interview, he never asked to leave, he never asked for food, and he was provided with a soft drink as well as cigarette and bathroom breaks. The agent denied threatening or coercing Appellant into giving his statement. On cross-examination, Agent Hardee estimated the tape recording was turned off for 10-15 minutes during the interview. He agreed there was a time that Appellant asked to smoke a cigarette and he was told no, explaining it was at a very important part of the interview when Appellant was about to make an admission. Agent Hardee also acknowledged he told Appellant at some point that the tape recording of his interview "wasn't going any further" than that room, but the agent knew that was not true.

Appellant testified he did not know or understand about *Miranda* rights and he did not recall the officers reading him his rights. He stated his reading ability was "not too good," he only completed seventh or eighth grade, he never obtained a GED, and he was in special education classes. Appellant claimed he did not remember signing the *Miranda* waiver, explaining that he had difficulty remembering things since he suffered a stroke. He did not understand at the time he was with the officers that he had a right to a lawyer, that he did not have to talk to them, or that what he was saying could be used against him in a trial. Appellant testified he felt that he had to stay there and did not feel that he had the freedom to leave. He stated he thought he was just going to pick up his phone and did not think about giving an interview. Upon questioning by the trial court, Appellant stated the officers did not really threaten him, but they did promise they would talk to the solicitor if he was forthcoming.

A review of the recorded statement reveals Appellant initially denied having any knowledge in the matter. However, Appellant eventually told the officers that Cohen asked him to burn down the mobile home in exchange for $5,000 but he told her no; he told Miller what Cohen had said, and Miller indicated he would do it for $1,500; he and Miller went to the club the night of the fire; when they left, Appellant told Miller to take him home but Miller drove to a backroad behind the mobile home; Miller checked the doors to the home, but they were locked; Appellant told Miller not to do it; Miller threw a lit piece of paper or a match through a window of the home; and when they left, Miller circled around the area, but they did not see anything lit or any smoke, so Appellant did not believe Miller had successfully started a fire. Appellant gave inconsistent statements regarding what Miller used to light the fire and whether Appellant actually observed him throw a lit item into a window or whether Appellant was back at the car at that time so he could not actually see what Miller did.

We observe from the recording that Appellant informed the officers he suffered a stroke in the previous year, he did not feel well that morning, and he repeatedly indicated he had trouble with his memory. Of particular note, however, is an assurance made by Agent Hardee approximately twenty-one minutes into the interview, after Appellant was asked whether he thought the fire was intentionally started, and Appellant responded he did not want to "say the wrong thing." Agent Hardee responded, "Well, you're not going to say the wrong thing. *Whatever you tell me, it ain't gonna leave this room. This, um, tape is going into my file*. And I'm gonna, I'm gonna burn a copy for him. And we'll have a copy of this tape. *And it ain't gonna go any further than this room*. That's why we got the door shut, the blinds pulled, there's no sound device in here. I want you to be honest with me and tell me what you think."

In ruling on the matter, the trial court found "the seminal issue" as to the recorded statement was whether Appellant was *Mirandized*, and the court determined Appellant made a "knowing, voluntary and intelligent waiver of those rights." Remarking that the State must show by a preponderance of the evidence that Appellant waived his rights after being advised under *Miranda*, it found "that showing has certainly been made." The trial court noted that voluntariness hinged on whether there was police coercion. In contemplating the voluntariness of his statement, the trial court considered the characteristics of Appellant and found he had "the requisite intelligence to knowingly and intelligently waive his right to

remain silent as well as his right to an attorney at the time the statements were made." It found "absolutely no evidence of coercion or threats made to [Appellant] at any time during the investigative interrogation." It further found the testimony of the two officers more credible than Appellant regarding his understanding of his rights and found the recorded statement was admissible.

B. Discussion

Appellant argues the trial court erred in admitting his recorded statement as it was induced by deception regarding its use, promises of leniency, threats of severe punishment, and other factors which indicate his statement was not voluntary. In particular, he contends he was coerced and tricked into making inculpatory statements by the officers' misrepresentation that his statement would not be used against him. He maintains their promises that his statement would not leave the room and the recording would be placed only in their file conveyed it would not be used against him and rendered the previous *Miranda* warnings meaningless. Although it does not appear South Carolina has addressed the voluntariness of a statement after police have assured confidentiality, Appellant notes other jurisdictions have ruled such assurances preclude a finding of voluntariness. Additionally, Appellant argues his statement was induced by implied promises of leniency and threats that he would die in prison if he did not cooperate. He also asserts his low level of education, recent stroke and cognitive impairments, along with the officers' coercive tactics, demonstrate his confession was not voluntary. Appellant contends, under the totality of the circumstances, his will was overborne and his statement was not voluntarily given. We agree.

"A confession is not admissible unless it was voluntarily made." *State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). "If a defendant was advised of his *Miranda* rights, but chose to make a statement anyway, the 'burden is on the State to prove *by a preponderance of the evidence* that his rights were voluntarily waived.'" *State v. Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989) (quoting *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988)). "The State bears this burden of proof even [when] a defendant has signed a waiver of rights form." *Id.* "On appeal, the trial [court's] ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion." *Myers*, 359 S.C. at 47, 596 S.E.2d at 492. "In determining whether a confession was given 'voluntarily,' [the appellate court] must consider the totality of the circumstances surrounding the defendant's giving the confession." *State v.*

Collier, 421 S.C. 426, 435, 807 S.E.2d 206, 211 (Ct. App. 2017) (alteration in original) (quoting *State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007)).

"The history of the Fifth Amendment right against compulsory self-incrimination, and the evils against which it was directed, have received considerable attention in the opinions" of the United States Supreme Court (USSC). *Michigan v. Tucker*, 417 U.S. 433, 439 (1974). These "decisions have referred to the right as 'the mainstay of our adversary system of criminal justice,' and as 'one of the great landmarks in man's struggle to make himself civilized.'" *Id.* (citations omitted) (first quoting *Johnson v. New Jersey*, 384 U.S. 719 (1966); then quoting *Ulmann v. United States*, 350 U.S. 422, 426 (1956)). "Prior to *Miranda*, [the courts] evaluated the admissibility of a suspect's confession under a voluntariness test." *Dickerson v. United States*, 530 U.S. 428, 432-33 (2000). "Over time, [the courts] recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment." *Id.* at 433. The courts have not "abandoned this due process jurisprudence, and . . . continue to exclude confessions that were obtained involuntarily." *Id.* at 434. The issue of voluntariness "is not limited to instances in which the claim is that the police conduct was 'inherently coercive.'" *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (quoting *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944)). Rather, it "applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." *Id.*

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." *Pittman*, 373 S.C. at 565, 647 S.E.2d at 164. "This principle is best justified when viewed as part and parcel of 'fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feelings of the American people and are enshrined in the Due Process Clause of the Fourteenth Amendment.'" *Id.* (quoting *Haley v. Ohio*, 332 U.S. 596, 607 (1948)). "In determining whether a confession was given 'voluntarily,' [the appellate court] must consider the totality of the circumstances surrounding the defendant's giving the confession." *Id.* at 566, 647 S.E.2d at 164. "The due process test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details

of the interrogation.'" *State v. Miller*, 375 S.C. 370, 384, 652 S.E.2d 444, 451 (Ct. App. 2007) (quoting *Dickerson*, 530 U.S. at 434).

> [C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). Improperly extorted confessions "may be and have been, to an unascertained extent, found to be untrustworthy." *Id.* at 541. "But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration." *Id.* Though independent corroborating evidence may verify the truth of a defendant's confession, if a defendant has "been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, [the courts are] constrained to find that the procedures leading to his conviction [have] failed to afford" the defendant due process of law. *Id.* In determining the voluntariness of a statement, the question is "whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not [the defendant] in fact spoke the truth." *Id.* at 544. "As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). Therefore, when faced with involuntary confessions, our courts "enforce[] the strongly felt attitude of our society that important human values are sacrificed [when] an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Id.* at 206-07.

> [T]he [USSC] has instructed [that] the totality of the circumstances includes "the youth of the accused, his

> lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep."

Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Our appellate courts have also "recognized that appropriate factors to consider in the totality-of-circumstances analysis include: background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency." *Miller*, 375 S.C. at 386, 652 S.E.2d at 452. "[N]o one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances." *Pittman*, 373 S.C. at 566, 647 S.E.2d at 164. "The pertinent inquiry is, as always, whether the defendant's will was 'overborne.'" *Myers*, 359 at 47, 596 S.E.2d at 492 (quoting *State v. Von Dohlen*, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996)). "Coercive police activity is a necessary predicate to finding a statement is not voluntary." *Miller*, 375 S.C. at 386, 652 S.E.2d at 452. "Coercion is determined from the perspective of the suspect." *Id.*

"A statement may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.'" *Id.* (alterations in original) (quoting *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990)). "A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." *Rochester*, 301 S.C. at 200, 391 S.E.2d at 246-47. "The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the giving of a confession." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

Both parties agree that the voluntariness of a statement, following law enforcement assurance of the statement's confidentiality, has not been addressed in South Carolina. However, as noted by Appellant, this issue has arisen in other jurisdictions.

In *Redmond v. People*, 501 P.2d 1051 (Colo. 1972), the Colorado Supreme Court reversed the admission of the defendant's confession, finding the *Miranda* warning given to the defendant was meaningless after the defendant was told parts of his statement would not be used and that the focus of attention was not upon him but upon another.[7] *Id.* at 1052-53. In that case, the evidence showed Douglas Redmond and an individual named Wolford devised a scheme to acquire hashish in San Francisco for eventual sale in Colorado. *Id.* at 1051. Marc Tobias, a part-time police informant, became included in the plan and subsequently alerted the police about airline reservations made for transportation of the drug as well as the location of the drug once they arrived in Colorado. *Id.* at 1051-52. Redmond was given a full *Miranda* warning, signed an advisement form including the same, and was then interrogated. *Id.* at 1052. Before Redmond made any incriminating statements, an officer told him the police were interested in the involvement of Tobias and told him the information he provided, apart from that which involved Tobias, "would just be between the two of them and would be off-the-record and would not be used against him, even if it were incriminating." *Id.* The officer proceeded to take notes during the interview regarding the defendant's statements related to Tobias but stopped taking notes when Redmond discussed matters unrelated to Tobias. *Id.* "Redmond . . . was never told that the barrier of immunity from prosecution, [created by the officer], had disappeared." *Id.* The trial court admitted the portions of the statement included in the officer's notes, i.e., those that related to Tobias. *Id.* On appeal, the sole issue before the appellate court was "whether the admission of the defendant's statement to [the officer], in . . . light of the non-disclosure agreement which [the officer] made, foreclose[d] the admission of the statement made by Redmond." *Id.* The court determined the clear language of *Miranda* "prohibit[ed] the use of a blue-pencil test as a means of admitting part of Redmond's statement," and found, given the type of promise that prompted Redmond's confession, it was not possible to determine what parts of the statement were truly voluntary and what parts were, at best, inadmissible. *Id.* at 1052-53. Accordingly, the court reversed and remanded for a new trial. *Id.* at 1053.

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[7] Notably, as is the law of this state, Colorado law provides the appellate court is required to accept the trial court's findings and ruling on admissibility of a statement if there is sufficient evidence to support the same. *Id.* at 1052.

In *Porter v. State*, 239 S.E.2d 694 (Ga. Ct. App. 1977), the Court of Appeals of Georgia found the defendant's confession was inadmissible on the face of the record before the appellate court.[8] *Id.* at 642. There, after Porter was read his *Miranda* rights, the Sheriff said, "We don't want to get on the street and say anything about what he said now?" *Id.* Another individual in the room responded, "No, that's right. That's what I've told him and the GBI [agent] explained to him this is just for his secretary in typing . . . [.]" *Id.* The court found "the clear thrust of the conversation [was] that Porter was being told his statement would not be used against him" and it was being recorded for the purpose of the agent's notes being typed by his secretary. *Id.* The court then held, "A confession given under such a pretense may not be admitted against the confessor." *Id.*

In *United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014), the United States Court of Appeals for the Ninth Circuit determined that under the totality of circumstances—which included Preston's intellectual disability as well as a promise by officers during questioning that they would not "tell this to anybody,"—Preston's confession was involuntarily given and should not have been admitted at trial. *Id.* at 1010, 1014. The court observed Preston had an IQ of sixty-five—which was in the range of intellectual disability as recognized by the USSC. *Id.* at 1010. The court also looked at other factors occurring during the questioning—including some with similarities to the case at hand—such as the fact that: the officers minimized culpability of one type of perpetrator and the consequences of such to those individuals if they were truthful; they told Preston he was not arrested or in custody but also informed him he was "free to go" after the interview while indicating he was free to stop talking to them only when they terminated the interview and conveying that he had to tell them something or they would keep coming back to him until he did; they asked Preston questions that required him to choose between two incriminating alternatives; they asked a

[8] Though not addressed in *Porter*, Georgia courts also appear to apply an abuse of discretion standard in reviewing the admissibility of statements. *See Berry v. State,* 326 S.E.2d 748, 751 (Ga. 1985) ("Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal."); *Golden v. State*, 852 S.E.2d 524, 530 (Ga. 2020) (noting the appellate court defers to the trial court's findings of disputed facts and will not disturb the trial court's factual and credibility determinations unless they are clearly erroneous, but applies de novo review of the trial court's application of the law to the facts).

number of leading questions that introduced facts Preston did not mention until brought up by the officers; they mislead Preston about the purpose of the statement, promising they would not tell anybody and that his statement would never leave the U.S. Attorney's file; and the summary of Preston's confession was a brief gathering of details chosen by the officers and handwritten by one of the officers, but which Preston never corrected when repeated back to him. *Id.* at 1013-15. The court concluded, "in light of the totality of the circumstances, including Preston's individual characteristics, his confession was involuntary." *Id.* at 1020. In doing so, the court noted Preston's reduced mental capacity, his susceptibility to interrogative pressure based upon such, and the techniques used by the officers during their interrogation of Preston. *Id.* 1020-26. The court cautioned that "when questioning people of low intelligence, investigators should avoid offering promises of leniency or using deceptive interrogation techniques due to the vulnerability of [such a] group." *Id.* at 1026. It then stated as follows:

> The officers misled Preston in other ways as well, telling him that his written confession was just an apology note to the child, that they would not tell anyone else what he said, and that the confession would never leave the "folder" or the United States Attorney's Office. At the same time, they told Preston that he was free to leave only *after* he finished answering their questions, and threatened that they would keep returning until Preston did so. In this way, the police paired the prospect of relentless questioning with false promises of leniency. Such tactics, in combination, would be hard for a person of Preston's impaired intelligence to withstand or rationally evaluate.
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> Assuredly, interrogating officers can make *false representations* concerning the crime or the investigation during questioning without always rendering an ensuing confession coerced. But *false promises* stand on a different footing.

Id. (second and third emphases added) (footnotes omitted) (citation omitted).

Other states have also determined that trial courts should have suppressed defendants' statements that were induced by misleading tactics of law enforcement. In *Ex parte Johnson*, the trial court conducted a hearing to determine the voluntariness of the defendant's statement, during which the defendant testified that he consented to answer the trooper's questions only upon the trooper's assurance

that his responses were for use in the completion of a traffic accident report in an incident in Tennessee and that those responses would not be used against him in any criminal proceeding in Tennessee or Alabama. 522 So. 2d 234, 236 (Ala. 1988). The trooper testified that he did not recall telling Johnson that the statement and accident report would not be used against him in subsequent proceedings in Alabama. *Id.* The testimony being in dispute, the trial court made a credibility determination regarding the disputed testimony in favor of the trooper. *Id.* The Alabama Supreme Court noted,

> [B]ecause the determination of voluntariness of a confession is within the sound discretion of the trial judge, it has been generally held that "his decision will not be disturbed unless it is palpably contrary to the great weight of the evidence. He need only be convinced by a preponderance of the evidence that it was voluntarily made."

Id. (quoting *Hammins v. State*, 439 So.2d 809, 811 (Ala. Crim. App. 1983)). Nonetheless, it found, under the totality of the circumstances—the standard by which the court was bound—the defendant's statement to the trooper was the product of deception. *Id.* at 237. The court observed that the trooper's own testimony showed the defendant "was told the interview was 'strictly' for the purpose of investigation of a traffic accident." *Id.* It further noted the trooper could not affirmatively and unequivocally testify that he did not tell the defendant that the accident report would not be used in Alabama as asserted by the defendant. *Id.* Also, in spite of the fact that there was another witness present during the entire interview, that person was not called to corroborate the trooper's testimony. *Id.* The court thus concluded the defendant's purported waiver of rights was not voluntarily, knowingly, and intelligently made and concluded his statement was inadmissible at trial. *Id.*; *see also State v. Stanga*, 617 N.W.2d 486, 487 (S.D. 2000) (holding the defendant's confession should have been suppressed when the interrogating officer repeatedly told the defendant that any statement he gave was "between you and me," signifying that it would not go beyond the interrogation room, as law enforcement is not allowed to mislead suspects on their constitutional rights).

We note there is no dispute as to what occurred and what was said during the interview at hand, as we have the video of it before us. Upon a thorough review of

the recording, as well as the *Jackson v. Denno* hearing, we find, under the totality of the circumstances, the trial court erred in admitting Appellant's recorded statement. *See Collier*, 421 S.C. at 435, 807 S.E.2d at 211 ("In determining whether a confession was given 'voluntarily,' [the appellate court] must consider the totality of the circumstances surrounding the defendant's giving the confession." (alteration in original) (quoting *Pittman*, 373 S.C. at 566, 647 S.E.2d at 164)). First, like the Georgia, Colorado and Alabama courts, we believe that if a defendant receives *Miranda* warnings and it is thereafter conveyed to him during the interview that his statement, whether in whole or in part, would not be used against him and/or is being obtained for some other purpose, such may render the statement inadmissible.[9] As previously noted, Agent Hardee assured Appellant—before any inculpatory statement made by Appellant—"Whatever you tell me, it ain't gonna leave this room. This, um, tape is going into my file. . . . . And we'll have a copy of this tape. And it ain't gonna go any further than this room. That's why we got the door shut, the blinds pulled, there's no sound device in here." As in *Porter*, "the clear thrust" of this statement by Agent Hardee was that Appellant was being told his statement was not going to be told to others to be used against him but was recorded simply for their own files. As in *Redmond*, the officer indisputably conveyed to Appellant that his statement would not be used against him, and the focus of attention was not on Appellant but was on another—Cohen. Further, at no point during the interview did the officers here communicate that this promise to Appellant was no longer effective. We agree with Appellant that, though interrogating officers may sometimes make *false representations* concerning the facts surrounding the crime without rendering an ensuing confession coerced, they cannot make *false promises*, whether direct or implied, that induce a confession from the individual. *See Miller*, 375 S.C. at 386, 652 S.E.2d at 452 ("A statement may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.'" (alterations in original) (quoting *Rochester*, 301 S.C. at 200, 391 S.E.2d at 246)); *Preston*, 751 F.3d at 1026 ("[I]nterrogating officers can make false representations concerning the crime or the investigation during questioning without always rendering an ensuing confession coerced[, b]ut false promises stand on a different footing." (citation omitted)).

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[9] The State conceded in oral argument that if *Miranda* warnings were required here, Agent Hardee's assurance negated the warnings, rendering Appellant's statements inadmissible as a matter of law.

Further, even if Agent Hardee's assurance of the confidentiality of Appellant's statement, on its own, is not sufficient to render Appellant's statement involuntary, we find various other factors unquestionably pushed his statement over the line into one in which Appellant's will was overborne. The officers repeatedly informed Appellant that they would speak to the solicitor on his behalf. We acknowledge that the officers' assurances that they would speak on Appellant's behalf are not, alone, sufficient to constitute promises of leniency that induced Appellant's statement. *See State v. Arrowood*, 375 S.C. 359, 368-69, 652 S.E.2d 438, 443 (Ct. App. 2007) (holding an offer by police officers to attest to a defendant's cooperation with an investigation was not a promise of leniency, and his statements were not produced as a consequence of any promise); *Rochester*, 301 S.C. at 200, 391 S.E.2d at 246-47 ("A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise."). Nevertheless, the officers conveyed this to Appellant in conjunction with various coercive tactics. In particular, the officers pushed for the information they sought while simultaneously indicating to Appellant the following: they sought the information for the purpose of prosecuting Cohen; they did not care who started the fire; they were there to help Appellant; and no matter what he told them, Appellant was going to get to go home after the interview. They also made a promise to speak up for Appellant while threatening Appellant that if he did not give them the information they sought, they would go after Appellant and "put [him] there" with Cohen. They informed Appellant that, while they wanted Cohen to serve thirty-four years for the crime, if it was not her, it would be someone else—implicitly Appellant—and suggested at his current age and health condition, Appellant was "not built" for such a prison sentence and would not survive it. We acknowledge the evidence presented here does not disclose Appellant's IQ or that he suffered an intellectual impairment to the same degree as that of the defendant in *Preston*. Nonetheless, there is evidence that Appellant suffered from a mental deficiency as evidenced by (1) his low level of education and the fact that while in school he was enrolled in special education classes and (2) his physical health issues that may have additionally impaired his cognitive abilities. We find Appellant's statement to be the product of: promises that no matter what he told them, he would be allowed to go home; consistent assurances that Appellant was not the person they sought to hold culpable of the crime; suggestions that if they did not get information from him implicating Cohen, they would come after him; threats that Appellant could go to jail for thirty-four years and, given his age and poor health, he likely would

never come home from incarceration; promises to "speak up" for Appellant and "talk" for him if he gave them the information they wanted; and, most importantly, assurances that whatever Appellant told them would not leave that room. Further, we note, while Appellant may not suffer from an "intellectual disability"—as defined in our statutes—it is undisputed that Appellant does suffer from an intellectual deficit or impairment. Our review of the record demonstrates the officers' coercive and deceptive tactics during the interview caused Appellant's will to be overborne, inducing him to make the inculpatory statement. *See Saltz*, 346 S.C. at 136, 551 S.E.2d at 252 ("If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process.").

We are not insensitive to the deferential standard of review we apply to the trial court's determination of the voluntariness of a statement. *See Myers*, 359 S.C. at 47, 596 S.E.2d at 492. ("On appeal, the trial [court's] ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion."). However, this court is still tasked with considering the totality of the circumstances surrounding the defendant's giving of a confession in determining whether a confession was given voluntarily. *See Collier*, 421 S.C. at 435, 807 S.E.2d at 211 ("In determining whether a confession was given 'voluntarily,' [the appellate court] must consider the totality of the circumstances surrounding the defendant's giving the confession." (alteration in original) (quoting *Pittman*, 373 S.C. at 566, 647 S.E.2d at 164)); *Ex parte Johnson*, 522 So. 2d at 236-37 (observing, while the determination of voluntariness of a confession is within the sound discretion of the trial judge and generally will not be disturbed unless contrary to the great weight of the evidence, the appellate court is bound by the totality of the circumstances). In considering the totality of all the surrounding circumstances—including the characteristics of the accused and the details of the interrogation—we find the trial court abused its discretion in finding Appellant's recorded statement was voluntarily made, and the trial court erred by admitting it into evidence. *See State v. Osborne*, 301 S.C. 363, 365, 367, 392 S.E.2d 178, 179, 180 (1990) (finding the State failed to meet its burden by a preponderance of the evidence and the trial court erred in admitting Osborne's statements into evidence when she was told on numerous occasions that she could remain silent, but if she knew any information, she could be charged with the crime of withholding evidence); *State v. Peake*, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (holding the State failed to meet its burden of showing the appellant's statement was voluntary and not the product of the officer's promise of leniency when the

officer's promise was tantamount to a promise not to seek the death penalty if the appellant gave a statement). *Cf. State v. Compton*, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005) (finding the trial court properly concluded the appellant's statements were given knowingly and voluntarily, noting the record indicated the appellant "was never told his statements would not be used against him" and nothing indicated the appellant "made the statements involuntarily and based upon a promise of leniency"). Based upon the record before us, we come to the inescapable conclusion that Appellant's confession can fairly be characterized only as involuntary and, therefore, his convictions must be reversed and the matter remanded for a new trial.

II. Competency

Appellant also challenges the trial court's failure to require further evaluation of him by the Department of Disabilities and Special Needs after his examination by the Department of Mental Health. The record reveals that one of the concerns of the trial court was the timing of Appellant's argument that he required further evaluation. Because we are reversing and remanding for a new trial, and inasmuch as Appellant's mental competency may have changed over the course of time—thereby requiring a new evaluation and hearing—we decline to address the competency issue. *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 on appeal when its determination of a prior issue is dispositive); *State v. Mekler*, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008) (affirming this court's decision reversing defendant's conviction and granting a new trial, but finding it unnecessary to address another issue, noting resolution of the issue upon retrial would be dependent on updated factors).

CONCLUSION

For the foregoing reasons, we reverse Appellant's convictions and remand for a new trial.

REVERSED AND REMANDED.

LOCKEMY, CJ., and HEWITT, JJ., concur.