The Supreme Court of South Carolina

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N O T I C E

In the Matter of James Marshall Biddle

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 419 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on October 5, 2021, beginning at 11:00 a.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

September 21, 2021

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

RE: Use of Remote Communication Technology by the Trial Courts (As Amended September 21, 2021)[1]

Appellate Case No. 2021-001032

ORDER

(a) Purpose. Pursuant to Rule 612 of the South Carolina Appellate Court Rules (SCACR), this Court may provide for the use of remote communication technology by the courts of this State to conduct proceedings, including, but not limited to trials, hearings, guilty pleas, discovery, grand jury proceedings, and mediation or arbitration under the South Carolina Court-Annexed Alternative Dispute Resolution Rules. The purpose of this order is to provide guidance on the use of remote communication technology by the trial courts, including appellate proceedings before the circuit court.

Since the start of the coronavirus emergency, remote communication technology has been used extensively by the trial courts, and this use has allowed court proceedings to safely occur despite the pandemic. In addition, this recent use of remote communication technology has shown it can, if used appropriately, conserve judicial resources, reduce travel and wait times for court participants, and reduce courtroom security and safety concerns.

While this order addresses some specific types of matters, it is impossible for it to address every type of matter that can possibly come before a trial court. For matters not specifically addressed in this order, judges should consider the general guidance along with how this order deals with similar matters to determine if a particular use of remote communication technology is appropriate.

[1] This order was initially issued on August 27, 2021. This order amends sections (d)(9) and (d)(15) of that order.

When this order indicates that a proceeding may be conducted in whole or part using remote communication technology, it means that the use of remote communication technology can range from allowing a single person, such as a witness or other participant in the proceedings, to participate by remote means, to a proceeding in which all of the participants (judge, counsel, parties, witnesses, etc.) are participating by remote means, or anything in between.

This Court recognizes that various trials, pleas or hearings may have already been scheduled to be conducted using remote communication technology under the guidance contained in the order of June 15, 2021.[2] If so, the use of remote communication technology for that trial, plea or hearing may continue to be conducted under the guidance contained in the June 15, 2021 order, notwithstanding any new limitations in this order.

(b) Definitions. For the purpose of this order:

(1) Judge: a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

(2) Remote Communication Technology (RCT): technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time. This can range from a telephone call or conference call which provides only audio to sophisticated software products like WebEx, Zoom or Microsoft Teams which allows both audio and video to be shared. When this order refers to using RCT, Enhanced Remote Communication Technology (ERCT) may be used instead.

(3) Enhanced Remote Communication Technology (ERCT): a form of RCT such as WebEx, Zoom and Microsoft Teams which allows audio and video to be shared at differing locations in real time. When this order indicates ERCT is to be used, that form of RCT must be used.

(4) Trial Court: the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

[2] This amended order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2596.

(c) General Guidance Regarding Use of RCT.

(1) Discretion of Judges. In various provisions of this order, the decision to allow RCT to be used rests in the discretion of the judge. Even when the language in this order indicates RCT may be used, the facts and circumstances in a particular case or matter may indicate that the use of this technology is inappropriate. To some extent, the exercise of this discretion will necessarily be influenced by the technical skill of the judge, attorneys, other case participants and any supporting staff who will be using this technology. Finally, for some proceedings, this order may restrict this discretion. For example, this order may indicate that certain proceedings must be conducted using ERCT. Another example is that for some types of proceedings the consent of the parties or a sufficient justification must exist before RCT of any type may be used.

(2) Constitutional Rights of Parties. In the absence of a waiver, judges should not allow RCT to be used in a manner which would violate the rights of a party under the either the State or Federal Constitution.

(3) Victims' Rights. Victims' rights under Article I, Section 24 of the South Carolina Constitution and Article 15 of Chapter 3 of Title 16 of the South Carolina Code of Laws must be honored when RCT is used to conduct court proceedings. Nothing in this order shall be construed as preventing a judge, in the exercise of discretion, from allowing a victim to hear and/or view a proceeding or trial by RCT.

(4) Public Access. When a hearing, trial or other court proceeding is of a nature that it would normally be open to the public, the judge should take reasonable measures to provide public access to the portion of the proceeding that is being conducted using RCT. When a portion of a proceeding is being conducted in a courtroom open to the public, this requirement is satisfied if the testimony presented using RCT can be heard by any observers in the courtroom. In other situations, this may be accomplished by other methods such as live streaming the proceeding over the internet, broadcasting the proceeding at a publicly accessible room at a

courthouse or other facility, or utilizing a process that permits members of the public to view and/or listen to the proceedings.[3]

(5) Use of ERCT. Even when the use of ERCT, an enhanced form of RCT, is not required by this order, judges should consider using ERCT when the ability to both see and hear the persons participating remotely will assist in reaching a resolution of the matter under consideration.

(6) Consent of the Parties. Except as restricted by the guidance in this order, including the limits on the use of RCT in jury trials under section (d)(11) below, a judge may use RCT to the extent consented to by the parties. Even when the parties have consented, the judge may find it is inappropriate to use RCT based on the specific facts and circumstance of the case, including, but not limited to, the number of parties in the case, the number of witnesses expected to testify or the complexity of the legal issues involved.

(7) COVID-19 and Other Communicable Diseases; Disasters. While the number of COVID-19 infections has decreased significantly from its peak, the virus continues to pose a risk to those participating in court proceedings. Further, in the future, other communicable diseases may pose similar risks. Since the use of RCT can reduce the risk of infection to participants, judges should consider this factor in determining if the use of RCT is appropriate. In the event of a natural or man-made disaster, such as a hurricane, earthquake, flood, war or other armed conflict, or riot, the effects of the disaster may require a greater use of RCT. Finally, nothing in this order should be construed as preventing the Chief Justice from issuing guidance requiring the use of RCT by the trial courts in response to a public health emergency or other disaster.

(8) Attorney-Client Communications. If the use of RCT results in the attorney and the client being at different locations, a means must be available for the attorney and client to communicate confidentially while RCT is being used. This could be done outside of the RCT software using telephonic or text communication, and judges should allow persons to

[3] This Court is aware of the efforts made by the trial courts to provide public access to court proceedings during the coronavirus pandemic. In many situations, this involved new and creative uses of technology. We commend these efforts and ask the trial courts to continue to explore ways to ensure public access.

possess cell phones or other electronic devices in the courtroom when necessary for this purpose. Further, this private communication may be possible using the features of the RCT software, such as virtual breakout rooms. In any event, it is the responsibility of the attorney to ensure that an adequate method of communication is available.

(9) Recording Remote Proceedings. Other than the judge or court staff assisting the judge, no person shall record any court proceedings which are conducted using RCT except when the recording is authorized by the judge under Rule 605, SCACR.

(10) Conducting Remote Proceedings to Facilitate Transcript Preparation in Courts of Record. Where a court reporter or court monitor is unavailable, the judge shall conduct the RCT proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(11) Remote Administration of Oaths. Where this order authorizes a hearing, trial or other matter to be conducted by RCT, any oath necessary during that hearing, trial or other matter may be administered using RCT. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing RCT in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order. For the purpose of this provision, the term "oath" includes an affirmation.

(12) Effect of Remote Proceedings; Direct Contempt. Proceedings conducted using RCT shall have the same effect as if all of the participants had been physically present in the courtroom. For the purpose of any direct

contempt, a person participating by RCT shall be deemed to be in the presence of the judge.

(13) Exhibits. In the event an exhibit is to be introduced during the course of a proceeding conducted using RCT, the party introducing the exhibit must ensure that the judge, the other parties and counsel, and any court reporter all have a copy of the exhibit prior to the time it is introduced. This copy may be provided in paper or electronically. Nothing in this order shall be construed as preventing a judge from requiring the original of an exhibit to be presented to the court.

(d) Guidance as to Specific Proceedings and Other Matters.

(1) County Grand Jury Proceedings. The Solicitor or the Attorney General is authorized to present an indictment to the grand jury using RCT, and any necessary oath may be administered using RCT (see section (c)(11) above). Consistent with the law regarding the secrecy of county grand jury proceedings,[4] any recording feature in the RCT must not be used, and the person presenting testimony by RCT must be warned that no recording of any of the proceedings before the grand jury can be made.

(2) South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR). RCT and ERCT may be used for Online Dispute Resolution under Rule 5(h), SCADR.

(3) Discovery in Civil Cases. The parties in a civil case may agree to use RCT to conduct any discovery under the South Carolina Rules of Civil Procedure. Further, in the exercise of discretion, a judge may require discovery in a case to be conducted using RCT, and may direct that ERCT be used.

(4) Arrest and Search Warrants. An officer seeking the issuance of an arrest warrant or search warrant may appear before a judge using RCT.

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[4] *Ex parte McLeod*, 272 S.C. 373, 377-78, 252 S.E.2d 126, 128 (1979) (In a case involving a county grand jury, the Court stated "the investigation and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes all its proceedings are legally sealed against divulgence" and "the presence or use of a court stenographer in proceedings before the grand jury is likewise not permissible.").

During this appearance, the judge may administer the oath to the officer (see section (c)(11) above) and, if appropriate, may take sworn testimony to supplement the allegations in the warrant. The judge shall make a notation on the warrant indicating the oath was administered remotely and the officer was not available to sign the warrant in the presence of the judge. If probable cause is found, the judge shall sign the warrant and return the warrant to the officer for execution. While the officer may sign the warrant when it is returned, the failure to do so shall not affect the validity of the warrant. The warrant may be transmitted to the judge and returned to the officer by e-mail, fax or other electronic means. For the purpose of this section, the term "search warrant" shall also include applications under the South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145.

(5) Determination of Probable Cause Following Warrantless Arrest. If after considering the affidavit submitted to support a warrantless arrest, a judge determines it is appropriate to supplement the affidavit with sworn testimony, a judge may take the testimony using RCT and administer the oath (see section (c)(11) above).

(6) Bail Hearings in Criminal Cases. At the discretion of the judge, a hearing to set bail, modify the terms of bail or to revoke bail for a criminal defendant may be conducted in whole or part using RCT.

(7) Preliminary Hearings. With the consent of the defendant and the representative of the State, a preliminary hearing may be conducted using RCT. Further, even without consent, a judge may allow a witness to testify at a preliminary hearing using RCT if the judge finds there is sufficient justification to do so.

(8) Defense of Persons and Property Act. A hearing under the Defense of Persons and Property Act (S.C. Code Ann. §§ 16-11-410, 16-11-440(C), and 16-11-450) can have far reaching consequences not only on the criminal case itself, but also on the civil remedies available to the victim. In light of this, any use of RCT in these hearings shall be limited to that provided by section (d)(12) below for non-jury trials.

(9) Guilty Pleas.

(A) General Rule. Except as provided in (B) below, the judge, the defendant, any counsel for the defendant, and the prosecutor must be physically present in the courtroom during a guilty plea. A judge may allow another person, including but not limited to a victim, interpreter, or law enforcement officer, to participate in the guilty plea by RCT. Once the plea has been accepted, the use of RCT in sentencing is governed by section (d)(13) below.

(B) Incarcerated Defendants. If the defendant is in pretrial confinement or other incarceration, the judge may, with the consent of the parties, conduct a guilty plea in whole or part using RCT. The consent shall be placed on the record during the proceedings.

(10) Trials in General. As a general rule, trials, whether jury or non-jury, should be conducted with all the necessary participants (i.e., judge, jury (if applicable), criminal defendant, counsel, self-represented litigant, etc.) being present in the courtroom, with witnesses appearing in the courtroom to testify. In addition to being consistent with our longstanding practice and tradition in this State, this Court continues to believe there is great value in conducting trials live and in-person. In light of this, the following provisions relating to jury and non-jury trials restrict the use of RCT in these trials.

(11) Use of RCT in Jury Trials.

(A) With the consent of all parties, the judge may allow a witness to testify using ERCT. The consent shall be placed on the record and, in a criminal case, the judge must question the defendant to ensure this consent is being made knowingly and intelligently.

(B) Without the consent of the parties, a judge may allow a witness to testify using ERCT if the judge finds there is sufficient justification to do so. In a criminal case, this justification must rise to a level to satisfy the standard established by *Maryland v. Craig*, 497 U.S. 836 (1990).[5]

[5] "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy* [*v.*

(12) Use of RCT in Non-Jury Trials.

(A) If all the parties consent, the judge may allow a non-jury trial to be conducted in whole or part using RCT or ERCT. The consent shall be placed on the record and, in a criminal case, the judge must question the defendant to ensure this consent is being made knowingly and intelligently.

(B) Without the consent of the parties, a judge may allow a witness to appear by ERCT if the Court finds there is an adequate justification for allowing the witness to testify by ERCT. In criminal cases, this justification must rise to a level to satisfy the standard established by *Maryland v. Craig*, 497 U.S. 836 (1990) (see footnote 5).

(13) Criminal Sentencing.

(A) Non-Capital Cases. Consistent with the broad discretion given to judges in sentencing,[6] a judge may allow testimony or other information to be presented using RCT during sentencing in a non-capital case.

(B) Capital Cases. In capital sentencing proceedings, the use of RCT shall be limited to that provided by section (d)(11) above if

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Iowa, 487 U.S. 1012, at 1021 (1988)], our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig,* 497 U.S. at 850.

[6] *State v. Gulledge*, 326 S.C. 220, 229, 487 S.E.2d. 590, 594 (1997) ("A court may consider any relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided the information has sufficient indicia of reliability to support its probable accuracy."); *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (in sentencing, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he [or she] may consider or the source from which it may come."); Rule 1101(d)(3), SCRE ("rules of evidence are inapplicable to sentencing except in the penalty phase of capital trials").

sentencing involves a jury, or by section (d)(12) above if sentencing is by a judge without a jury.

(14) Other Pretrial and Post-Trial Proceedings. Except for those pretrial proceedings addressed in other sections of this order, judges may, in their discretion, use RCT, either in whole or part, for pretrial proceedings. This includes, but is not limited to, hearings on motions, proceedings on procedural matters such as rights advisements or waivers of those rights, and status conferences. Further, in the discretion of the judge, post-trial proceedings, including hearings on post-trial motions under Rule 29, SCRCrimP, or Rules 50, 52, 59 or 60, SCRCP, may be conducted in whole or part using RCT. Without the consent of the parties to use RCT, judges should be cautious in using RCT for complex motions or where it appears the resolution of a motion may be dispositive of the case or a cause of action.

(15) Family Court Proceedings.

(A) Juvenile Delinquency Cases. During the adjudicatory hearing in a juvenile delinquency case, ERCT may be used to the same extent as permitted in a non-jury criminal case under section (d)(12) above. In the dispositional hearing, RTC may be used to the same extent permitted for non-capital sentencing under section (d)(13)(A) above. Further, for guilty pleas, RTC may be used to the same extent provided under section (d)(9) above.

(B) Other Hearings or Proceedings. In many situations, a provision of this order will be directly applicable, and the family court should follow the guidance given in that provision. Due to the wide ranging and diverse matters which come before the family court, it is simply impossible to provide specific guidance that can be made applicable to every situation that may come before the family court, and this order does not attempt to do so. Instead, for matters not specifically covered by this order, this Court is confident the family court judges will consider the general guidance and make analogies to the specific guidance given for similar proceedings to determine the extent to which RCT should be used.

(16) Appellate Proceedings Before the Circuit Court. In appeals to the circuit court, the circuit court may, in its discretion, conduct any necessary hearings either in whole or part using RCT.

This order is effective immediately, and shall remain in effect until modified or rescinded by this Court.

s/ Donald W. Beatty C.J.

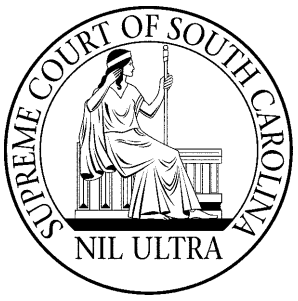
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 27, 2021
As Amended September 21, 2021



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
September 22, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lukas Stasi and Brittney L. Stasi, Petitioners,

v.

Mallory Sweigart and Matthew Kidwell, Defendants,

Of whom Mallory Sweigart is the Respondent,

In the interest of a minor under the age of eighteen.

Appellate Case No. 2020-000677

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
Thomas Henry White IV, Family Court Judge

Opinion No. 28058
Heard June 16, 2021 – Filed September 22, 2021

REVERSED

Thomas Franklin McDow IV and Erin K Urquhart, McDow and Urquhart, LLC; Barrett Wesley Martin, Barrett W. Martin, P.A., all of Rock Hill, for Petitioners.

Stephen D. Schusterman, Schusterman Law Firm, of Rock Hill, for Respondent.

JUSTICE FEW: This is an appeal from an order of the family court terminating Mallory Sweigart's parental rights to her nine-year-old daughter. The court of appeals reversed, finding Mallory had not "wilfully failed to visit the child," the statutory ground for termination alleged in this case. We granted certiorari to review the court of appeals' decision. We reverse the court of appeals.

I. Facts and Procedural History

The Child was born on September 3, 2012. Mallory Sweigart—the Child's biological mother[1]—was twenty-five years old when the Child was born. Brittney Stasi is Mallory's sister, and Lukas Stasi is Brittney's husband.

Mallory suffered from severe mental illness since at least the age of fourteen. In June 2014, while living in her grandmother's home in Ohio with the Child, Mallory attempted suicide for the first time. Mallory was hospitalized following the suicide attempt, and her doctors diagnosed her with borderline personality disorder. Within days, she left Ohio to attend an in-patient rehabilitation center in Florida for thirty days, after which she returned to Ohio to recover. The Child stayed with the Stasis in Fort Mill, South Carolina, from June 2014 until August 2014. The Child then returned to Ohio, where she lived with Mallory in a rental home. On December 1, 2014, Mallory attempted suicide again. The next day, the Stasis brought the Child back to Fort Mill. Mallory moved to Florida and began out-patient treatment for her borderline personality disorder.

In January 2015, the Stasis filed an action in family court seeking custody of the Child. The family court promptly granted the Stasis temporary custody. Mallory and the Stasis mediated the case and entered into a custody agreement in October 2015, which the family court approved and incorporated into a final custody order. The custody order provided Mallory visitation with the Child on the second Saturday

[1] The Child's biological father is Matthew Kidwell. Although properly served with the Stasis' Summons and Complaint in this termination proceeding, Matthew did not file responsive pleadings. At the time of the trial, Matthew lived in Ohio and had seen the Child only one time in her entire life. The family court terminated Matthew's parental rights, and that ruling was not appealed.

of every month in Fort Mill, with a specific visit for the Child's birthday party in September and an additional visit for Christmas in December. The order placed conditions on visitation, including that Mallory submit to a fingernail drug screen twice a year, attend weekly borderline personality disorder therapy sessions, and not be involved in any "critical event" such as another suicide attempt.

From December 2014 until September 2017—almost three years—Mallory saw the Child only four times. Two of those occurred in August and October 2015 while Mallory was in Fort Mill for court hearings. After the family court signed the final custody order in October 2015 setting monthly visitation, Mallory made only two of the monthly visits—in August and October 2016—until September 2017. During those twenty-two months, Mallory missed twenty-two of the twenty-four opportunities the final custody order gave her to visit the Child. She did not visit the Child for her birthday in 2015 or 2016 and missed the Christmas visits both of those years. There were three lengthy periods during which Mallory did not see the Child at all: from December 2, 2014, until August 7, 2015—eight months; from October 7, 2015, until August 13, 2016—ten months; and from October 1, 2016, until September 9, 2017—eleven months.

When the Stasis first started taking care of the Child, Brittney and Mallory had a strong and loving relationship. While in Florida after her first suicide attempt, Mallory emailed Brittney on July 3, 2014, stating, "I know that we both have a love for each other than cannot be described." She wrote, "Thank you is not even enough to say. I wouldn't want her anywhere else, and I know you all are loving her -- are loving her so much." She concluded the email asking Brittany to "tell Luke, also, I appreciate him loving her and doing all that he does," and, "I love you all."

Beginning in December 2014, however, their relationship began to deteriorate. When Mallory was served with the Stasis' January 2015 complaint seeking custody, she attempted suicide a third time and could not attend the hearing in January 2015 because she was hospitalized. The relationship continued to deteriorate after the final custody order in October 2015, when Mallory claimed the Stasis coerced her into signing the custody agreement. In February 2016, Mallory created a GoFundMe[2] page to raise funds for an attorney. In the description for why she

[2] "GoFundMe" is an online crowdfunding resource that allows people to raise money for an individual cause across multiple electronic and social media platforms.

needed the money, Mallory publicly claimed Brittney "has taken illegal custody of my daughter" after "my family bullied me into signing custody papers." She wrote, "I know now that my family lied to me, coerced me, and took my daughter while pretending they wanted to help me." She asked for money because "with proper legal representation, I can quite easily win my daughter's life back."

In April 2016—represented by counsel for the first time—Mallory filed an action seeking to have custody of the Child returned to her. Mallory filed an affidavit in support of the claim and made extreme allegations against Brittney. Mallory wrote that Brittney "had a plot to steal my daughter from me at my worst and darkest time" and accused Brittney of "sexually abusing me at a young age." At the hearing on the claim, Mallory's attorney described the relationship as "very poisoned." The family court dismissed Mallory's action.

In May 2016, someone called the Department of Social Services in York County and accused Brittney of physically and sexually abusing the Child and allowing "predators" in the home. Brittney claims Mallory did it, but Mallory claims she did not.[3] DSS investigated the allegations and concluded they were baseless. At this point, Brittney and Mallory's relationship was outright hostile, and the two completely stopped communicating with each other. Lukas took over all communications with Mallory regarding the Child.

In April 2017, the Stasis filed this action for termination of Mallory's parental rights and adoption of the Child. In November 2018, the family court terminated Mallory's parental rights and granted the adoption. In its order, the family court noted that in the twenty-nine months the Child lived with the Stasis before this proceeding was filed, Mallory visited the Child only four times, including two incidental visits while she was in town for hearings. The family court found by clear and convincing evidence Mallory willfully failed to visit the Child and termination of Mallory's parental rights was in the Child's best interests.

The court of appeals considered the case without oral argument. The court of appeals found the Stasis "did not prove by clear and convincing evidence that [Mallory's] failure to visit was willful" and reversed the termination of Mallory's parental rights

[3] At trial in September 2018, Mallory claimed her friend and employer in Florida is the person who made the call and the accusations.

in an unpublished opinion. *Stasi v. Sweigart*, Op. No. 2019-UP-383 (S.C. Ct. App. filed Dec. 10, 2019). We granted the Stasis' petition for a writ of certiorari to review the court of appeals' opinion.

II. Termination of Parental Rights

The South Carolina Children's Code addresses termination of parental rights in Chapter 7, Article 7. *See* S.C. Code Ann. §§ 63-7-2510 to -2620 (2010 & Supp. 2020). Section 63-7-2510 of the South Carolina Code (2010) provides,

> The purpose of this article is to establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

Section 63-7-2570 of the South Carolina Code (Supp. 2020) provides, "The family court may order the termination of parental rights upon a finding of one or more of the following grounds and a finding that termination is in the best interest of the child." The statutory ground at issue in this case is, "The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child." § 63-7-2570(3).

A. Willful Failure to Visit

The events that took place—or more importantly, those that did not take place—are not in dispute. There is no question the Child has not lived with Mallory since December 2, 2014. There is no question Mallory did not visit the Child on twenty-two of her twenty-four court-ordered visitation dates from October 2015 until September 2017. There is no question Mallory did not visit the Child for multiple lengthy periods of time, three of which lasted at least eight months. There is no question Mallory did not visit the Child for her birthday or for Christmas in 2015 or 2016.

The circumstances surrounding these failures are not much in dispute either. Mallory lived in Florida for the legitimate purpose of pursuing treatment for severe

mental illness. Mallory had limited funds and arranging travel to South Carolina was not easy. The relationship between Mallory and Brittney—a loving one as late as July 2014—deteriorated from January 2015 when the Stasis filed the custody action until May 2016 when Mallory accused Brittney of molesting the Child. After that incident, Mallory and Brittney did not speak to each other.

From these undisputed failures by Mallory to visit the Child and the circumstances in which the visits did not occur, we turn to the key question—hotly disputed in this case—whether Mallory "wilfully failed to visit" her daughter. Willfulness "is a question of intent." *S.C. Dep't of Soc. Servs. v. Smith*, 423 S.C. 60, 81, 814 S.E.2d 148, 159 (2018) (quoting *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992)). As is always the case, such a question of a parent's intent in the life of a child is difficult to answer. As in all family court appeals, we review substantive decisions like this de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011).

When events or circumstances are in dispute in a proceeding for termination of parental rights, we require the facts supporting termination be proven by clear and convincing evidence. *Broom v. Jennifer J.*, 403 S.C. 96, 111, 742 S.E.2d 382, 389 (2013) (citing *Richberg v. Dawson*, 278 S.C. 356, 357, 296 S.E.2d 338, 339 (1982)). This standard of proof is required by the Due Process Clause of the Fourteenth Amendment. *See Richberg*, 278 S.C. at 357, 296 S.E.2d at 339 ("It is now established that, before parental rights may be completely and irrevocably severed, the State must show conditions warranting such action by clear and convincing evidence." (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 102 S. Ct. 1388, 1391-92, 71 L. Ed. 2d 599, 603 (1982))); *Santosky*, 455 U.S. at 747-48, 102 S. Ct. at 1391-92, 71 L. Ed. 2d at 603 ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."). Answering the question of a mother's intent in failing to visit her child, especially when considering the many difficult circumstances Mallory faced, is more of a judgment call than a finding of specific facts, such as events or circumstances. Nevertheless, due process requires no less of this Court just because the answer to the question is a difficult exercise in judgment. The evidence must be clear and we must be convinced that Mallory "wilfully failed to visit" her daughter and that termination is in her daughter's best interest before we may terminate Mallory's parental rights.

"Our appellate courts have defined 'willful' in a variety of contexts. In each instance, the court has required a showing of a consciousness of wrongdoing in order to prove willfulness." *State v. Garrard*, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010) (citing *Broome*, 307 S.C. at 53, 413 S.E.2d at 839). A parent has the moral and legal duty to care for and act in the best interests of his or her children. The satisfaction of this parental duty can be difficult under the best of circumstances. It becomes all the more difficult when—as addressed by subsections 63-7-2570(3) and (4)—children "live[] outside the home of either parent." The law, therefore, requires such a parent to provide financial support, § 63-7-2570(4), and to "visit the child" when "not prevented" from doing so, § 63-7-2570(3).

When a parent cannot comply with these duties—depending on the circumstances—the failure may be understandable, even unavoidable, and thus not willful. However, when a parent *chooses* not to comply with either of these duties, the intention of that choice may render the failure willful. Thus we have said, "Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *Broome*, 307 S.C. at 53, 413 S.E.2d at 839; *see also Garrard*, 390 S.C. at 149, 700 S.E.2d at 271 (stating willfulness requires "a consciousness of wrongdoing").

We readily acknowledge there is considerable mitigating evidence indicating Mallory's failures were understandable, at times unavoidable. Mallory faced logistical, financial, and personal challenges in visiting the Child. Logistically, Mallory lived in Saint Petersburg, Florida, and the Stasis lived in Fort Mill, South Carolina. The cities are 584 miles apart. Subsection 63-7-2570(3) provides, in the context of willfulness, "The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit." We have considered that—at times—it was difficult for Mallory to arrange travel for visitation because of the distance.

Financially, Mallory struggled. Although her family helped with finances when she initially moved to Florida, they withdrew financial support sometime in 2015. Mallory was then forced to support herself for the first time. At various times, she worked up to three jobs to support herself and attempt to comply with the conditions on visitation. The "dialectical behavior therapy" sessions for borderline personality disorder cost between $1,600 and $2,000 per month. The drug tests cost approximately $400 each, totaling $800 per year. After paying her bills and the

therapy and testing costs, as Mallory testified, she had "Very little [money left]. Some months, none."

Personally, Mallory suffered—certainly still suffers—from borderline personality disorder and other mental health issues. We understand some of Mallory's bad decisions regarding the Child were attributable to her mental health. During oral argument to this Court, Mallory's attorney focused particularly on Mallory's mental health issues, detailing how her illness affected her behavior throughout this time period. Mallory apparently thought she "graduated" from dialectical behavior therapy in April 2016, and she even testified she believed she was "cured" of borderline personality disorder. At trial, Mallory stated that committing to weekly therapy sessions "changed [her] whole life." When she was better able to cope with her mental illness in 2017, she began to visit the Child more often.

Mallory did not miss every visit in the years leading up to the termination proceeding. She did make two of the court-ordered visits between October 2015 and September 2017. She also made two "incidental visits" with the Child while she was in South Carolina for hearings in August and October 2015. We have considered the fact Mallory made these visits. However, the incidental visits lasted no more than two hours each. Also, Mallory did not make the intentional decision to come to Fort Mill to visit her daughter she had not seen in eight months. Instead, Mallory came to Fort Mill to participate in a status meeting and mediation for the case. *See* § 63-7-2570(3) (providing the family court "may attach little or no weight to incidental visitations"); *Horton v. Vaughn*, 309 S.C. 383, 387, 423 S.E.2d 543, 545 (Ct. App. 1992) ("As used in a TPR statute, 'incidental visitation' means that a parent may not rely upon fortuitous meetings between the parent and a child . . . ."), *overruled on other grounds by Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 536 S.E.2d 372 (2000).

We also acknowledge Mallory began to exercise her court-ordered visitation in September 2017—five months after the Stasis filed this action—and did so consistently from December 2017 until the trial in September 2018. *But see Smith*, 423 S.C. at 83, 814 S.E.2d at 160 (holding the parent's actions to cure his willful failure to visit "were judicially motivated"); *S.C. Dep't of Soc. Servs. v. Cummings*, 345 S.C. 288, 296, 547 S.E.2d 506, 510-11 (Ct. App. 2001) ("A parent's curative conduct after the initiation of TPR proceedings may be considered by the court on the issue of intent; however, it must be considered in light of the timeliness in which it occurred.").

In addition, as the court of appeals discussed, there were several months when the Stasis prevented[4] Mallory from visiting because they believed her non-participation in dialectical behavior therapy violated the family court's order, and thus the order required them to prevent visitation. The family court later clarified, however, that Mallory still attended some therapy for her mental health, so her non-participation in "dialectical behavior therapy" specifically was not a violation of the order.[5] The Stasis also prevented her from visiting from November 2016 to February 2017 because Mallory did not get the drug test due in November. While the Stasis did this because Mallory clearly had not complied with the family court's order, Mallory claimed she could not afford the test. There were, therefore, individual opportunities to visit the child that Mallory missed that were understandable, even unavoidable.

Despite this considerable mitigating evidence, we find the record as a whole clearly and convincingly demonstrates Mallory made one conscious and intentional decision after another to not visit the Child on her court-ordered visitation dates. We find Mallory made these decisions knowing she was violating her duties to the Child and with conscious disregard for the rights of the Child. *See Broome*, 307 S.C. at 53, 413 S.E.2d at 839; *Garrard*, 390 S.C. at 149, 700 S.E.2d at 271.

One of the three lengthy periods during which Mallory failed to visit the Child began on December 2, 2014, and lasted until August 7, 2015. During this time, Mallory moved from Ohio to Florida and began therapy for her borderline personality disorder. Although arranging travel to Fort Mill was difficult, multiple family members testified they offered to help Mallory pay for visitation costs. Mallory's grandmother offered to drive Mallory from Florida to Fort Mill and buy her a hotel room so Mallory could see the Child. Mallory told her she "didn't want to do it." The grandmother even bought Mallory a plane ticket from Florida to Fort Mill so

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[4] Subsection 63-7-2570(3) provides before a court can terminate parental rights based on a willful failure to visit, "it must be shown that the parent was not prevented from visiting by the party having custody or by court order."

[5] The family court held the Stasis in contempt of court for preventing visitation on this basis in October and November 2017. In a separate appeal, the court of appeals held the Stasis did not violate the final custody order and reversed. *See Stasi v. Sweigart*, Op. No. 2019-UP-384 (S.C. Ct. App. filed Dec. 10, 2019).

Mallory could visit the Child for her birthday in September 2015. Mallory did not visit in September 2015 for the Child's birthday, and Mallory's grandmother testified she does not think Mallory ever used the ticket.

Mallory also did not visit the Child for ten months from October 7, 2015, to August 13, 2016. Mallory testified she had a vehicle she could have driven to Fort Mill as early as November 2015, but Mallory still missed her scheduled December visit and her extra visit for Christmas in 2015. In February 2016, Mallory created a GoFundMe page which raised almost $8,000. Mallory claimed she used $5,000 of the funds to pay the attorney who represented her in the April 2016 action. However, the attorney told the family court he represented Mallory for free. Mallory testified she used the rest of the money from the GoFundMe page to pay for therapy, travel expenses, and a drug test. However, despite having these funds, she did not visit the Child. In May 2016, Mallory traveled to Ohio to visit her brother instead of attending the Child's dance recital, which the Stasis specifically invited Mallory to attend. During this trip, Mallory became so intoxicated one night she walked onto the porch of the wrong house and threw up, prompting the homeowner to call the police. Mallory's mother testified, as to this period of time and others, "Multiple times I offered to drive her, give her money, whatever it was she needed to go and see [the Child]." Clearly, Mallory had the ability to visit the Child during this period, but instead, she chose to prioritize other things over the needs of her daughter.

The third lengthy period in which Mallory did not visit the Child was from October 1, 2016, to September 9, 2017. She missed the scheduled visit for Christmas in December 2016. During this period, Mallory bought a calendar to give to the Child. On the space for the second Saturday of each month—the court-ordered visitation dates—Mallory wrote "Mommy and [daughter]" with hearts surrounding the day. Mallory showed the calendar to the Child during a FaceTime call at the beginning of 2017, thus promising the Child she would visit on these dates. Mallory nevertheless still did not visit the Child until her birthday in September 2017. Mallory gave the Child hope she would visit, and then crushed the hope by not doing so for seven more months.

Initially, it was not Mallory's choice to live so far away from the Child. The family court considered this distance in the final custody order and in its decision not to order child support. The court stated, Mallory "shall not be required to pay child support at this time as [she] will be responsible for the costs associated with her transportation for visitation as well as the cost of her ongoing therapy/treatment."

At the termination trial in November 2018, however, the Child's guardian ad litem testified that in 2015 she found a therapist in Charlotte, North Carolina, similar to Mallory's therapist in Florida. Mallory's mother testified she offered to "get her an apartment there," but Mallory declined. Instead of moving to Charlotte—located less than thirty minutes from her daughter—Mallory told the guardian she chose to stay in Florida. It does not appear anything other than Mallory's own conscious and intentional decisions kept her from moving closer to the Child. *See S.C. Dep't of Soc. Servs. v. Headden*, 354 S.C. 602, 611, 582 S.E.2d 419, 424 (2003) (noting "The distance between Mother and Child in this case was by the Mother's own making").

The court of appeals suggested the Stasis should have forgiven Mallory's non-compliance with the conditions on visitation because she could not afford the costs of compliance. However, the final custody order stated the parties "shall operate under and be bound by the attached Parenting Schedule and Guidelines (Exhibit A)." The guidelines stated Mallory's visitation "shall be suspended" if she did not comply with the conditions. This mandatory language left the Stasis with no discretion. Only the family court—not the Stasis—could "forgive" Mallory's non-compliance. When conditions on visitation cannot reasonably be met, it is not acceptable to ignore the conditions and fail to visit for a longer period of time than it would reasonably take to ask the family court to modify the conditions. Instead of asking for understanding when she chose—for whatever reason—to ignore the conditions, Mallory should have sought to change the conditions. Mallory's actions—or more importantly, her inactions—demonstrate she made repeated conscious and intentional decisions to forego her parental duty to visit the Child.

Further, the conditions in the family court's custody order were reasonable. Enabling a parent to visit under reasonable conditions is quite different from preventing a parent from visiting. *See Matter of M.*, 312 S.C. 248, 250, 439 S.E.2d 857, 859 (Ct. App. 1993) (holding the order requiring the father to participate in psychotherapy as a pre-requisite to visitation did not prevent visitation, "Rather, it outlined a mechanism through which visitation could resume. The father's defiant refusal to meet the reasonable conditions placed on his right to visitation was tantamount to an election not to visit [the child] unless he could do it on his own terms").

Finally, we think it is important to consider the extent to which FaceTime contact should impact our decision. The October 2015 final custody order provided Mallory was "entitled to FaceTime/telephone contact on Tuesdays of each week at 4:00 p.m. for a maximum of thirty minutes." In her brief to the court of appeals, Mallory

argued her FaceTime calls with the Child should be considered as visitation under subsection 63-7-2570(3). The court of appeals acknowledged this argument but noted the argument missed the point of the subsection. The court of appeals wrote, "The question of whether phone calls constitute visitation misses the primary question raised here, which is whether Mother's failure to visit was willful. Attempts to communicate with a child when a parent cannot otherwise visit are always relevant when considering whether the failure to visit was willful."

We agree with the court of appeals. Whether a parent consistently pursues—or often chooses not to pursue—FaceTime or telephone contact can be important evidence on the difficult question of whether the failure to make court-ordered visitation was understandable, or willful. However, FaceTime or telephone contact is not visitation.[6] As the family court judge aptly stated in the November 2018 order, "A parent cannot hug a child or dry a crying child's tears via FaceTime."

Here, Mallory did exercise 50-60% of her scheduled FaceTime calls, which means—of course—she missed 40-50% of them. One would hope a parent who claims she suffers difficulties that keep her from visiting her child, but who nevertheless desires to do so, would exercise all of her permitted FaceTime calls. Mallory, however, offered excuses. She claimed she was not able to call every Tuesday at the scheduled time because she had to work some of those days. This is unpersuasive. Mallory could have arranged a break time with her employer to ensure she could at least speak with the Child every week. She also could have asked the Stasis—or the family court if necessary—to change the scheduled time for the calls to ensure she would not have to interrupt her work schedule. *She* chose not to do either. She also did not exercise her scheduled FaceTime contact for twelve consecutive weeks from March 15, 2017, to May 31, 2017, even after the Stasis filed this termination proceeding in April 2017.

The fact Mallory missed *any* of the FaceTime calls is difficult to understand. The fact she missed almost half of them is convincing evidence her failure to visit was willful. *See Smith*, 423 S.C. at 83, 814 S.E.2d at 160 ("Nevertheless, Father's failure to even attempt to make contact with Child for almost an entire year constitutes clear

[6] There may, of course, be circumstances in which in-person visitation is simply not possible, in which case the family court may order virtual visitation such as by FaceTime because it may be the only option.

and convincing evidence that Father willfully failed to visit Child."); *Headden*, 354 S.C. at 611, 582 S.E.2d at 424 (noting "the Mother made little to no effort to maintain a relationship with the Child with letters or phone calls when physical visits were not possible").

As we stated in *Smith*, "Willfulness does not mean that the parent must have some ill-intent towards the child or a conscious desire not to visit; it only means that the parent must not have visited due to [her] own decisions, rather than being prevented from doing so by someone else." 423 S.C. at 81, 814 S.E.2d at 159 (quoting *Broom*, 403 S.C. at 114, 742 S.E.2d at 391). However, a parent who intentionally fails to make one opportunity—even several opportunities—for court-ordered visitation has not necessarily "wilfully failed to visit the child" under subsection 63-7-2570(3), even though one or several failures were intentional. For example, if we consider in isolation Mallory's intentional choice to go to Ohio in May 2016 instead of making her court-ordered visit with the Child and attending the Child's dance recital, and even if we consider Mallory's shocking and drunken behavior while she was in Ohio, that one incident—though clearly purposeful—was not necessarily "willful" under subsection 63-7-2570(3). Willfulness requires real-time consciousness that the failure to visit is wrong, *Garrard*, 390 S.C. at 149, 700 S.E.2d at 271, and "a conscious indifference to the rights of the child to receive support and consortium from the parent," *Broome*, 307 S.C. at 53, 413 S.E.2d at 839.

As we have discussed at length, Mallory's difficult circumstances make some of her failures understandable. No circumstances, however, can change the fact that on most of the occasions Mallory's failure to visit the Child was the result of her own conscious choice made with knowledge she was wrong and knowledge she acted against the interests of her daughter. On most of the occasions, Mallory's failure to visit did not result from the difficulty of her circumstances or the Stasis' effort to comply with the conditions of visitation set forth in the family court's custody order. Rather, on most of the occasions when Mallory failed to visit the child, she acted willfully as the term is used in subsection 63-7-2570(3). *See Broom*, 403 S.C. at 114, 742 S.E.2d at 391 (noting the mother's explanation for the lack of visits—difficulties in scheduling visits—"does not alter the fact that she missed numerous months of visitation when it was clearly possible to schedule at least one visit per month").

Therefore, we hold Mallory's failure to visit the Child was willful.

B. Best Interest of the Child

When a statutory ground for termination—here, willful failure to visit—is established by clear and convincing evidence, we must determine whether termination is in the best interest of the child. "In a TPR case, the best interest of the child is the paramount consideration." *Smith*, 423 S.C. at 85, 814 S.E.2d at 161 (citing *S.C. Dep't of Soc. Servs. v. Smith*, 343 S.C. 129, 133, 538 S.E.2d 285, 287 (Ct. App. 2000)).

At the time of the trial in 2018, the Child was six years old and had lived with the Stasis since she was two years old. The Stasis' home, including the love and care they gave her, is essentially the only environment the Child has ever known. *See* § 63-7-2510. The Child refers to the Stasis as "mom" and "dad" and to their other children as her brothers and sisters. The Stasis provide the Child with stability. Dr. Cheryl Fortner-Wood, an expert in child development and attachment, testified the Child has developed a secure-attachment relationship with the Stasis in the years the Child has lived with them.

On the contrary, Mallory's role in the Child's life is inconsistent at best, nonexistent at worst, and certainly not stable. Dr. Fortner-Wood testified attachment with others is "based on [the] history of interaction" with the other person. She also stated an eight-hour visitation once a month and weekly phone calls of thirty minutes—much more contact than Mallory and the Child actually had—would not be enough to facilitate a secure-attachment relationship. In fact, we know the Child and Mallory's relationship was very strained. The guardian testified the Child constantly begged the Stasis and the guardian before visits and FaceTime calls not to make her see or talk to Mallory. Dr. Fortner-Wood testified that forcing a child to do something she adamantly does not want to do can "actually have a negative impact on the relationship between the child and the attachment figure." Thus, every time the Child is forced to see or talk to Mallory when she outwardly states she does not want to may hurt her secure relationship with the Stasis. *See Smith*, 423 S.C. at 85, 814 S.E.2d at 161 (considering the lack of bonding between the father and the child in determining the best interest of the child).

It is also notable the Child referred to Mallory as a "liar" on multiple occasions and asked the Stasis and the guardian why Mallory lies to her. The Child's therapist testified the Child expressed concerns about Mallory taking her away from the Stasis. During one of their sessions, the Child told the therapist she was scared to

leave the Stasis and that she would run away if she had to leave them. Resuming visits between Mallory and the Child after three years would only deepen this fear. Most importantly as to Mallory's relationship with the Child—as the guardian testified—Mallory has not "placed [the Child] as a priority" in her life.

We are also concerned about Mallory's continuing mental health issues. During oral argument to this Court, Mallory's attorney confirmed Mallory still suffers from "significant mental health issues." We certainly do not fault Mallory for her mental health issues, and we commend her efforts in seeking professional help. However, Mallory rarely visited the Child when her mental health was at its best, and even then, her relationship with the Child was poor. If Mallory's mental illness is still a problem—or worse is deteriorating—then resuming visits is not in the Child's best interest.

"Appellate courts must consider the child's perspective, and not the parent's, as the primary concern when determining whether TPR is appropriate." *Smith*, 423 S.C. at 85, 814 S.E.2d at 161 (quoting *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 343, 741 S.E.2d 739, 749-50 (2013)). The Child is now nine years old. She has lived with the Stasis since 2014 and has not seen or spoken to Mallory since the family court terminated Mallory's rights in 2018. We hold it is in the Child's best interest to terminate Mallory's parental rights.

We pause here to comment on oral argument. Technically, neither due process nor any other provision of law requires oral argument in a given case. Each judge or appellate panel is entitled to make the decision in each case whether oral argument would be helpful. *See* Rule 215, SCACR ("The appellate court may decide any case without oral argument if it determines that oral argument would not aid the court in resolving the issues."). In this case, counsel for the Stasis filed a written request for oral argument at the court of appeals. The court denied the request. On certiorari in this case, this Court—individually and collectively—found oral argument to be very helpful. The question whether Mallory's repeated failures to visit the Child were understandable, even unavoidable, or whether they were willful, has not been an easy judgment call. From our perspective, oral argument was warranted in this complicated and difficult case.

III. Conclusion

We find by the required clear and convincing standard of proof that Mallory's failure to visit the Child was willful and that termination of Mallory's parental rights is in the Child's best interest. Therefore, we reverse the court of appeals and reinstate the family court's order terminating Mallory's parental rights and granting the Stasis' adoption of the Child.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth Philip Shabel, Respondent.

Appellate Case No. 2021-000268

Opinion No. 28059
Submitted September 3, 2021 – Filed September 22, 2021

PUBLIC REPRIMAND

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Julie K. Martino, both of Columbia, for the Office of Disciplinary Counsel.

Kenneth Philip Shabel, of Spartanburg, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

In 2007, Client A retained Respondent for assistance with obtaining visitation with his daughter. Client A lived in Virginia and the child lived in South Carolina with

her mother and step-father. Respondent was successful in obtaining visitation for Client A, but several months later, the child's mother filed an action to terminate Client A's parental rights. The termination of parental rights case went to trial in 2010. Respondent again prevailed, and Client A's visitation rights were restored.

In 2011, the child disclosed sexual abuse by Client A. Client A was arrested and charged with first-degree criminal sexual conduct with a minor. Respondent told Client A that his law partner had experience with handling criminal cases, and Client A, with the help of his father, retained the firm for representation on the criminal matter. The firm charged Client A $10,000. Client A paid $5,000 up front, and the other $5,000 came in contributions made throughout the representation by friends and family members. The firm did not keep an accounting of when and how the fee was earned.

The child's mother refiled for termination of Client A's parental rights. Respondent and his law partner agreed that Respondent would focus on the termination of parental rights matter, while his law partner would focus on the criminal matter. Client A's parental rights were terminated in October 2012. Respondent and Client A discussed filing an appeal, but Client A ultimately decided not to appeal and to focus on the criminal case.

Respondent and his law partner prepared the criminal case together and divided the duties. Ultimately, Client A was convicted. Client A and his family discussed filing an appeal and retained Respondent's firm to handle the appeal. The firm charged Client A $3,000 for representation on the appeal and held the money in the firm's trust account until used. Client A then hired a different attorney to write the appellate briefs and assist Respondent with the appeal. In early 2016, the court of appeals held oral arguments. The attorney from the other law firm handled the oral argument.

Shortly thereafter, Respondent went to work for the firm that represented the mother in the underlying family court matter. Respondent informed Client A of his move to the new firm and notified Client A that he could no longer represent him due to the potential conflict of interest. Respondent filed a motion to be relieved. Respondent informed Client A that the $317.57 remaining in the firm's trust account would be sent to his new attorney. The law firm sent a check, but it was returned due to insufficient funds in the firm's trust account.

Client A's father requested an accounting of how the funds provided for Client A's defense were used. He also filed a complaint with ODC. In response to the notice of investigation, Respondent stated he had already left the firm and could not provide an accounting. Respondent's former law partner provided ODC with an accounting of the funds paid for the criminal appeal. That accounting indicated $317.57 remained on Client A's ledger; however, Respondent did not provide an accounting of the funds paid for the criminal trial. Respondent also indicated that he did not have signatory authority on the trust account, did not participate in monthly reconciliations, and assumed the account was being properly managed by his law partner and the firm's office manager.

Respondent admits the flat-fee agreements should have been in writing; that he should have been able to provide Client A with an accounting upon request; and that he failed to keep his client's money safe. Respondent admits his conduct in this matter violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.5(f) (requiring flat-fee agreements to be in writing) and Rule 1.15 (requiring lawyers to keep client property safe).

Matter B

Two checks from Respondent's former firm's trust account were presented against insufficient funds. As to the first check, ODC sent a notice of investigation, but the firm's office manager intercepted the notice and responded herself without informing Respondent or his law partner. The second check was returned when the firm attempted to refund Client A the remaining funds it held on his behalf.

Respondent again responded to ODC that he never had signatory authority on the firm's trust account, did not participate in monthly reconciliations, and did not take steps to ensure that the reconciliations were being performed. Respondent explained that he relied on his law partner to handle all financial matters for the firm.

Respondent admits he abdicated his responsibility for the trust account and that he did not discuss the requirements of Rule 417, SCACR, with his law partner. Respondent acknowledges he should have taken steps to ensure the firm was reconciling the trust account pursuant to Rule 417, SCACR. *See* Rule 1.15(a), RPC, Rule 407, SCACR (mandating compliance with Rule 417, SCACR).

Matter C

Respondent was a partner in his former law firm from September 2006 until March 2016. Respondent admits he knew payroll taxes were required to be paid but believed his law partner was responsible for the taxes and paid them. In 2012, Respondent received a notice from the Internal Revenue Service (IRS) stating that as a partner in the firm, he was responsible for payroll taxes that had not been paid. After receiving the IRS notice, Respondent learned that although many payroll tax returns were submitted and taxes were withheld from employees' checks, the taxes had not been remitted to the IRS. Respondent discussed the tax issues with his law partner, and together they met with an IRS representative. The firm entered into an agreement to pay $2,000 per month for the unpaid payroll taxes and penalties.

Unbeknownst to Respondent until 2012, the IRS, the South Carolina Department of Revenue (SCDOR), and the South Carolina Department of Employment and Workforce (SCDEW) had begun placing liens against the law firm's assets based on the failure to pay payroll taxes and unemployment insurance beginning in 2009. The IRS, SCDOR, and SCDEW placed liens against the firm's assets in Spartanburg County. The IRS placed liens against Respondent personally in Greenville County. Respondent entered into an agreement to pay the IRS what was determined to be his personal share of the firm's payroll tax liability. Respondent made all of the payroll tax payments for which he was deemed personally responsible, and the Greenville County liens in his name were satisfied in 2014. When Respondent left the partnership, his law partner agreed to assume responsibility for the remaining liens in Spartanburg County that were filed against the firm's assets.

Respondent explained that he trusted his law partner and believed his law partner was handling the trust account and the payroll taxes but admitted he shared the responsibility and should have taken a more active role in the firm's financial affairs. Respondent expressed deep remorse for not being more involved in the operation of the firm as a partner. Respondent admits his failure to ensure payroll taxes were being remitted to the IRS and SCDOR violated Rule 8.4, RPC, Rule 407, SCACR (prohibiting misconduct involving a pattern of indifference to legal obligation).

II.

Respondent admits his misconduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (prohibiting a violation of the Rules of Professional Conduct). In the Agreement, Respondent consents to a confidential admonition or a public reprimand, agrees to pay costs, and agrees to complete the Legal Ethics and Practice Program Ethics School and Trust Account School within one year.

III.

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct. Within thirty days, Respondent shall pay or enter into a reasonable plan to repay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. Within one year of the date of this opinion, Respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Christopher Lance Sheek, Respondent.

Appellate Case No. 2021-000921

Opinion No. 28060
Submitted September 9, 2021 – Filed September 22, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Julie K. Martino, both of Columbia, for the Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of a public reprimand or a definite suspension not to exceed one year, and agrees to pay costs. We accept the Agreement and suspend Respondent from the practice of law in this state for one year. The facts, as set forth in the Agreement, are as follows.

I.

The disciplinary complaint in this matter arose following Respondent's conduct in two cases before the South Carolina Court of Appeals that demonstrated a lack of competence to handle appellate cases, a consistent failure to adhere to the SCACR,

and repeated failure to comply with the court of appeals' orders and directives from the Clerk of the court of appeals.

In the first matter, the Clerk notified Respondent on October 1, 2010, that his brief was not in compliance with Rule 267, SCACR, and that he had ten days to cure the deficiency. Respondent failed to respond and did not cure the deficiency. The Clerk wrote Respondent again on October 20, 2010, and gave him an additional ten days. Respondent failed to respond to that letter or cure the deficiency.

On November 19, 2010, the Clerk wrote Respondent informing him of a deficiency in the supplemental record on appeal, and that he had seven days in which to cure the deficiency. Again, Respondent failed to respond or cure the deficiency. On November 24, 2010, opposing counsel filed a Motion to Require Appellant to Serve and File a Complete Record on Appeal, in which opposing counsel cited numerous failures by Respondent to include designated documents in the record and to properly number the pages of the record. The court of appeals granted that motion on January 19, 2011.

On February 16, 2011, having received no response from Respondent to any of its letters or the court's order, the Clerk wrote Respondent once again. In addition to requesting compliance with the previous letters and order within seven days, the Clerk notified Respondent that he had not yet filed a certificate of counsel for the record or supplemental record. The Clerk requested that those certificates be filed within seven days. On February 25, 2011, after receiving no response from Respondent, the Clerk gave Respondent an additional seven days to comply.

The Clerk dismissed the appeal on March 18, 2011. On April 5, 2011, the court received Respondent's Motion to Reinstate Appeal. On April 29, 2011, the court entered an order stating that it would consider the motion to reinstate if Respondent complied with the prior order and the directives of the Clerk within seven days.

On May 13, 2011, the court reinstated the appeal. The same day, the Clerk wrote to Respondent to request certificates of counsel, which the Clerk originally requested on February 16, 2011. On June 8, 2011, the Clerk wrote to Respondent and cited other deficiencies Respondent failed to correct. The Clerk gave Respondent ten days to cure all these deficiencies. Also, on June 8, 2011, the Clerk received a letter from opposing counsel explaining that Respondent had not served the second

supplemental record on appeal and that opposing counsel could not file his final brief until Respondent did so.

On June 20, 2011, the court of appeals received a request by Respondent for an extension of time to comply with the pending deadlines. The court of appeals granted the extension until August 3, 2011. On June 30, 2011, opposing counsel again filed a motion to require Respondent to comply with the court of appeals' orders and directives to serve an entire record on appeal. On August 24, 2011, opposing counsel filed a motion to dismiss.

Having heard nothing from Respondent since his request for an extension on June 20, 2011, the court of appeals granted the motion to dismiss on October 11, 2011. On October 27, 2011, Respondent filed a motion to reconsider. The court of appeals entered an order on December 7, 2011, giving Respondent fifteen days to comply with its orders and directives and stating the court of appeals would consider the motion to reinstate if Respondent complied with those orders. On January 11, 2013, after finally receiving notification that Respondent had complied with the court of appeals' orders and directives, the appeal was reinstated for a second time. In addition, on January 11, 2013, the Clerk sent Respondent letters regarding several simple deficiencies that still existed in his filings. Ultimately, after no response from Respondent and a failure to cure the noted deficiencies, the court dismissed the appeal by order dated February 20, 2013.

In the second appellate matter, opposing counsel filed a motion to dismiss due to Respondent's failure to timely serve an initial brief and designation of matter to be included in the record on appeal. Opposing counsel also noted that Respondent filed the brief prior to ordering the transcript. Respondent filed a return, in which he admitted he had not ordered the transcript at the time the brief was filed but claimed he had mistakenly ordered the transcript from the wrong court reporter and had corrected his error and ordered the transcript from the correct court reporter.

Opposing counsel filed a reply with exhibits indicating that Respondent made misrepresentations to the court of appeals regarding the true status of the transcript and appeal. Specifically, opposing counsel attached correspondence from the court reporter showing Respondent had been in contact with the correct court reporter since December 2011 and did not order the transcript until August 16, 2012, after he filed his return to the motion to dismiss. Respondent represented the incorrect information in his return was a result of incorrect information provided to him by

his staff. Respondent acknowledged that it was his responsibility to ensure that correct information was provided to the court of appeals.

By order filed September 28, 2012, the court of appeals dismissed the appeal. The court cited Respondent's failure to order the transcript until eight months had passed from the filing of the notice of appeal, Respondent's misrepresentations regarding the ordering of the transcript, Respondent's failure to serve the opposing party with the initial brief, and Respondent's filing of the initial brief without ordering the transcript.

Respondent admits his conduct violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.1 (requiring competence); Rule 3.2 (expediting litigation); Rule 3.4(c) (knowingly disobeying rules of a tribunal); Rule 4.1(a) (prohibiting a false statement of material fact to a tribunal); Rule 5.1(a) (supervising lawyer must make reasonable efforts to ensure his law firm complies with the Rules of Professional Conduct); Rule 5.3 (establishing responsibilities regarding non-lawyer assistants); and 8.4(e) (prohibiting conduct prejudicial to the administration of justice).

II.

Respondent admits his conduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (prohibiting a violation of the Rules of Professional Conduct) and Rule 7(a)(5) (prohibiting conduct tending to pollute the administration of justice). Respondent also agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (Commission) in investigating and prosecuting this matter within thirty days of the imposition of discipline.

In terms of the appropriate sanction, we note Respondent's disciplinary history includes a prior instance of mishandling an appeal and untruthfulness in statements to others. *See In re Sheek*, 399 S.C. 351, 731 S.E.2d 873 (2012) (publicly reprimanding Respondent for, among other things, a failure to timely file a record on appeal which resulted in the dismissal of the appeal). Respondent also received a Letter of Caution in May 2005 citing the following Rules of Professional Conduct: Rule 1.1 (requiring competence); Rule 4.1 (requiring truthfulness in statements to others); Rule 4.4 (requiring respect for rights of third persons); Rule 8.4(d) (prohibiting conduct involving dishonesty); and Rule 8.4(e) (prohibiting

conduct prejudicial to the administration of justice). *See* Rule 2(s), RLDE, Rule 413, SCACR (providing a letter of caution may be considered in a subsequent disciplinary proceeding against the lawyer if the caution or warning contained therein is relevant to the misconduct alleged in the proceedings).

III.

We accept the Agreement and suspend Respondent from the practice of law for one year. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. Within thirty days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Shawn M. Campbell, Respondent.

Appellate Case No. 2021-000252

Opinion No. 28061
Submitted September 3, 2021 – Filed September 22, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Julie K. Martino, both of Columbia, for the Office of Disciplinary Counsel.

Shawn M. Campbell, of Spartanburg, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension of up to one year. We accept the Agreement and suspend Respondent from the practice of law in this state for four months. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

On October 20, 2015, Respondent's bank notified the Commission on Lawyer Conduct that a check in the amount of $1,000 was presented against insufficient funds in Respondent's trust account. ODC sent a notice of investigation. On

November 16, 2015, ODC received what purported to be a response to the notice of investigation from Respondent. It was later discovered this response was written by Respondent's office manager, who intercepted letters from ODC and provided responses without Respondent's knowledge or consent. This response indicated that the office manager was late in taking a deposit to the bank, which resulted in the insufficient funds. The response also indicated that the funds were deposited and the account was reconciled.

Because the response did not adequately explain the reason for the insufficient funds notice or include requested documentation, ODC requested clarification and additional documentation from Respondent. On December 11, 2015, the office manager provided a supplemental response that appeared to be from Respondent. In the response, the office manager attempted to explain that $1,000 was erroneously transferred between accounts and caused the insufficient funds notification. The office manager did not provide a satisfactory explanation for the insufficient funds, nor did she provide all of the information requested by ODC.

Thereafter, Respondent eventually produced additional information that revealed the firm's trust account was short by $3,306.05. Thus, the shortage was caused by more than the $1,000 untimely deposit discussed in the office manager's response. The ODC investigation revealed that several cash receipts reflected on client ledgers were never deposited into the trust account. Disbursements were made from the trust account against the money that was never deposited. In at least one instance, client money that should have been deposited into the trust account was deposited into the operating account instead.

Respondent admits his conduct in this matter violated Rule 1.15(f), RPC, Rule 407, SCACR (prohibiting disbursement before deposit in the trust account) and Rule 417, SCACR (establishing financial recordkeeping requirements).

Matter B

On May 11, 2016, Respondent's bank notified the Commission on Lawyer Conduct that a check had been presented against insufficient funds in Respondent's trust account. The following day, ODC sent a notice of investigation to Respondent, who did not respond because the office manager intercepted the notice of investigation. On June 13, 2016, ODC sent Respondent a reminder pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), reminding him of his obligation to

respond. Three days later, Respondent called ODC to say he had not received the notice of investigation and that he would provide a response within a few days. Respondent had not yet learned his office manager was intercepting his mail.

On June 24, 2016, Respondent provided a response to ODC, explaining that after his law partner decided to leave their partnership to work with another firm, Respondent began the process of converting the partnership to a solo practice. Respondent explained that a substantial portion of the funds in the trust account at that time were attributed to his former partner's guardian ad litem files and that the unearned funds were transferred to his former partner's new firm. As to one client, Respondent's former law partner developed a conflict of interest based on his new employment. The client's ledger indicated there was $317.57 in Respondent's trust account. A check was written for that amount and forwarded to the client's new lawyer. This check was the one returned due to insufficient funds in the trust account which triggered the investigation of this matter.

Respondent explained that when he received notice the check had been returned, he investigated and discovered a hand-written check that previously cleared the trust account had not been entered into the firm's accounting software, which caused the account to appear to have more funds than it actually did. Respondent was not performing monthly reconciliations of the trust account and failed to realize the handwritten check was unaccounted for until after the check at issue failed to clear the account. Respondent transferred funds to cover the check and the bank fees, then reissued a check to the client's new lawyer. The second check successfully cleared the trust account on May 17, 2016.

Respondent admits his failure to keep clients' money safe violated Rule 1.15, RPC, Rule 407, SCACR (requiring lawyers to keep client property safe), and that his failure to reconcile the trust account violated Rule 417, SCACR (establishing financial recordkeeping requirements).

Matter C

During the course of ODC's investigation into Matters A and B, Respondent discovered the firm's office manager had responded to three letters from ODC without Respondent's knowledge or consent. According to the office manager, she responded to the letters without telling Respondent because two weeks before the first letter, Respondent's college-aged son tragically died in a car accident along

with four other students. Respondent was out of the office frequently in the weeks and months following his son's death, which led to the office manager intercepting the notices of investigation and responding without Respondent's knowledge. When Respondent discovered what happened, he terminated the office manager's employment.

The ODC investigation revealed very little money ran through Respondent's trust account because the majority of his cases were on a flat-fee basis. Most of the money that was deposited into the trust account was attributed to guardian ad litem fees that were held in the trust account until earned. ODC's investigation further revealed that the office manager sometimes took cash that came in from clients for her personal use and later wrote personal checks to replace it. When Respondent's law partner left the firm and client money needed to be transferred to the new firm, the office manager made several deposits via personal checks to cover the shortage in the trust account to ensure the checks to the new firm would clear.

Respondent admits that prior to 2017, he abdicated his responsibility for the trust account to the office manager. Respondent did not perform monthly reconciliations himself and did not adequately supervise the office manager to ensure she knew how to perform the reconciliations. In February 2017, Respondent attended the Legal Ethics and Practice Program Trust Account School. Based on a review of trust account records subsequently subpoenaed by ODC, Respondent is now properly performing trust account reconciliations.

Respondent admits he failed to ensure the firm complied with the financial recordkeeping requirements of Rule 417, SCACR. He further admits his failure to timely deposit cash payments into the trust account, his actions in disbursing before deposit, and his failure to train and supervise the office manager's handling of the financial recordkeeping violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(c) (requiring deposit of all unearned fees into the trust account); Rule 1.15(f) (requiring deposit before disbursement); Rule 5.3(a) (requiring attorneys with managerial authority to make reasonable efforts to ensure the conduct of all firm employees is compatible with lawyers' professional obligations); Rule 5.3(b) (requiring an attorney to properly supervise non-lawyer staff members); and Rule 5.3(c) (requiring supervising attorneys to ensure conduct of staff is compatible with the Rules of Professional Conduct).

Matter D

In January 2017, ODC received a complaint about both Respondent and his former law partner regarding the handling of a matter for Client D. Respondent's former law partner assisted Client D with various family court matters over the course of several years. In 2011, Client D was charged with first-degree criminal sexual conduct, and Client D hired Respondent's firm to represent him on the criminal charge for an agreed-upon flat fee of $10,000. A $5,000 payment was made on Client D's behalf, and the fee was deposited into Respondent's operating account. Subsequent payments, made by Client D's family and friends, were held in trust until earned. Respondent and Client D did not execute a written fee agreement explaining the flat fee or that some funds would be held in trust.

Respondent's former law partner was primarily responsible for Client D's ongoing family court matter, which concluded with the termination of Client D's parental rights in 2012. Respondent was initially responsible for Client D's criminal matter, although his former law partner ultimately handled a good portion of the trial. Client D was convicted in 2014 and hired Respondent's former law partner to handle the criminal appeal. The fee for the appeal was a flat fee of $3,000. Neither Respondent nor his former law partner executed a written fee agreement with Client D regarding the appeal.

When Respondent's former law partner developed a conflict of interest after leaving the firm, Client D engaged new counsel to handle the appeal and requested that Respondent forward any remaining funds held in the trust account. Respondent forwarded a check in the amount of $317.57, which was returned after being presented against insufficient funds (as discussed in Matter B). Respondent also failed to provide a complete accounting to Client D.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5(b) (requiring a lawyer to adequately explain the basis of the fee to a client); Rule 1.5(f) (requiring flat-fee agreements must be in writing); Rule 1.15 (requiring lawyers to keep client property safe and provide a full accounting).

Matter E

Beginning in 2010, Respondent delegated the preparation of payroll tax returns to the office manager. The office manager did not prepare tax returns for every tax reporting period, but when she did, taxes were withheld from employees' checks. Despite these withholdings, Respondent frequently failed to remit payroll taxes and unemployment insurance taxes to the South Carolina Department of Revenue (SCDOR), the South Carolina Department of Employment and Workforce (SCDEW), and the Internal Revenue Service (IRS). On many occasions, Respondent elected not to pay the payroll taxes or unemployment insurance because he did not have adequate cash flow to operate the law firm. SCDOR and SCDEW placed liens against the firm's assets and against Respondent and his former law partner in eight separate tax years from 2010 to 2019. The IRS placed liens against the firm's assets in five separate tax years from 2010 to 2016. All of the liens against the firm's assets were filed in Spartanburg County. Additional liens arising out of the failure to remit payroll tax withholdings were filed in Greenville County against Respondent and his former law partner personally.

Respondent and his former law partner met with an IRS representative and set up a plan to pay the outstanding taxes, fines, and penalties. Respondent and his former law partner made their respective individual payments to satisfy the personal liens in Greenville County. Respondent continued to make payments on the Spartanburg County liens, and the firm's obligations to SCDOR and SCDEW are now satisfied. However, as to the federal tax obligations, the ODC investigation revealed that in 2020, Respondent still owed over $60,000 in unpaid taxes. At some point, the IRS determined the debt was "currently not collectable" and had not contacted Respondent since 2016. Respondent believed that because he had not been contacted by the IRS, his obligations had been satisfied. However, upon discovering the outstanding obligation, Respondent contacted the IRS to enter a payment plan to pay off the liens, all of which relate to tax periods prior to 2016.[1]

[1] Although the Covid-19 pandemic has lengthened the negotiations process, Respondent has communicated with the IRS several times and is in the process of finalizing a settlement agreement to pay the taxes, penalties, and fines he owes.

Respondent admits his failure to remit payroll taxes and unemployment taxes violated Rule 8.4(d), RPC, Rule 407, SCACR (prohibiting conduct involving dishonesty).

II.

Respondent admits his misconduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (prohibiting a violation of the Rules of Professional Conduct). In the Agreement, Respondent consents to a public reprimand or definite suspension of up to one year and agrees to pay costs.

Respondent's disciplinary history includes a 2011 letter of caution citing Rule 1.15, RPC, Rule 407, SCACR (requiring lawyers to keep client property safe) and Rule 417, SCACR (establishing financial recordkeeping requirements). *See* Rule 2(s), RLDE, Rule 413, SCACR (providing a letter of caution may be considered in a subsequent disciplinary proceeding if the warning contained therein is relevant to the misconduct involved in the subsequent proceeding).

III.

We find Respondent's misconduct warrants a definite suspension. Accordingly, we accept the Agreement and suspend Respondent from the practice of law in this state for a period of four months. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR. Within thirty days, Respondent shall pay or enter into a reasonable plan to repay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vickie Rummage, Employee, Appellant,

v.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier, Respondents.

Appellate Case No. 2018-000359

Appeal From The Workers' Compensation Commission

Opinion No. 5822
Heard September 23, 2020 – Filed May 19, 2021
Withdrawn, Substituted, and Refiled September 22, 2021

AFFIRMED

Andrew Nathan Safran, of Andrew N. Safran, LLC, of Columbia, for Appellant.

Michael Allen Farry and Jeremy R. Summerlin, both of Horton Law Firm, P.A., of Greenville, for Respondents.

KONDUROS, J.: Vicki Rummage (Claimant) appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) denying her claim for aggravation of a preexisting psychological condition. We affirm.

FACTS/PROCEDURAL BACKGROUND

Claimant worked the third shift as a weaver for BGF Industries. On May 18, 2012, at approximately 3 a.m., she fell after stumbling backward into a hand truck that had been placed behind her while she was doffing her weaving machine. Claimant fell backward and struck her head causing a laceration and scrape marks along her neck. She declined going to the hospital at that time, and the wound was closed with glue from the company's first aid supplies. She finished her shift but later stated she had some blurred vision and a headache after the accident. She drove home and returned to work for her next shift two days later. Claimant worked for a week, and her supervisor sent her for evaluation at the local hospital where she had a CT scan that showed normal results.

Dr. John McLeod, III, a workers' compensation physician for BGF Industries and its insurer Great American Alliance Insurance Co. (collectively, Respondents), evaluated Claimant on May 30, 2012, and noted he "suspected some element of concussion." It was noted her medications included Xanax, Percocet, Prinivil, Lopid, Fiorcet, Ambien, and Lorcet. She complained of headaches and soreness in her upper back and neck. A follow-up appointment on June 6, 2012, did not reveal any significant new information.

In September 2012, Claimant was referred to Dr. Jeff Benjamin at Grand Strand Specialty Associates. Claimant admitted a history of migraine headaches to Dr. Benjamin but indicated the ones she was suffering post-injury were different and "quite excruciating." She also complained of fatigue, nausea, blurred vision, spasms in her legs, and mood swings. Dr. Benjamin noted Claimant's symptoms were consistent for closed-head injury. She subsequently complained of fogginess and extreme fatigue. Claimant began physical therapy for her neck and was prescribed Trileptal for headaches and cervical strain. Claimant reported being an "emotional mess" based on the nausea and headaches she was experiencing. Dr. Benjamin gave Claimant trigger point injections,[1] and she received an occipital

[1] "A trigger point injection (TPI) is an injection that is given directly into the trigger point for pain management. The injection may be an anesthetic such as lidocaine (Xylocaine) or bupivacaine (Marcaine), a mixture of anesthetics, or a corticosteroid (cortisone medication) alone or mixed with lidocaine." Catherine

nerve block. Eventually, in November, Dr. Benjamin indicated he did not think there was much more he could do to assist Claimant except refer her to a pain clinic.

In December of 2012, Claimant began seeing Dr. Daniel Collins, another workers' compensation physician, who treated her for the next three years. His initial note reflects a prior medical history of only sinus troubles. Claimant complained of pain in her neck and head, ringing in her ears, and lightheadedness with slight memory loss. Dr. Collins prescribed Neurontin, which Claimant indicated she had not tried before; physical therapy; and a speech therapy evaluation. In a follow-up a month later, Dr. Collins's notes reflect Claimant was attending speech therapy for mild cognitive impairments, physical therapy, and she would begin taking Lyrica. Claimant was still experiencing significant headaches and neck pain. In the following months, Dr. Collins noted worsening depression. He administered trigger point injections for neck pain and Botox injections for headaches. He prescribed various medications for depression, anxiety, sleep issues, and pain.

Claimant attended speech therapy with Martha Williams at Sandhills Regional Medical Center Rehab Services beginning in January 2013. After testing, Williams reported Claimant had mild impairment of attention, memory, executive function, and visuospatial skills. Williams indicated Claimant's fatigue or preoccupation would increase deficits to a moderate level. Williams worked with Claimant to use different strategies to manage and complete daily tasks. On Williams's advice, Claimant was using games to aid with focus and cognitive abilities. By October, Williams noted improvements in language and task management but the therapy had benefitted Claimant as much as possible at the time.

During the course of litigation, it was discovered Dr. Fred McQueen had treated Claimant for years prior to her workplace injury for various conditions. His notes in the record begin in 2006 and continue to the date of Claimant's injury and a few months beyond. In 2006, Dr. McQueen noted Claimant suffered from cervical and lumbrosacral disc disease with radiculopathy down her extremities. Over the course of the next six years, Dr. McQueen prescribed a variety of medications for anxiety, depression, sleep problems, muscle spasms and soreness, headaches, and

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Burt Driver, M.D., *Trigger Point Injection*, MedicineNet (July 30, 2020), https://www.medicinenet.com/trigger_point_injection/article.htm.

pain. He noted the various stressors in her life including caring for her husband and adult son, who both suffered health issues, caring for both parents through the end of their lives, and working multiple jobs. He noted twice he was concerned with how much longer Claimant would be able to keep working like she was and that her body was breaking down. Dr. McQueen's notes characterize her at times as having chronic depression and chronic pain, and the notes consistently showed she was taking medication for pain and Xanax, while the prescribing of some other medications seem to fluctuate slightly in being prescribed or filled.

Respondents deposed Claimant in December 2013. She testified she had a previous workers' compensation claim with a different employer in 2007 that had been denied, she had not been represented by an attorney in that case, and that it did not progress to a hearing. She also denied being deposed in the prior case. With regard to her treatment and condition after her fall, Claimant testified she complained of neck, arm, back, and leg pain during her visit with Dr. McLeod but was mainly concerned with her head. Claimant testified she then saw Dr. Benjamin and complained of neck and head pain. She next saw Dr. Collins and provided him with a history of Dr. Benjamin's treatment but according to Claimant, Dr. Collins did not ask about any other prior medical history. Claimant acknowledged Dr. McQueen had given her pain medications in the past but claimed she could not remember if it was for her neck and back; she thought it was mainly for her leg. Claimant also acknowledged Dr. McQueen had prescribed depression medications for her in the past when she was experiencing difficult times. She only recalled taking blood pressure medication at the time of her workplace injury. Claimant indicated the problems that began after her fall included headaches, dizziness, ringing in the ears, loss of memory, depression, and neck pain. She stated her neck pain radiated down her arm and she had not had similar neck or arm pain before. Finally, Claimant stated she could no longer manage her housework or caregiving duties and she is very easily confused and distracted. She indicated she sometimes used Facebook to stay in touch with people and played games on the computer for short periods of time as recommended by her speech therapist.

Dr. Collins's deposition was taken March 13, 2014. He stated he was not made aware of a lot of Claimant's prior medical history which concerned him. He stated, "[I]t's really impossible to tell at this point how much or how little the work injury from May 2012 played into symptoms that she had apparently been experiencing for a few years, several years." Dr. Collins noted some of Claimant's current

medications were very similar to prior medications, but some of them were new, for example the Botox injections. Dr. Collins stated, "It becomes harder and harder to figure out what is related specifically to the work injury from May and what is possibly an exacerbation of a preexisting or possibly a completely new diagnosis." Dr. Collins noted Claimant's speech issues were new and that he had no doubt she wanted to get better. Dr. Collins opined a long-term physician would be able to give the best information about the progression of her issues.

That same day, March 13, 2014, Dr. McQueen, Claimant's long-time physician completed a form sent to him by Claimant's attorney in January. It indicated Dr. McQueen's opinion, to a reasonable degree of medical certainty, that Claimant's current headaches, frequency of cervical symptoms, and depression were made worse by her fall and were consistent with post-concussive syndrome. He also opined the treatment for these aggravated symptoms was different and more focused than prior to the fall and she was previously able to continue to work in spite of any preexisting conditions.

Several specialists evaluated Claimant for this case. Tora Brawley, Ph.D., a clinical psychologist and neuropsychologist, evaluated Claimant on May 15, 2014. Claimant's neurocognitive test was discontinued due to interference of her psychiatric symptoms, and Dr. Brawley indicated Claimant could be reevaluated once those were better managed. Dr. Brawley stated "formal assessment of effort did not reveal attempts to malinger." Dr. Amanda Salas, a forensic psychiatrist, evaluated Claimant in April 2015 and issued a report of her findings in September 2015. Dr. Salas indicated Claimant presented as honest and determined, not overly exaggerated or dramatic. In talking with Claimant, Dr. Salas observed she had trouble with landmark dates and some word-finding difficulties. Claimant's husband stated Claimant had gotten lost driving in familiar places and had frequent crying spells. Dr. Salas diagnosed Claimant with Major Depressive Disorder, different than her prior depression. She opined Claimant was not at maximum medical improvement as to mood symptoms and memory impairments, and that she should be stabilized emotionally and then evaluated for cognitive deficit. Finally, Dr. Donna Schwartz Maddox, a psychiatrist with added qualifications in forensic psychiatry, interviewed Claimant in June of 2014 and prepared a report dated April 2016.[2] Dr. Maddox stated Claimant was not malingering and exhibited good effort on the cognitive portion of her mental status exam and did not over

[2] No explanation is provided for the delay between the interview and report.

endorse symptoms. She noted Claimant's pseudobulbar affect[3] was difficult to feign. Dr. Maddox indicated that, in her opinion, Claimant had increased depression since the accident and needed therapy along with better pharmacological treatment. Claimant's neurocognitive deficits could then be evaluated. Dr. Maddox met with Claimant again in October of 2016 and opined she remained depressed with a flat and tearful affect.

All of the aforementioned providers reviewed Claimant's prior medical history, and Claimant acknowledged prior depression and osteoarthritic pain to each. Claimant also complained to each of worsening depression and headache pain in addition to the new symptoms previously mentioned including ringing in the ears, memory loss, speech impairment, low energy, and a general inability to focus.

In April 2015, at Employer's request, Claimant was evaluated at NC Neuropsychiatry in Charlotte, North Carolina.[4] Dr. Thomas Gualtieri administered various tests to Claimant, which primarily involved her responding to questions on a computer. Dr. Gualtieri stated:

> The patient's evaluation today demonstrates a non-credible clinical presentation with dramatic inconsistencies. The patient's overt memory performance and indeed general appearance, fluency and lucidity is quite a variance with her claimed symptomatology. There was clear evidence of symptom exaggeration. There is no reason to believe that her current problems are related to a head injury . . . . [H]er subsequent course is not at all typical of recovery from concussion.

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[3] "Pseudobulbar affect . . . is a condition [that is] characterized by episodes of sudden uncontrollable and inappropriate laughing or crying. Pseudobulbar affect typically occurs in people with certain neurological conditions or injuries, which might affect the way the brain controls emotion." Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/pseudobulbar-affect/symptoms-causes/syc-20353737.

[4] The report is actually dated 12/11/14, but Employer indicates that was error. Claimant suggests the erroneous date indicates this was something of a canned report preprepared by Dr. Gualtieri.

He opined Claimant may suffer from somatization disorder.[5]

Drs. Brawley and Salas both questioned Dr. Gualtieri's choice of tests and methodology. Additionally, they both felt the results of Dr. Gualtieri's testing were invalid because Claimant's significant depressive disorder would interfere with her performance, rendering them unreliable.

Dr. Gualtieri responded to the criticisms of his evaluation. He indicated a main factor in evaluating brain injury was the nature of the initial injury itself and Claimant's description of the injury and delay in seeking treatment rendered this a "non-event." In light of her history, it was not reasonable to assume any current issues were attributable to her fall. Dr. Gualtieri also expressed the validity of his Neuropsych Questionnaire test and noted it was more reliable than just an interview assessment of whether a person was exaggerating or feigning symptoms. He cited to numerous journal articles he had authored on the subject. Dr. Gualtieri indicated Claimant had presented herself well and recalled her history fluently although she was occasionally tearful. He stated she did not appear depressed and was not impaired from taking the tests he administered. Additionally, the test scores she received were inconsistent with each other and not consistent with a profile of someone with a traumatic brain injury.

After all the evaluations, and after having provided Claimant's prior medical history in full, Claimant's attorney solicited final opinions—such as the one issued by Dr. McQueen—from Dr. Collins, Dr. Salas, and Dr. Maddox. They all opined to a reasonable degree of medical certainty Claimant was not malingering, presented clinical evidence of depression and anxiety (probably Major Depressive Disorder), had suffered an increase in her psychological issues after her workplace injury, had not reached MMI, and required psychiatric treatment including therapy.

Finally, a hearing on Claimant's case was held in November of 2016. At that time, Claimant acknowledged seeing Dr. McQueen and that she had previously struggled

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[5] "Somatic symptom disorder is characterized by an extreme focus on physical symptoms—such as pain or fatigue—that causes major emotional distress and problems functioning. [An individual] may or may not have another diagnosed medical condition associated with these symptoms . . . ." Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/somatic-symptom-disorder/symptoms-causes/syc-20377776.

with depression, including taking medication for it. However, she indicated it was nothing she was not able to overcome; she was working, taking care of her responsibilities, and never received psychiatric therapy. Claimant testified she had headaches before her fall but the ones after the accident were different. The nausea accompanying her headaches became worse, and she began experiencing new symptoms including ringing in the ears, speech issues, and dizziness. Claimant indicated she received Botox injections from Dr. Collins and was prescribed medications that helped. However, after Dr. Collins left his practice she "got nothing." At the time of the hearing, she was no longer receiving workers' compensation benefits and was not receiving Botox injections. She indicated her crying and depression were worse, she could not be in a crowd, and did not "have a life" anymore. She also testified her memory issues were new. Claimant further testified she used Facebook at her speech therapist's suggestion as a means to stay in contact with people. Her primary Facebook activity centered on offering prayers to others and commenting on pictures of her grandchildren and their activities. Claimant indicated she had not tried to hide prior issues from her providers.

On cross-examination, Claimant stated she did not go to the doctor immediately after her accident and continued working until August 2012, approximately three months after the injury, although she struggled every day. She acknowledged taking medication for pain and depression since 2005. She admitted her medications had included Xanax, Ambien, and Cymbalta. Claimant acknowledged receiving medications for pain and depression in 2007 and 2009, while being treated for pain, depression, anxiety, and headaches. Claimant did not recall her specific medications, but again, did not dispute anything reflected in the records. In December 2009, Dr. McQueen was still treating Claimant for chronic pain, migraines, and generalized anxiety disorder (GAD), but according to Claimant these issue were not like they became after the accident. Claimant did not recall how she responded during her deposition to questions about her prior workers' compensation claim except that her husband's insurance had paid for her shoulder surgery which was the subject of the claim. Claimant remembered being treated for pain prior to the accident but she did not know if it was called chronic pain. She admitted Dr. Collins prescribed some of the same medications as Dr. McQueen had previously for depression and anxiety.

The single commissioner denied Claimant's claim, by and large based on her assessment of Claimant's credibility. The single commissioner found Claimant to

be "wily and manipulative" and noted her belief Claimant was "using the worker[s'] compensation system for purposes of secondary gain." The single commissioner gave little weight to the medical opinions of Drs. Collins, Brawley, Salas, and Maddox because they had not been provided Claimant's accurate medical history and had based their opinions on Claimant's unreliable self-reporting. The single commissioner gave greater weight to Dr. Gualtieri's opinion that Claimant was untruthful because it "mirrored" her own impressions and "matched the evidence." According to the single commissioner, Dr. Gualtieri "was not fooled or manipulated" by Claimant. Over Claimant's objection, the single commissioner had admitted the order of Commissioner Barry Lyndon from Claimant's prior workers' compensation case. This document was admitted to impeach Claimant's deposition testimony regarding whether a deposition, attorney, or hearing was involved in that case. In her order, the single commissioner indicated she had not relied on Commissioner Lyndon's credibility analysis in making her own assessment in the present case.

Claimant appealed the single commissioner's order raising numerous allegations of error, primarily the single commissioner had ignored the great weight of medical evidence and relied solely on her credibility assessment to deny the claim. At the hearing before the Appellate Panel, Claimant offered the case of *Michau v. Georgetown*, 396 S.C. 589, 723 S.E.2d 805 (2012), and argued Dr. Gualtieri's opinion, which was not stated to a reasonable degree of medical certainty, did not qualify as "medical evidence" sufficient to rebut the medical evidence offered by Claimant. Respondents acknowledged Dr. Gualtieri's opinion was not so stated.

The Appellate Panel affirmed the single commissioner, and its order essentially adopted the single commissioner's order[6] with only a minor deviation. This appeal followed.

STANDARD OF REVIEW

"In an appeal from the Commission, [the appellate court] . . . may [not] substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law." *Jones v. Harold Arnold's Sentry Buick, Pontiac*, 376 S.C. 375, 378, 656

[6] The Appellate Panel unanimously affirmed the single commissioner's order and stated "the same shall constitute the Decision and Order of the Appellate Panel."

S.E.2d 772, 774 (Ct. App. 2008). "Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." *Lockridge v. Santens of Am., Inc.*, 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). "Accordingly, we limit review to deciding whether the Commission's decision is supported by substantial evidence or is controlled by some error of law." *Jones*, 376 at 378, 656 S.E.2d at 774.

"Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." *Lockridge*, 344 S.C. at 515, 544 S.E.2d at 844. "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Lee v. Harborside Cafe*, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002) (quoting *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

LAW/ANALYSIS

I. Medical Evidence—Admission of Dr. Gualtieri's Report

Claimant contends the Appellate Panel erred in affirming the single commissioner's order because the single commissioner relied on the medical opinion of Dr. Gualteri, although that opinion was not stated to a reasonable degree of medical certainty as required by section 42-9-35 of the South Carolina Code (2015) and as discussed in *Michau v. Georgetown*, 396 S.C. 589, 723 S.E.2d 805 (2012).[7] We conclude this issue is not preserved for our review.

The workers' compensation scheme provides for the manner of review of a single commissioner's order. "Either party or both may request Commission review of the Hearing Commissioner's decision by filing the original and three copies of a Form 30" and "[t]he grounds for appeal must be set out in detail on the Form 30 in the form of questions presented." S.C. Code Ann. Regs. 67-701(A)(3) (2012). "Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error." S.C.

[7] In *Michau*, the court concluded a medical opinion offered by the opponent of a workers' compensation claim must be stated to a reasonable degree of medical certainty. *Id.* at 596, 723 S.E.2d at 808.

Code Ann. Regs. 67-701(A)(3)(a). As to what this requirement means in terms of preservation, our courts have said "[o]nly issues raised to the [Appellate Panel] within the application for review of the single commissioner's order are preserved for review." *Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 249, 791 S.E.2d 719, 722 (2016). *See also Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940) ("[A]ll findings of fact and law by the [single c]ommissioner became and are the law of this case, except only those within the scope of the exception of defendant and the notice given to the parties by the Commission."). This issue was not raised in Claimant's exceptions to the single commissioner's order. [8] Claimant first raised the *Michau* argument during her hearing before the Appellate Panel. Afterward, when reviewing a draft order denying the claim, Claimant, via letter, persuaded the Appellate Panel to include a mention of the *Michau* case and section 42-9-35 in its final order. Therefore, Claimant argues the issue was raised to and ruled on by the Appellate Panel, and the issue is therefore preserved. Indeed, an oft-cited rule of appellate preservation instructs an issue must be raised to and ruled upon to be preserved for appellate review. However, other requirements for preservation cannot be disregarded. To successfully preserve an issue for appellate review, the issue must be: "(1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). Therefore, even if we look to general appellate rules of preservation in deciding this issue, we

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[8] Claimant argues she raised this issue to the Appellate Panel prior to the hearing by stating in her prehearing memo that there was an absence of "competent evidence which support[ed] the fact finder's determination [Claimant] did not meet her burden of proof." However, "[e]ach issue raised to the Commission must be done with specificity, not through blanket general exceptions." *Hilton*, 418 S.C. at 251 n.2, 791 S.E.2d at 722 n.2. *See also Adcox v. Clarkson Bros. Constr. Co.*, 773 S.E.2d 511, 516 (N.C. Ct. App. 2015) (noting a claimant's very generalized exception to the hearing commissioner's order was "like a hoopskirt—cover[ing] everything and touch[ing] nothing"). Furthermore as to Dr. Gualtieri's opinion specifically, Claimant alleged only that he created the report prior to meeting Claimant, that he used his own diagnostic tests when evaluating Claimant, that he was not qualified to evaluate neuropsychological test data, and that his findings do not align with Claimant's experts' findings.

cannot conclude Claimant's argument was "raised in a timely manner." Dr. Gualtieri's report was provided to Claimant prior to the hearing before the single commissioner and any defect it suffered could have been raised before the hearing in front of the Appellate Panel. Consequently, Claimant's point is unpreserved.

II. Admission of Prior Order

Claimant also maintains the Appellate Panel erred in affirming the single commissioner's order when the single commissioner admitted the prior workers' compensation order of Commissioner Lyndon. We disagree.

Claimant relies on *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (2002), a medical malpractice case, and Rule 608 of the South Carolina Rules of Evidence, which address the introduction of extrinsic evidence to impeach a testifying witness. However, the Rules of Evidence are not controlling in workers' compensation hearings. *See* S.C. Code Ann. § 1-23-330(1) (2005) ("*Except* in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed." (emphasis added)); *see also Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000) ("[T]he South Carolina Rules of Evidence do not apply in proceedings before the Workers' Compensation Commission."). Section 1-23-330 addresses the admissibility of evidence in contested cases and provides that "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded." § 1-23-330(1).

In this case, the prior order made numerous credibility findings. Claimant raised these concerns to the single commissioner. Respondents maintained the prior order was presented not to comment on Claimant's credibility, but solely to impeach her deposition testimony that she had never been deposed before, she did not have an attorney in the prior case, and the prior case did not proceed to a hearing. However, only a very limited portion of Commissioner Lyndon's order served to rebut Claimant's testimony on these matters. In fact, the first two pages of the prior order, consisting of the cover page and a list of exhibits, sufficiently address the points Respondents sought to rebut. Consequently, the prior order was largely immaterial and irrelevant to this case.

Regardless, the admission of the prior order is subject to a harmless error analysis. *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 299, 519 S.E.2d 583, 600 (Ct. App. 1999) (subjecting the erroneous admission of letters in a workers'

compensation case and finding their admission harmless when the information contained therein was cumulative of other admissible evidence). The admission of the prior order is troubling because the single commissioner's credibility findings are the foundation of her decision. Nevertheless, the single commissioner indicates she did not consider Commissioner Lyndon's credibility findings, and as an officer of the court, we give credence to the veracity of that assertion. Additionally and importantly, as will be discussed in Section III, other substantial evidence in the record supports the single commissioner's credibility determination. Therefore, we conclude any error in admitting Commissioner Lyndon's Order was harmless under the particular facts of this case.

III. Expert Medical Evidence and Credibility

Finally, Claimant argues the decision of the single commissioner, and its affirmance by the Appellate Panel, was arbitrary and capricious as it was based on lay observations and non-medical evidence as opposed to the medical evidence presented in the case. We disagree.

"The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009). "The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011).

In a case brought under section 42-9-35, the burden is on the claimant to produce medical evidence to establish a claim for the exacerbation of a preexisting condition. *See* §42-9-35(A) ("The employee shall establish by a preponderance of the evidence, including medical evidence, that: (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment . . . ."). However, this does not require the fact finder to ignore medical evidence that is not expert opinion, other lay evidence, or the credibility of the Claimant. In some instances the medical evidence and credibility determination can be tidily separated. For example, a recent case from the supreme court, *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 643, 842 S.E.2d 349, 352 (2020), discussed the

interplay of credibility determinations and medical evidence in workers' compensation cases.

> The commission often makes findings of fact based on credibility determinations
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> . . . .
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> The reason we consistently affirm these findings derives from a principle that applies beyond credibility to all factual determinations of the commission: "an award must be founded on evidence of sufficient substance to afford a reasonable basis for it." When the commission's factual determination is "founded on evidence of sufficient substance," and the evidence "afford[s] a reasonable basis" for the commission's decision in the case, the evidence meets the "substantial evidence" standard and we are bound by the decision. This point is illustrated in the hundreds of cases in which our appellate courts have affirmed factual determinations by the commission.

Crane, 429 S.C. at 643, 842 S.E.2d at 352 (quoting *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012)).

> In cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact. This case illustrates that point. Even if [the claimant] was untruthful in his testimony at the hearing, his claims for future medical care, temporary total disability, and permanent impairment caused by hearing loss are based on objective medical evidence. The opinions of his treating physicians that he suffers from severe to profound hearing loss as a result of his work-related accident are similarly based on objective medical evidence. There is little in [the claimant]'s medical records—or anywhere in the record before us—that indicates [the claimant]'s

> credibility reasonably and meaningfully relates to whether he actually suffered hearing loss on [the date of the incident].
>
> To make a proper review of a factual determination by the commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reasons the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision. In most cases, this is obvious from context.

Id. at 646-47, 842 S.E.2d at 354.

In this case, credibility was a substantial issue because the deterioration in Claimant's psychological condition was not objectively measureable like the employee's hearing loss in *Crane*. Therefore, the Appellate Panel could have properly given less weight to Claimant's doctor's opinions if it believed Claimant was untruthful in her self-reporting of symptoms or her presentation. *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony."); *see also Fishburne*, 384 S.C. at 87, 681 at 601 (noting the single commissioner gave less weight to a physician's opinion "because of the objective evidence and [her] own observations and impressions at the hearing," which included finding the claimant was not credible).

Although the single commissioner's unforgiving assessment of Claimant's credibility was unduly harsh and unwarranted, the record is not without substantial evidence that Claimant lacked credibility, even in the absence of Commissioner Lyndon's order. In particular, in her deposition, Claimant denied some relatively major prior issues entirely. For example, she denied any real neck problems or dizziness prior to the accident even though she had complained of both many times according to Dr. McQueen's notes and had undergone a CT scan prior to her injury for "headaches and dizziness." She characterized her depression as manageable and somewhat episodic although Dr. McQueen and/or his nurse practitioner characterized it as chronic and major at different times. Claimant appeared to

downplay the frequency and intensity of prior headaches in spite of McQueen's notes indicating she suffered from tension headaches, sinus headaches, and later, migraine headaches. With respect to medications, Claimant frequently indicated she did not remember whether she was taking a particular medication at a given time, although she did not deny taking medicines generally. Her greatest misleading statement as to specific medications was that she was only taking "something for blood pressure" at the time of her fall when the records reveal she had been taking Percocet and Xanax consistently for many years and other medications with frequency. The record also demonstrated two occasions in which Claimant had been dishonest with providers regarding the filling of her pain medications. The single commissioner also relied on her lay observations of Claimant's demeanor.

Claimant's medical records demonstrated a long-standing history of serious psychological issues. Additionally, the medical evidence showed Claimant did not lose consciousness when she fell and two weeks postfall, she exhibited no "focal neurological deficits." Dr. Gualtieri's report also indicated Claimant's injury was not the type that should have produced the issues she was suffering and that in his opinion, Claimant was malingering.

In sum, substantial evidence in the record supports the Commission's decision. Claimant's medical experts' opinions were substantially weakened in light of the credibility findings of the Appellate Panel as the opinions rely, at least in part, on an unexaggerated presentation of symptoms. The medical evidence presented by Respondents established Claimant had long-standing significant psychological issues prior to her workplace fall and the fall itself may not have been the source for any deterioration in her condition. Ever mindful of our limited standard of review in workers' compensation cases, the order of the Appellate Panel denying Claimant's compensation is

AFFIRMED.

LOCKEMY, C.J., concurs.

MCDONALD, J., concurring in result only.