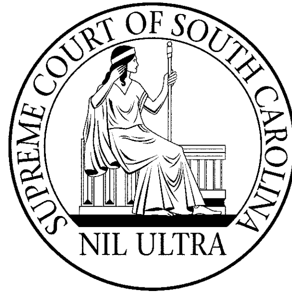

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
September 28, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael N. Frasier, Jr., Petitioner.

Appellate Case No. 2020-001405

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 28117
Heard March 15, 2022 – Filed September 28, 2022

REVERSED

Appellate Defender Kathrine Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

JUSTICE HEARN: Petitioner Michael Frasier was convicted of trafficking cocaine in excess of 100 grams after police discovered cocaine during a traffic stop for an inoperable brake light. The questions before the Court concern whether police had reasonable suspicion to prolong the traffic encounter and whether Frasier consented to the search. The trial court concluded the officer had reasonable suspicion and Frasier consented, and the court of appeals affirmed. In deciding these two issues, we clarify the scope of this Court's standard of review in the Fourth Amendment context. Ultimately, we reverse the court of appeals because law enforcement lacked reasonable suspicion to prolong the traffic stop and Frasier did not consent to the search.

FACTS/PROCEDURAL HISTORY

During the morning of August 14, 2013, two plainclothes officers with the North Charleston Police Department sat in an unmarked car outside a bus station conducting a routine drug interdiction as part of the department's narcotics division. On this particular morning, Frasier had traveled from New York to North Charleston on a commercial bus. The two officers were approximately 75 to 100 yards away from the bus station's exit when they observed Frasier leave the station. According to the officers, Frasier immediately stopped after exiting the station and looked left and right before walking about ten yards to a vehicle driven by Cheryl Jones. Frasier entered the vehicle, and the two left the station. Officers characterized Frasier's conduct as clearing the area for threats, including law enforcement, which they deemed suspicious. As the vehicle left the station, the officers discovered that it had an inoperable third brake light. Accordingly, one of the officers called Steven Hall, a patrol officer who previously had worked in the narcotics department, to perform a traffic stop. Although the legal basis for the traffic stop stemmed from the broken brake light, the officers informed Hall that Frasier seemed suspicious. However, the officers never informed Hall of the specific conduct that raised their suspicion, such as Frasier's scanning the parking lot.

Hall subsequently caught up to the vehicle on the North Bridge over the Ashley River after reaching a speed of 87 miles per hour. Jones used her turn signal to get into the left lane and out of the officer's way. Apparently upon realizing that she was being pulled over, she then turned on her flashers and moved into the right lane before pulling off the road. Hall testified that Jones took longer than usual to pull over although the dashcam video indicated it took less than a minute. Hall exited his patrol car and approached Jones's vehicle. He informed Jones that her brake light was out, and while talking with her, Hall noticed the zipper was down on her pants.

He testified that, from his experience, this suggested she was potentially hiding contraband in her pants. Hall testified that Frasier "just appeared to be nervous. He was sweating profusely. Did not want to really interact with me a whole lot as far as eye contact, something like that." Hall asked them where they were traveling from, and after repeating the question several times, Jones answered that she picked up Frasier from the bus stop. Hall requested Jones's driver's license, but she did not have it on her; instead, she gave him her personal information, and dispatch indicated that she did not have any outstanding warrants. Hall can be heard on the dashcam video telling dispatch that he is going to issue a warning ticket and try to obtain consent to search the car. Hall subsequently exited his patrol car, walked over to Jones and asked her to step out of her vehicle. Jones complied and consented for Hall to search the vehicle. Another patrol officer arrived on scene during the traffic stop, and both officers walked over to the passenger side door and asked Frasier to step out of the vehicle. Frasier complied, and placed his hands in his pockets. Hall immediately told Frasier to remove his hands from his pockets and asked Frasier if he would mind if he searched him. Frasier raised his hands in the air and said, "I do, but . . . ." Frasier subsequently placed his hands on the hood of the car at the direction of Hall. Ultimately, Hall found a white powdery substance later identified as cocaine on Frasier and a larger quantity in Frasier's jacket in the back seat of the vehicle. Frasier was arrested and charged with trafficking in cocaine in excess of 100 grams.

Thereafter, Frasier filed two motions to suppress, one contending Hall lacked reasonable suspicion to prolong the traffic stop and the second asserting he never consented to the search. Following the testimony of the officers, which was consistent with the account relayed above, Frasier argued all the drugs should be suppressed. The solicitor contended the following established reasonable suspicion to prolong the traffic stop in order to obtain consent: 1) Frasier's behavior at the bus stop, specifically traveling on a commercial bus which law enforcement knew was frequented by drug traffickers and his "scanning" the parking lot upon exiting the bus station; 2) Jones's purportedly "evasive driving" and the delay in pulling over; 3) the zipper down on her pants; 4) "evasively not answering very simple direct questions" such as where they were coming from; 5) the sense of nervousness Frasier displayed; and 6) "his sweating profusely."

Frasier contended once Hall wrote the warning ticket, the legal justification for the stop ended, and nothing the officer relied on established reasonable suspicion to prolong the encounter. The trial court stated that this issue "is at best a 50/50 call." Ultimately, the court denied Frasier's motion to suppress, concluding the facts above

supported a finding of reasonable suspicion, with the exception of Jones's alleged "evasive driving" and taking too long to pull over. The court found Jones's driving reasonable, and thus, it did not take that fact into consideration.

As to Frasier's second argument—that he did not give Hall consent to search him—defense counsel noted that Frasier responded, "I do, but . . ." in response to Hall asking whether he minded being searched. The solicitor contended that, "it was the officer's belief, as he testified earlier, that his words and actions together was [sic] consent." The trial court concluded the dashcam video unambiguously showed that Frasier consented to the search by virtue of his words and conduct, and it denied the second motion to suppress as well.

Ultimately, the jury found Frasier guilty, and the trial court sentenced him to the mandatory minimum sentence of twenty-five years imprisonment. Frasier appealed to the court of appeals which affirmed, citing our deferential standard of review and concluding evidence supported the trial court's decision. Frasier subsequently filed a petition for a writ of certiorari, which the Court granted in part.[1]

ISSUES

I. Did the court of appeals err in affirming the trial court's decision that Officer Hall had reasonable suspicion to prolong the traffic stop in order to subsequently ask for consent to search?

II. Did the court of appeals err in affirming the trial court's determination that Frasier gave Officer Hall consent to search him?

STANDARD OF REVIEW

Before reaching the merits, we take this opportunity to clarify our standard of review when reviewing an appeal from a motion to suppress based on Fourth Amendment grounds. Historically, we have repeatedly noted that appellate courts review an appeal from a motion to suppress based on a violation of the Fourth Amendment under the deferential "any evidence" standard. *See, e.g.*, *State v. Morris*, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015). Pursuant to this standard, our

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[1] This Court denied Frasier's argument concerning the admission of statements Frasier made following a *Miranda* warning when officers had asked similar questions before *Miranda* was given.

appellate courts "will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Spears*, 429 S.C. 422, 433, 839 S.E.2d 450, 455 (2020) (quoting *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)).

In *State v. Brockman*, 339 S.C. 57, 528 S.E.2d 661 (2000), this Court declined to follow the United States Supreme Court's decision in *Ornelas v. United States*, 517 U.S. 690 (1996) requiring federal courts to employ a more rigorous two-part analysis where courts defer to the trial court's factual findings but review the ultimate legal conclusion de novo. *Brockman* concluded that *Ornelas* was an advisory opinion, and thus, the Court declined to implement de novo review. *Id.* at 64-65, 528 S.E.2d at 664-65. At the time this Court issued *Brockman*, appellate courts routinely reviewed cold records and depended on trial courts to review credibility and weigh conflicting evidence in reaching its decision. However, with the dawn of the technological age, appellate courts are no longer dependent on the trial court in our review of evidence. The most obvious example is the advent of body and dashcam footage, whereby this Court reviews the same video as the trial court. Accordingly, while the need for deference remains, particularly in determining issues of credibility, it is no longer necessary for us to defer to the trial court's overall ruling in every case. Instead, we take this opportunity to refine our standard of review to better align with the federal standard, which has been adopted in nearly every state.[2]

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[2] *See James v. State*, 197 So.3d 532, 535 (Ala. Crim. App. 2015); *State v. Miller*, 207 P.3d 541, 543 (Alaska 2009); *State v. Fornof*, 179 P.3d 954, 956 (Ariz. Ct. App. 2008); *MacKintrush v. State*, 479 S.W.3d 14, 17 (Ark. 2016); *People v. Letner and Tobin*, 235 P.3d 62, 99-100 (Cal. 2010); *People v. McKnight*, 446 P.3d 397, 402 (Colo. 2019); *State v. Lewis*, 217 A.3d 576, 586-87 (Conn. 2019); *Lopez-Vasquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008); *Huffman v. State*, 937 So.2d 202, 205-06 (Fla. Dist. Ct. App. 2006); *State v. Cartee*, 844 S.E.2d 202, 203 (Ga. Ct. App. 2020); *State v. Spillner*, 173 P.3d 498, 504 (Haw. 2007) (reviewing a trial court's ruling on a motion to suppress evidence de novo); *State v. Perez*, 434 P.3d 801, 803 (Idaho 2018); *People v. Timmsen*, 50 N.E.3d 1092, 1097 (Ill. 2016); *Marshall v. State*, 117 N.E.3d 1254, 1258 (Ind. 2019); *State v. Brown*, 930 N.W.2d 840, 844 (Iowa 2019); *State v. Hanke*, 415 P.3d 966, 969 (Kan. 2018); *Commonwealth v. Conner*, 636 S.W.3d 464, 471 (Ky. 2021); *State v. Boeh*, 324 So.3d 653, 659-60 (La. Ct. App. 2021); *State v. Sasso*, 143 A.3d 124, 129 (Me. 2016); *State v. Holt*, 51 A.3d 1, 7 (Md. Ct. Spec. App. 2012); *Commonwealth v. Henley*, 171 N.E.3d 1085, 1097 (Mass. 2021); *People v. Pagano*, 967 N.W.2d 590, 592 (Mich. 2021); *State v.*

Accordingly, appellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review.

DISCUSSION

I. Reasonable Suspicion to Prolong the Traffic Stop

Frasier contends Hall did not have reasonable suspicion to prolong the traffic stop beyond the purpose of issuing the warning for an inoperable third brake light. He asserts law enforcement had, at best, an "unparticularized suspicion or hunch, not reasonable suspicion to justify the prolonged detention." Conversely, the State argues evidence supports the trial court's determination that Hall had reasonable suspicion of potential criminal activity, and therefore, the extension of the initial

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Bergerson, 671 N.W.2d 197, 201 (Minn. Ct. App. 2003); *Eaddy v. State*, 63 So.3d 1209, 1212 (Miss. 2011); *State v. Peery*, 303 S.W.3d 150, 153 (Mo. Ct. App. 2010); *State v. Neiss*, 443 P.3d 435, 443 (Mont. 2019); *State v. Shiffermiller*, 922 N.W.2d 763, 772 (Neb. 2019); *State v. Beckman*, 305 P.3d 912, 916 (Nev. 2013); *State v. Francisco Perez*, 239 A.3d 975, 981 (N.H. 2020); *State v. Nyema*, 267 A.3d. 449, 459 (N.J. 2022); *State v. Ochoa*, 206 P.3d 143, 147 (N.M. Ct. App. 2008) ("The constitutionality of a search or seizure is a mixed question of law and fact and demands de novo review."); *People v. Blandford*, 176 N.E.3d 1043, 1044 (N.Y. 2021); *State v. Watson*, 792 S.E.2d 873, 874 (N.C. Ct. App. 2016); *State v. Marsolek*, 964 N.W.2d 730, 735 (N.D. 2021); *State v. Hawkins*, 140 N.E.3d 577, 580-81 (Ohio 2019); *Fuentes v. State*, __ P.3d __, __ 2021 WL 3027309 (Okla. Crim. App. 2021); *State v. Maciel-Figueroa*, 389 P.3d 1121, 1123 (Or. 2017); *Commonwealth v. Smith*, 164 A.3d 1255, 1257 (Pa. Super. Ct. 2017); *State v. Taveras*, 39 A.3d 638, 645-46 (R.I. 2012); *State v. Moore*, 415 S.C. 245, 251 781 S.E.2d 897, 900 (2016); *State v. Aaberg*, 718 N.W.2d 598, 600 (S.D. 2006); *State v. Smith*, 484 S.W.3d 393, 399 (Tenn. 2016); *Herrera v. State*, 546 S.W.3d 922, 926 (Tex. App. 2018); *Salt Lake City v. Street*, 251 P.3d 862, 865 (Utah Ct. App. 2011); *State v. Rutter*, 15 A.3d 132, 135 (Vt. 2011); *McArthur v. Commonwealth*, 845 S.E.2d 249, 252 (Va. Ct. App. 2020); *State v. Gatewood*, 182 P.3d 426, 427-28 (Wash. 2008); *State v. Bookheimer*, 656 S.E.2d 471, 476 (W.Va. 2007); *State v. Reed*, 920 N.W.2d 56, 65-66 (Wis. 2018); *Jennings v. State*, 375 P.3d 788, 790 (Wyo. 2016).

traffic stop was constitutionally permissible. Applying the facts as found by the trial court, we disagree these findings rise to the level of reasonable suspicion.

"A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." *Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014). Once police pull over a motor vehicle for a traffic violation, "the police may order the driver to exit the vehicle without violating Fourth Amendment proscriptions on unreasonable searches and seizures." *State v. Pichardo*, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) (citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)). "In carrying out the stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Id.* (citing *United States v. Sullivan,* 138 F.3d 126 (4th Cir. 1998)).

In order to prolong or exceed the scope of a stop beyond the initial traffic violation, law enforcement must have reasonable suspicion that criminal activity may be afoot. *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868-69 ("If, during the stop of the vehicle, the officer's suspicions are confirmed or further aroused—even if for a different reason than he initiated the stop—the stop may be prolonged, and the scope of the detention enlarged as circumstances require."). Although reasonable suspicion is not susceptible to a rigid, formulaic approach, it requires more than a mere hunch or unparticularized suspicion. *Id.* at 182, 754 S.E.2d at 868. In other words, for an officer to have reasonable suspicion, "there [must] be an objective, specific basis for suspecting the person stopped of criminal activity." *Id.* While reasonable suspicion is not a high bar and "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). This inquiry involves the totality of the circumstances, and "[c]ourts must give due weight to common sense judgments reached by officers in light of their experience and training." *State v. Moore*, 415 S.C. 245, 252-53, 781 S.E.2d 897, 901 (2016).

In *Moore*, a police officer pulled over a vehicle on I-85 for speeding. *Id.* at 248, 781 S.E.2d at 899.[3] The officer testified he smelled alcohol, and the occupant

[3] The officer in *Moore* testified the driver took longer than usual to pull over and was evasive because he initially used his left turn signal before finally pulling onto

admitted to having a couple drinks. During the stop, Moore passed two of three field sobriety tests. The vehicle was registered out of state to a third party, and the officer found $600 on Moore during a consensual pat down. *Id.* at 249, 781 S.E.2d at 899. The officer subsequently asked Moore if he could search the vehicle, but Moore declined. *Id.* The officer decided not to charge Moore with driving while impaired, but he did request a canine unit, which subsequently alerted to the presence of drugs. The State relied on the following facts to support the presence of reasonable suspicion:

> (1) Moore initially turned on his left turn signal but then pulled his vehicle over to the right; (2) the time Moore took to pull over was longer than average, indicating the possibility of flight; (3) Deputy Owens noticed an odor of alcohol emanating from the vehicle, which led him to believe that Moore had been drinking in order to calm his nerves; (4) Moore smoked several cigarettes, which was also an indicator that he might be trying to calm his nerves; (5) Moore continued to talk on the phone during the traffic stop, which was an indicator of criminal activity as phones provide a means of communication between drug traffickers; (6) Moore's hands were shaking when he handed Deputy Owens his driver's license and rental agreement; (7) Moore's pulse appeared to be rapid; (8) Moore's breathing was heavy; (9) Moore tried to pick up his cell phone when he was asked to exit his vehicle, also indicating the possibility of flight; (10) Moore was carrying a large sum of money in his pocket despite being unemployed; (11) Moore was driving a rental car, which was rented by a third party; and (12) Moore was leaving a suburb of Atlanta, which is a known drug trafficking hub.

Id. at 249-50, 781 S.E.2d at 899-900. Notably, while the Court determined at least some evidence supported the trial court's decision to deny the motion to suppress, it acknowledged that nervousness is typically present in any encounter with police.

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the right shoulder. *Id.* at 250, 781 S.E.2d at 899. Officer Hall testified Jones was evasive as she took longer than usual to pull off the side of the road and initially switched to the left lane before exiting the highway on the right shoulder. However, the trial court expressly rejected this factor in its totality of the circumstances approach. Nevertheless, the State continues to argue that this fact is relevant. We disagree, as the video in question clearly shows Jones did not attempt to evade police.

The Court cautioned law enforcement that although "nervous behavior is a pertinent factor in determining reasonable suspicion, we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion." *Id.* at 254-55, 781 S.E.2d at 902.

Here, even after accepting the trial court's factual findings as we must do since they are supported by some evidence, we conclude that Hall lacked reasonable suspicion as a matter of law pursuant to de novo review.[4] The two plainclothes officers relayed to Hall that Frasier seemed suspicious, but that was only based on a subjective hunch. While "scanning the parking lot" is a relevant factor, it is far from establishing reasonable suspicion. Accordingly, in order for Hall to prolong the traffic encounter, there had to be more indications of criminal activity once Hall initiated the traffic stop. Although the State contends the following additional facts establish reasonable suspicion—repeating questions, noticing Jones's unzipped zipper, sweating, and being nervous—we disagree.[5] Hall did not see any items that would demonstrate potential criminal activity—such as cash on hand, hollowed out blunt cigars, or the smell of marijuana—before deciding to extend the stop. *See Moore*, 415 S.C. at 249, 781 S.E.2d at 899 (officers found a "wad" of $600 in cash); *Morris*, 411 S.C. at 581, 769 S.E.2d at 859 (police saw hollowed out cigars and smelled marijuana). It is equally apparent that this was a drug stop masquerading as

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[4] We note the trial court believed the issue was at best 50/50 but ruled in favor of the State. When a case boils down to a flip of the coin, the Fourth Amendment requires that we find in favor of the defendant since the State has the burden to demonstrate reasonable suspicion.

[5] Jones told Hall during the traffic stop that her zipper was undone because she had just taken a shower before meeting Frasier at the bus station. Concerning the fact that Frasier sweated, we agree with the trial court's statement that "[e]verybody sweats profusely in August in Charleston. I sweat profusely in Charleston in August. It's hot at 6 in the morning. As soon as you walk out the door, it's 90 to 100 percent humidity." The solicitor responded that he had the almanac showing the temperature and humidity for the day in question and "would be happy to give it to you." The court answered, "No. I live in Charleston. I've lived in Charleston my whole life . . . ." Further, although Hall testified that the driver door opening during the stop was unusual, he never articulated a reason as to how that fact was potentially indicative of illegal behavior.

a traffic encounter. Indeed, the goal of the stop was to "try to obtain consent," as Hall can be heard telling dispatch on the dashcam video. While we do not suggest that pretexual stops are illegal, in order to prolong the stop, there must be an *objective* basis for concluding that criminal activity may be afoot. Simply put, "[i]n law, the ends do not justify the means." *State v. Adams*, 409 S.C. 641, 654, 763 S.E.2d 341, 348 (2014). Because the State failed to meet its burden of demonstrating reasonable suspicion, we reverse.

II. Frasier's Consent

Frasier contends the court of appeals erred in affirming the trial court's conclusion that he gave Hall consent to search him. The State asserts there is evidence in the record to support the trial court's decision. We agree with Frasier.

Warrantless searches are generally considered per se unreasonable unless they fall within a recognized exception under the Fourth Amendment. Police may search an individual if that person consents, but the burden is on the State to demonstrate consent. *State v. Harris*, 277 S.C. 274, 276, 286 S.E.2d 137, 138 (1982) ("However, the State bears the burden of proving the voluntariness of a consent to search from the totality of the surrounding circumstances."). Law enforcement must obtain consent voluntarily, which is a fact-intensive inquiry viewed under the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). Police do not need to tell an individual that he can refuse to consent, but it is a factor in the overall analysis. *Id.*; *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("Therefore, like the federal standard, our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent.").

During the pretrial testimony, Hall noted that he asked Frasier "if he minded if I checked him out or searched him, and he said, 'I do, but,' and just kind of put his hands up on top of the car." The State also described the encounter as, "[R]egarding his actions, Frasier shrugged his shoulders, placed his hands on top of Jones's vehicle, positioned himself in a manner such that the officer could search him, and exposed both his body and his pockets to the officer." Because we are able to view the same video as the trial court, we can make an independent finding and are not constrained to defer to the trial court's conclusion that Frasier consented through his words and conduct. The video clearly indicates that Frasier stepped out of the vehicle at the direction of one of the officers, with a second officer standing beside him.

Once Frasier began to place his hands in his pockets, Hall understandably told Frasier to remove them. In response, Frasier raised his hands over his head and began to turn. Hall testified it was Frasier's conduct that indicated he consented to a search, but it is clear from the video that Frasier only placed his hands on the vehicle at the direction of the officer. Indeed, after asking whether Frasier had any weapons on him, Hall asked Frasier to "put his hands up on the car for me." Accordingly, because Frasier's conduct was at the direction of the officer, it was not a voluntary decision to allow Hall to search him. Thus, the State failed to prove that Frasier voluntarily consented, and we therefore reverse on this ground as well.

CONCLUSION

We hold law enforcement lacked reasonable suspicion to prolong the traffic stop, and thus, the discovery of cocaine was the product of an illegal seizure. We also conclude that Frasier did not voluntarily consent. Accordingly, we reverse the court of appeals.

REVERSED.

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

The Supreme Court of South Carolina

Re: Amendments to Rules 407, 413, and 502, South Carolina Appellate Court Rules

Appellate Case No. 2022-000837

ORDER

Pursuant to Article V, Section 4 of the South Carolina Constitution, we amend the Rules for Lawyer Disciplinary Enforcement (RLDE) and the Rules for Judicial Disciplinary Enforcement (RJDE), which are found in Rule 413 and Rule 502 of the South Carolina Appellate Court Rules; and the Rules of Professional Conduct (RPC), which are found in Rule 407 of the South Carolina Appellate Court Rules.

The amendments to the RPC correct a scrivener's error in one rule and amend a comment to remind lawyers who sell a law practice that they have a duty to securely store client files.

The amendments to the RLDE and the RJDE: (1) provide a means for the electronic service and filing of documents in lawyer and judicial disciplinary proceedings during the investigative process and when matters are pending before the Commissions on Lawyer and Judicial Conduct and the Supreme Court; (2) incorporate the provision of Rule 221, SCACR, requiring that any petition for rehearing in a disciplinary matter be received by the Supreme Court within 15 days of the filing of a decision or order; (3) clarify the process of issuance, service, and objection to or modification of subpoenas in disciplinary cases; (4) alter and clarify the time that initial and pre-hearing disclosures and discovery must be completed in cases involving formal charges; (5) clarify the process for submission of agreements to panels and the Supreme Court; (6) require that disciplinary counsel serve a notice of investigation on a lawyer or judge by U.S. mail and e-mail; (7) eliminate the requirement that a public reprimand be served on a lawyer or judge by certified mail; (8) permit Commission counsel to petition this Court to appoint the receiver in cases where there are no issues involving lawyer discipline.

The amendments, which are contained in the attachment to this Order, are effective immediately. Furthermore, based on the adoption of electronic filing and service procedures within these rules, the June 15, 2020 order of the Chief Justice titled *RE: Amended Supplemental Guidance Regarding Lawyer and Judicial Disciplinary Matters During the Coronavirus Emergency*, is hereby rescinded, effective immediately.

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
September 28, 2022

Rule 407, SCACR:

(1) Rule 1.8(m), RPC, is amended to substitute "affect" for "effect."

(2) Comment 10 to Rule 1.17, RPC, is amended to provide:

> [10] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(g) for the definition of informed consent); the obligation to protect information relating to the representation (see Rules 1.6 and 1.9); and the obligation to securely store a client's file (see Rule 1.15(i)).

Rule 413, SCACR:

(1) Rule 2(w), RLDE is amended to provide: "**(w) Public Reprimand:** a reprimand by the Supreme Court in the form of a written, published decision."

(2) Rules 4(d) and 5(c), RLDE, are amended to change the references to the Office of Finance and Personnel to the Office of Fiscal Services, and to change the references to the Judicial Department to the Judicial Branch.

(3) Rule 14, RLDE, is amended to provide:

RULE 14
TIME, SERVICE AND FILING

. . .

(c) Service.

(1) Formal Charges; Subpoenas. Service upon the lawyer of formal charges or a subpoena in any disciplinary or incapacity proceedings shall be made by personal service upon the lawyer or the lawyer's counsel by any person authorized by the chair of the Commission, or by registered or certified mail, return receipt requested, to the lawyer's last known address. If service cannot be so made, service shall be deemed complete when deposited in the U.S. Mail, provided the formal charges or the subpoena were sent by registered or certified mail, return receipt requested, to the primary address the lawyer provided in the Attorney Information System under Rule 410, SCACR, and to the lawyer's last known address, if those addresses differ. A subpoena directed to a non-party shall be served as provided in the South Carolina Rules of Civil Procedure.

(2) Service of Other Documents. Unless otherwise provided in these rules, service of all other documents shall be made in the manner provided by Rule 262, SCACR, and any order of the

Supreme Court specifying the proper means of electronic service under the South Carolina Appellate Court Rules.

(3) Electronic Service on Disciplinary Counsel. In addition to the methods of service available under paragraph (c)(2) of this rule, disciplinary counsel may be served by one of the following methods of electronic service.

(A) Disciplinary counsel may be served by e-mail. The address for service on the Office of Disciplinary Counsel is ODCmail@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent. A document served by this method must be in an Adobe Acrobat portable document format (.pdf).

(B) Lawyers may serve disciplinary counsel using OneDrive for Business. Lawyers are strongly encouraged to use this method for serving large volumes of materials. More information about this method, including registration and other instructions, is available upon request by e-mailing ODCmail@sccourts.org.

(C) Disciplinary counsel may be served by an electronically transmitted facsimile copy. The fax number for disciplinary counsel is (803) 734-1964. While this method is well suited for relatively small documents, depending primarily upon the limitations of the sending fax machine, it may not be possible to send large documents in a single transmission. If it becomes necessary to split a document into multiple parts to make the fax transmission, a separate cover sheet should be used on each part to identify the document.

(d) Filing. When these rules require the filing of a document with the Commission or the Supreme Court, the filing may be accomplished by:

(1) Delivering the document to the Commission or the clerk of the Supreme Court;

(2) Depositing the document in the U.S. mail, properly addressed to the Commission or the clerk of the Supreme Court, with sufficient first class postage attached; or

(3) One of the following electronic methods of filing:

> **(A) Electronic Filing by Lawyers with the Supreme Court.** Lawyers who are licensed to practice law in South Carolina may utilize OneDrive for Business to electronically submit documents for filing with the Supreme Court, and lawyers are strongly encouraged to use this method of filing. More information about this method, including registration and filing instructions, is available in the Attorney Information System (https://ais.sccourts.org/AIS) under the tab "Appellate Filings."
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> **(B) Filing by E-Mail.** Filings may be made by e-mail. For the Commission, the e-mail shall be sent to OCCmail@sccourts.org. For the Supreme Court, the e-mail shall be sent to supctfilings@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent (i.e., Record on Appeal, Part 1 of 4). A document filed by this method must be in Adobe Acrobat portable document format (.pdf). Filers shall not utilize any other file format or a file-sharing service when e-mailing documents for filing. The Commission or the Clerk of the Supreme Court may reject any document submitted by e-mail in a format other than .pdf or using a file-sharing service.
>
> **(C) Faxing Documents.** A document may be filed by an electronically transmitted facsimile copy. The fax

number for the Commission is (803) 734-0363. The fax number for the Supreme Court is (803) 734-1499. While this method is well suited for relatively small documents, depending primarily upon the limitations of the sending fax machine, it may not be possible to send large documents in a single transmission. If it becomes necessary to split a document into multiple parts to make the fax transmission, a separate cover sheet should be used on each part to identify the document. In the event the facsimile copy is not sufficiently legible, the Commission or the clerk of the Supreme Court may require the party to provide a copy by mail.

(e) Date of Filing. The date of filing shall be the date of delivery or the date of mailing if filed using one of the methods specified in (d)(1) or (2) of this rule. When filed using one of the electronic methods of filing specified in paragraph (d)(3) of this rule, a document transmitted and received by 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. Any document filed with the Supreme Court or the Commission shall be accompanied by proof of service of such document on all other parties.

(4) Rule 27(f), RLDE, is amended to provide:

(f) Rehearing. A petition for rehearing must be received by the Supreme Court within 15 days after the filing of the decision or order in accordance with Rule 221, SCACR. No return to a petition for rehearing may be filed unless requested by the Supreme Court. Ordinarily, however, rehearing will not be granted in the absence of such a request.

(5) Rule 15(a)-(e), RLDE, is amended to provide:

RULE 15
OATHS; SUBPOENA POWER

(a) Oaths. Oaths and affirmations may be administered by any member of the Commission, disciplinary counsel, or any other person authorized by law to administer oaths and affirmations.

(b) Subpoenas for Investigation.

(1) Disciplinary counsel may compel by subpoena the attendance of the lawyer or witnesses and the production of pertinent books, papers, documents (whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence for the purposes of investigation. Disciplinary counsel shall conduct any appearance in accordance the provisions of Rule 19(c)(3).

(2) In the investigation stage of the proceedings, a lawyer under investigation may request the issuance of subpoenas for specific witnesses or documents by making the request to the Commission. The Commission chair, vice-chair, or Commission counsel may direct disciplinary counsel to issue the subpoena(s). Disciplinary counsel shall provide the lawyer with copies of documents submitted in response to the subpoena(s). Disciplinary counsel shall conduct any appearance in accordance with the provisions of Rule 19(c)(3).

(c) Subpoenas for Deposition or Hearing. After formal charges are filed, either disciplinary counsel or respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents at a deposition or hearing held under these rules.

(d) Enforcement of Subpoenas. The willful failure to comply with a subpoena issued under this rule may be punished as a contempt of the Supreme Court. Upon proper application, the Supreme Court may enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(e) Quashing or Modifying Subpoenas; Interlocutory Appeals Prohibited.

(1) Any attack on the validity of a subpoena shall be heard and determined by the chair or the vice chair of the Commission during an investigation, or by the chair of the hearing panel before which the matter is pending, who may enter an order granting or denying the relief or modifying the subpoena. A request for an extension of time to comply with a subpoena during an investigation shall be heard and determined by the chair or the vice-chair of the Commission.

(2) Any resulting order shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief following service of the hearing panel report pursuant to Rule 27(a).

. . . .

(6) Rule 25(a), (b), and (f), RLDE, is amended to provide:

RULE 25
DISCOVERY

(a) Initial Disclosure. Within 30 days of the service of an answer, disciplinary counsel and respondent shall exchange:

(1) the names and addresses of all persons known to have knowledge of the relevant facts;

(2) non-privileged evidence relevant to the formal charges;

(3) the names of expert witnesses expected to testify at the hearing and affidavits setting forth their opinions and the bases therefor; and,

(4) other material only upon good cause shown to the chair of the hearing panel.

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the lawyer. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request.

(b) Pre-Hearing Disclosure. The chair of the hearing panel shall set a date for the exchange of witness lists and exhibits no later than 30 days prior to the scheduled hearing. Disciplinary counsel and respondent shall exchange exhibits to be presented at the hearing, names and addresses of witnesses to be called at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded). Copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under Rule 25(h).

. . .

(f) Completion of Discovery. All discovery shall be completed 30 days prior to the date of the scheduled hearing, unless the Commission permits otherwise.

. . . .

(7) Rule 21, RLDE, is amended to provide:

RULE 21
DISCIPLINE BY CONSENT

(a) Agreement. At any stage in the proceedings, the lawyer and disciplinary counsel may agree to the imposition of a stated sanction, a range of sanctions, or the issuance of a letter of caution in exchange for the lawyer's admission of any or all of the allegations of misconduct involved in the proceedings. If the agreement is entered into after the filing of the formal charges, the agreement shall admit or deny the allegations contained in the formal charges. If the agreement is entered into before the filing of the formal charges, the agreement shall contain the specific factual allegations which the lawyer admits he or she has committed and the applicable provisions of the Rules of Professional Conduct or other ethical or disciplinary provisions that the lawyer admits the lawyer has violated. The agreement shall be signed by disciplinary counsel, by the lawyer and, if the lawyer is represented by counsel, by the lawyer's counsel. The signature of the lawyer's counsel on the agreement shall indicate that counsel has advised the lawyer regarding the agreement and that counsel believes the lawyer is voluntarily entering into the agreement with a full understanding of the effect of the agreement. Together with any signed agreement, a lawyer may also submit to disciplinary counsel a sworn statement(s) or other documents, including affidavits by other persons, for the Commission and the Court to consider in mitigation.

(b) Affidavit of Consent. The lawyer shall also sign an affidavit stating that:

(1) the lawyer consents to the sanction(s) or letter of caution;

(2) the consent is voluntarily given; and

(3) the matters admitted in the agreement and the facts stated in the affidavit are true.

(c) Submission to Panel. Disciplinary counsel shall transmit the fully executed agreement, the affidavit of consent, and any documents submitted by the lawyer in mitigation to Commission counsel and also serve the lawyer with a copy. Commission counsel shall submit the agreement, affidavit of consent, and any documents submitted in mitigation to an investigative panel if formal charges have not been filed, or to a hearing panel if formal charges have been filed on any of the allegations. Provided, if formal charges have been filed but not heard, an investigative panel can consider the proposed agreement and affidavit if the parties both agree in writing. The panel shall either reject the agreement or submit the agreement, affidavit of consent, and any documents that were submitted in mitigation to the Supreme Court if it determines the agreement should be accepted. An investigative panel shall, however, finally approve or disapprove an agreement for an admonition, a deferred discipline agreement or a letter of caution and, if approved, shall impose the sanction or issue the letter of caution without submitting the matter to the Supreme Court.

(d) Action by Supreme Court. If the panel submits the matter to the Supreme Court, the Supreme Court shall either reject the agreement or issue a decision disciplining the lawyer, which shall be based on the agreement. The decision shall comply with the requirements of Rule 27(e).

(e) Effect of Rejection of Agreement. If an agreement is rejected by the panel or the Supreme Court, the proceedings shall continue. The rejected agreement, affidavit of consent, and any documents submitted in mitigation shall be withdrawn and shall not be used against the lawyer in any further proceedings.

(f) Confidentiality. The agreement, affidavit of consent, and any documents submitted in mitigation shall remain confidential until the Supreme Court enters a decision disciplining the lawyer, at which time the agreement, affidavit of consent, and any documents submitted in mitigation shall be available to the public. The agreement, affidavit of consent, and any documents submitted in mitigation shall not be available to the public at any time if the agreement is rejected, or if the submission of the agreement results in the imposition of an admonition, a deferred discipline agreement or a letter of caution by an investigative panel.

(g) Briefs, Additional Information, and Oral Arguments. The Supreme Court may require the parties to submit briefs and/or participate in oral arguments in connection with the agreement. The Supreme Court may also require the parties to submit additional information prior to taking action with respect to the agreement. Either the lawyer or disciplinary counsel may move before the Supreme Court for permission for the parties to file briefs, to have oral arguments, or both in connection with the agreement, but the Supreme Court, in its discretion, may take action on the agreement without briefs, without oral arguments, or without either, notwithstanding a request from one or both of the parties.

(8) Rule 19(b) and (c)(1), RLDE, is amended to provide:

(b) Investigation. Disciplinary counsel shall conduct all investigations. Disciplinary counsel may issue subpoenas pursuant to Rule 15(b), conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints. Disciplinary counsel shall issue and serve a notice of investigation to the lawyer with a copy of the complaint or information received requesting that the lawyer serve a written response to the allegations in the notice on disciplinary counsel; provided, however, that disciplinary counsel may seek permission of the chair or vice-chair to dispense with the requirement to make this request or to dispense with the requirement to serve the lawyer with a copy of the complaint or information received. Disciplinary counsel shall serve the notice of

investigation by e-mail and U.S. mail to the primary e-mail address and physical address the lawyer has designated in the Attorney Information System. *See* Rule 410, SCACR. The lawyer shall serve a written response on disciplinary counsel within 15 days of service of the notice of investigation. The written response must include the lawyer's verification that it is complete and accurate to the best of the lawyer's knowledge and belief.

(c) Requirements of Notice of Investigation.

(1) When issuing notice of investigation pursuant to Rule 19(b), disciplinary counsel shall give the following notice to the lawyer:

(A) a specific statement of the allegations being investigated and the rules or other ethical standards allegedly violated, with the provision that the investigation can be expanded if deemed appropriate by disciplinary counsel;

(B) the lawyer's duty to respond pursuant to Rule 19(b);

(C) the lawyer's opportunity to meet with disciplinary counsel pursuant to Rule 19(c)(3); and,

(D) the name of the complainant unless the investigative panel determines that there is good cause to withhold that information. Disciplinary counsel shall advise the lawyer if disciplinary's counsel's written statement of the allegations constitutes the complaint pursuant to Rule 2(e).

. . . .

(9) Rule 31(c), RLDE, is amended to provide:

(c) Petition. If a lawyer has been transferred to incapacity inactive

status, has disappeared or died, has been suspended or disbarred, or other sufficient reason exists and no partner, personal representative or other responsible party capable of conducting the lawyer's affairs is known to exist, disciplinary counsel shall petition the Supreme Court for an order of receivership appointing the receiver to inventory the files of the inactive, disappeared, deceased, suspended or disbarred lawyer and to take action as appropriate to protect the interests of the lawyer and the lawyer's clients. Commission counsel may petition the Supreme Court for the order of receivership in cases where there are no issues involving discipline. If the Supreme Court determines that a lawyer suffers from a physical or mental condition that adversely affects the lawyer's ability to practice law but decides that a transfer to incapacity inactive status is not warranted, it may appoint the receiver to protect clients' interests. The order of receivership shall be public.

Rule 502, SCACR:

(1) Rule 2(v), RJDE is amended to provide: "**(v) Public Reprimand:** a reprimand by the Supreme Court in the form of a written, published decision."

(2) Rules 4(d) and 5(c), RJDE, are amended to change the references to the Office of Finance and Personnel to the Office of Fiscal Services, and to change the references to the Judicial Department to the Judicial Branch.

(3) Rule 27(g), RJDE, is amended to change the reference to the Judicial Department to the Judicial Branch.

(**4**) Rule 14, RJDE, is amended to provide:

RULE 14. TIME, SERVICE AND FILING

. . .

(c) Service.

(1) Formal Charges; Subpoenas. Service upon the judge of formal charges or a subpoena in any disciplinary or incapacity proceedings shall be made by personal service upon the judge or the judge's counsel by any person authorized by the chair of the Commission, or by registered or certified mail, return receipt requested, to the judge's last known address. If service cannot be so made, service shall be deemed complete when deposited in the U.S. Mail, provided the formal charges or the subpoena were sent by registered or certified mail, return receipt requested, to the primary address the judge provided in the Attorney Information System under Rule 410, SCACR, and to the judge's last known address, if those addresses differ, or, if the judge is not a member of the South Carolina Bar, to the address the judge supplied to South Carolina Court Administration and to the judge's last known address, if those

addresses differ. A subpoena directed to a non-party shall be served as provided in the South Carolina Rules of Civil Procedure.

(2) Service of Other Documents. Unless otherwise provided in these rules, service of all other documents shall be made in the manner provided by Rule 262, SCACR, and any order of the Supreme Court specifying the proper means of electronic service under the South Carolina Appellate Court Rules.

(3) Electronic Service on Disciplinary Counsel. In addition to the methods of service available under paragraph (c)(2) of this rule, disciplinary counsel may be served by one of the following methods of electronic service.

> **(A)** Disciplinary counsel may be served by e-mail. The address for service on the Office of Disciplinary Counsel is ODCmail@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent. A document served by this method must be in an Adobe Acrobat portable document format (.pdf).
>
> **(B)** Judges may serve disciplinary counsel using OneDrive for Business. Judges are strongly encouraged to use this method for serving large volumes of materials. More information about this method, including registration and other instructions, is available upon request by e-mailing ODCmail@sccourts.org.
>
> **(C)** Disciplinary counsel may be served by an electronically transmitted facsimile copy. The fax number for disciplinary counsel is (803) 734-1964. While this method is well suited for relatively small documents, depending primarily upon the limitations of the sending fax machine, it may not be possible to send large documents in a single transmission. If it becomes

necessary to split a document into multiple parts to make the fax transmission, a separate cover sheet should be used on each part to identify the document.

(d) Filing. When these rules require the filing of a document with the Commission or the Supreme Court, the filing may be accomplished by:

(1) Delivering the document to the Commission or the clerk of the Supreme Court;

(2) Depositing the document in the U.S. mail, properly addressed to the Commission or the clerk of the Supreme Court, with sufficient first class postage attached; or

(3) One of the following electronic methods of filing:

(A) Electronic Filing by Lawyers with the Supreme Court. Lawyers who are licensed to practice law in South Carolina may utilize OneDrive for Business to electronically submit documents for filing with the Supreme Court, and lawyers are strongly encouraged to use this method of filing. More information about this method, including registration and filing instructions, is available in the Attorney Information System (https://ais.sccourts.org/AIS) under the tab "Appellate Filings."

(B) Filing by E-Mail. Filings may be made by e-mail. For the Commission, the e-mail shall be sent to OCCmail@sccourts.org. For the Supreme Court, the e-mail shall be sent to supctfilings@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent (i.e., Record on Appeal, Part 1 of 4). A document filed by this method must be in Adobe Acrobat portable document format (.pdf). Filers shall not utilize any other file format

or a file-sharing service when e-mailing documents for filing. The Commission or the Clerk of the Supreme Court may reject any document submitted by e-mail in a format other than .pdf or using a file-sharing service.

(C) Faxing Documents. A document may be filed by an electronically transmitted facsimile copy. The fax number for the Commission is (803) 734-0363. The fax number for the Supreme Court is (803) 734-1499. While this method is well suited for relatively small documents, depending primarily upon the limitations of the sending fax machine, it may not be possible to send large documents in a single transmission. If it becomes necessary to split a document into multiple parts to make the fax transmission, a separate cover sheet should be used on each part to identify the document. In the event the facsimile copy is not sufficiently legible, the Commission or the clerk of the Supreme Court may require the party to provide a copy by mail.

(e) Date of Filing. The date of filing shall be the date of delivery or the date of mailing if filed using one of the methods specified in (d)(1) or (2) of this rule. When filed using one of the electronic methods of filing specified in paragraph (d)(3) of this rule, a document transmitted and received by 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. Any document filed with the Supreme Court or the Commission shall be accompanied by proof of service of such document on all other parties.

(5) Rule 27(f), RJDE, is amended to provide:

(f) Rehearing. A petition for rehearing must be received by the Supreme Court within 15 days after the filing of the decision or order in accordance with Rule 221, SCACR. No return to a petition for rehearing may be filed unless requested by the Supreme Court. Ordinarily, however, rehearing will not be granted in the absence of such a request.

(6) Rule 15(a)-(e), RJDE, is amended to provide:

RULE 15. OATHS; SUBPOENA POWER

(a) Oaths. Oaths and affirmations may be administered by any member of the Commission, disciplinary counsel, or any other person authorized by law to administer oaths and affirmations.

(b) Subpoenas for Investigation.

(1) Disciplinary counsel may compel by subpoena the attendance of the judge or witnesses and the production of pertinent books, papers, documents (whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence for the purposes of investigation. Disciplinary counsel shall conduct any appearance in accordance the provisions of Rule 19(c)(3).

(2) In the investigation stage of the proceedings, a judge under investigation may request the issuance of subpoenas for specific witnesses or documents by making the request to the Commission. The Commission chair, vice-chair, or Commission counsel may direct disciplinary counsel to issue the subpoena(s). Disciplinary counsel shall provide the judge with copies of documents submitted in response to the subpoena(s). Disciplinary counsel shall conduct any appearance in accordance with the provisions of Rule 19(c)(3).

(c) Subpoenas for Deposition or Hearing. After formal charges are filed, either disciplinary counsel or respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents at a deposition or hearing held under these rules.

(d) Enforcement of Subpoenas. The willful failure to comply with a subpoena issued under this rule may be punished as a contempt of the Supreme Court. Upon proper application, the Supreme Court may

enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(e) Quashing or Modifying Subpoenas; Interlocutory Appeals Prohibited.

(1) Any attack on the validity of a subpoena shall be heard and determined by the chair or the vice chair of the Commission during an investigation, or by the chair of the hearing panel before which the matter is pending, who may enter an order granting or denying the relief or modifying the subpoena. A request for an extension of time to comply with a subpoena during an investigation shall be heard and determined by the chair or the vice-chair of the Commission.

(2) Any resulting order shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief following service of the hearing panel report pursuant to Rule 27(a).

. . . .

(7) Rule 25(a), (b), and (f), RJDE, is amended to provide:

RULE 25. DISCOVERY

(a) Initial Disclosure. Within 30 days of the service of an answer, disciplinary counsel and respondent shall exchange:

(1) the names and addresses of all persons known to have knowledge of the relevant facts;

(2) non-privileged evidence relevant to the formal charges;

(3) the names of expert witnesses expected to testify at the hearing and affidavits setting forth their opinions and the bases therefor; and,

(4) other material only upon good cause shown to the chair of the hearing panel.

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the judge. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request.

(b) Pre-Hearing Disclosure. The chair of the hearing panel shall set a date for the exchange of witness lists and exhibits no later than 30 days prior to the scheduled hearing. Disciplinary counsel and respondent shall exchange exhibits to be presented at the hearing, names and addresses of witnesses to be called at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded). Copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under Rule 25(h).

. . .

(f) Completion of Discovery. All discovery shall be completed 30 days prior to the date of the scheduled hearing, unless the Commission permits otherwise.

. . . .

(8) Rule 21, RJDE, is amended to provide:

RULE 21
DISCIPLINE BY CONSENT

(a) Agreement. At any stage in the proceedings, the judge and disciplinary counsel may agree to the imposition of a stated sanction, a range of sanctions, or the issuance of a letter of caution in exchange for the judge's admission of any or all of the allegations of misconduct involved in the proceedings. If the agreement is entered into after the filing of the formal charges, the agreement shall admit or deny the allegations contained in the formal charges. If the agreement is entered into before the filing of the formal charges, the agreement shall contain the specific factual allegations which the judge admits he or she has committed and the applicable provisions of the Code of Judicial Conduct or other ethical or disciplinary provisions that the judge admits the judge has violated. The agreement shall be signed by disciplinary counsel, by the judge and, if the judge is represented by counsel, by the judge's counsel. The signature of the judge's counsel on the agreement shall indicate that counsel has advised the judge regarding the agreement and that counsel believes the judge is voluntarily entering into the agreement with a full understanding of the effect of the agreement. Together with any signed agreement, a judge may also submit to disciplinary counsel a sworn statement(s) or other documents, including affidavits by other persons, for the Commission and the Court to consider in mitigation.

(b) Affidavit of Consent. The judge shall also sign an affidavit stating that:

(1) the judge consents to the sanction(s) or letter of caution;

(2) the consent is voluntarily given; and

(3) the matters admitted in the agreement and the facts stated in the affidavit are true.

(c) Submission to Panel. Disciplinary counsel shall transmit the fully executed agreement, the affidavit of consent, and any documents submitted by the judge in mitigation to Commission counsel and also serve the judge with a copy. Commission counsel shall submit the agreement, affidavit of consent, and any documents submitted in mitigation to an investigative panel if formal charges have not been filed, or to a hearing panel if formal charges have been filed on any of the allegations. Provided, if formal charges have been filed but not heard, an investigative panel can consider the proposed agreement and affidavit if the parties both agree in writing. The panel shall either reject the agreement, or submit the agreement, affidavit of consent, and any documents that were submitted in mitigation to the Supreme Court if it determines the agreement should be accepted. An investigative panel shall, however, finally approve or disapprove an agreement for an admonition, a deferred discipline agreement or a letter of caution and, if approved, shall impose the sanction or issue the letter of caution without submitting the matter to the Supreme Court.

(d) Action by Supreme Court. If the panel submits the matter to the Supreme Court, the Supreme Court shall either reject the agreement or issue a decision disciplining the judge, which shall be based on the agreement. The decision shall comply with the requirements of Rule 27(e).

(e) Effect of Rejection of Agreement. If an agreement is rejected by the panel or the Supreme Court, the proceedings shall continue. The rejected agreement, affidavit of consent, and any documents submitted in mitigation shall be withdrawn and shall not be used against the judge in any further proceedings.

(f) Confidentiality. The agreement, affidavit of consent, and any documents submitted in mitigation shall remain confidential until the

Supreme Court enters a decision disciplining the judge, at which time the agreement, affidavit of consent, and any documents submitted in mitigation shall be available to the public. The agreement, affidavit of consent, and any documents submitted in mitigation shall not be available to the public at any time if the agreement is rejected, or if the submission of the agreement results in the imposition of an admonition, a deferred discipline agreement or a letter of caution by an investigative panel.

(g) Briefs, Additional Information, and Oral Arguments. The Supreme Court may require the parties to submit briefs and/or participate in oral arguments in connection with the agreement. The Supreme Court may also require the parties to submit additional information prior to taking action with respect to the agreement. Either the judge or disciplinary counsel may move before the Supreme Court for permission for the parties to file briefs, to have oral arguments, or both in connection with the agreement, but the Supreme Court, in its discretion, may take action on the agreement without briefs, without oral arguments, or without either, notwithstanding a request from one or both of the parties.

(9) Rule 19(b) and (c)(1), RJDE, is amended to provide:

(b) Investigation. Disciplinary counsel shall conduct all investigations. Disciplinary counsel may issue subpoenas pursuant to Rule 15(b), conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints. Disciplinary counsel shall issue and serve a notice of investigation to the judge with a copy of the complaint or information received requesting that the judge serve a written response to the allegations in the notice on disciplinary counsel; provided, however, that disciplinary counsel may seek permission of the chair or vice-chair to dispense with the requirement to make this request or to dispense with the requirement to serve the judge with a copy of the complaint or information received. Disciplinary counsel shall serve the notice of investigation by e-mail and U.S. mail to the primary e-mail address and physical address the judge has designated in the Attorney

Information System. See Rule 410, SCACR. If the judge is not a member of the South Carolina Bar, the notice shall be sent to the e-mail address and physical address the judge supplied to South Carolina Court Administration. The judge shall serve a written response on disciplinary counsel within 15 days of service of the notice of investigation. The written response must include the judge's verification that it is complete and accurate to the best of the judge's knowledge and belief.

(c) Requirements of Notice of Investigation.

(1) When issuing notice of investigation pursuant to Rule 19(b), disciplinary counsel shall give the following notice to the judge:

(A) a specific statement of the allegations being investigated and the canons or other ethical standards allegedly violated, with the provision that the investigation can be expanded if deemed appropriate by disciplinary counsel;

(B) the judge's duty to respond pursuant to Rule 19(b);

(C) the judge's opportunity to meet with disciplinary counsel pursuant to Rule 19(c)(3); and,

(D) the name of the complainant unless the investigative panel determines that there is good cause to withhold that information. Disciplinary counsel shall advise the judge if disciplinary's counsel's written statement of the allegations constitutes the complaint pursuant to Rule 2(e).

. . . .

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Doe, Appellant,

v.

Oconee Memorial Hospital, Greenville Health System, Respondents.

Appellate Case No. 2018-001480

Appeal from Oconee County
R. Scott Sprouse, Circuit Court Judge

Opinion No. 5945
Heard October 13, 2021 – Filed September 21, 2022

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Courtney Celeste Atkinson and Hannah Rogers Metcalfe, both of Metcalfe & Atkinson, LLC, of Greenville, for Appellant.

Kenneth Norman Shaw, of Haynsworth Sinkler Boyd, PA, of Greenville, for Respondents.

LOCKEMY, A.J.: In this civil action, Jane Doe appeals the circuit court's order dismissing her complaint against Oconee Memorial Hospital and Greenville Health System (the Hospital and GHS; collectively, Respondents) pursuant to Rule 12(b)(6), SCRCP. Doe argues the circuit court erred in dismissing her causes of

action for negligence and intentional infliction of emotional distress and in dismissing her complaint when her motion to amend her complaint was still pending. We affirm in part, reverse in part, and remand to the circuit court to allow Doe an opportunity to amend her complaint.

FACTS AND PROCEDURAL HISTORY

On December 5, 2015, Doe went to Oconee Memorial Hospital, informed medical staff that she believed she had been drugged and sexually assaulted in Georgia, and asked the Hospital to perform a sexual assault forensic examination. With Doe's consent, the nurse who performed the examination called the DeKalb County Sheriff's Office in Georgia and reported the assault to an officer. According to Doe, the officer stated he was unwilling to come to the Hospital to collect the evidence and told the nurse that Doe would have to personally drive the evidence to Georgia. The nurse gave Doe a box containing the specimens collected during the examination. Doe then went to her home in Oconee County and took the box with her. The next day, she traveled to the DeKalb County Sheriff's Office and gave them the box. About two months later, the investigating officer informed Doe the box did not contain a blood sample and the sheriff's office was therefore unable to determine whether she had been drugged. The officer informed Doe the sheriff's office was closing its case.

Doe commenced this action on December 5, 2017, against the Hospital and GHS, alleging the following causes of action: (1) negligence for failure to properly collect and protect evidence, (2) negligence for failure to order necessary tests, (3) gross negligence for failure to properly collect and protect evidence, (4) gross negligence for failure to order necessary tests, (5) negligent supervision, and (6) intentional infliction of emotional distress.

On January 10, 2018, Respondents[1] moved pursuant to Rule 12(b)(6), SCRCP, to dismiss Doe's complaint, arguing Doe failed to plead facts sufficient to support the duty and damages elements of her negligence claims or satisfy "the heightened standard of proof required for an intentional infliction of emotional distress claim." Respondents asserted they did not owe a duty to Doe individually because they were "performing a crime investigation service on behalf of law enforcement."

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[1] The motion was titled "Defendant Greenville Health System's Motion to Dismiss."

Respondents additionally argued that Doe's negligence claims were essentially claims for negligent spoliation of evidence, which Respondents argued was not a recognized tort in South Carolina, and that Doe failed to allege a cognizable injury. Respondents additionally argued GHS was a governmental facility under the South Carolina Tort Claims Act (the Act)[2] and was therefore immune from liability when an employee acted outside the scope of his official duty or with actual malice or intent to harm.

The circuit court heard the motion to dismiss on June 4, 2018. On the same date, Doe filed a motion to amend her complaint pursuant to Rule 15(a), SCRCP, requesting leave to "name any other appropriate entities as additional defendants, to add two additional causes of action for breach of contract and bailment, and to further clarify [her] pending claim for negligence." Doe stated during the hearing, however, that she was not alleging medical malpractice at the time. Although she addressed her motion to amend the complaint during the hearing, she did not submit a proposed amended complaint. As to the merits of GHS's motion to dismiss, Doe disputed that the Act applied, that GHS was the owner and operator of the Hospital, and that the public duty rule applied. Doe argued she suffered harm from the Hospital's actions because she did not know if she had been drugged or if she was actually raped because the evidence was contaminated and lost.

After taking the matter under advisement, the circuit court issued an order dismissing Doe's complaint with prejudice. The circuit court noted, however, that its ruling was "without prejudice to any future claims by [Doe] in a new action against [GHS] pertaining to different causes of action." In a footnote, the circuit court noted it could not consider the merits of Doe's motion to amend even if it were inclined to do so because she did not submit a proposed amended complaint.

The circuit court concluded Doe's claims failed because Respondents owed her no legal duty and she failed to allege any cognizable damages. Specifically, the circuit court found Doe failed to identify any authority or standard establishing Respondents owed her a duty as to the handling of the sexual assault examination kit. The circuit court reasoned that although Respondents "undoubtedly owed a duty of care in rendering medical services," Doe did not allege injuries stemming from those services but instead alleged Respondents negligently handled the sexual assault examination kit. In addition, the circuit court found Respondents did not

[2] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2021).

render medical services or treatment to Doe when the Hospital gathered evidence for the sexual assault examination kit. Rather, the circuit court concluded Respondents[3] performed a service on behalf of law enforcement pursuant to "statutes, ordinances, and regulations" that protected the public at large and did not establish a duty of care to individuals.

The circuit court next interpreted Doe's claims for negligence as an attempt to allege negligent spoliation of evidence. The circuit court rejected her argument that the claims sounded in "general negligence" and concluded negligent spoliation of evidence was not a cognizable claim pursuant to *Austin v. Beaufort County Sheriff's Office*[4] and *Cole Vision Corp. v. Hobbs*.[5]

The circuit court further concluded Doe failed to allege a cognizable injury. It reasoned Doe did not allege she suffered a physical injury; thus, the "only reasonable inference" the court could draw from her allegations was that she endured emotional distress, and South Carolina does not recognize negligent infliction of emotional distress as a cause of action.

As to Doe's claim for intentional infliction of emotional distress, the circuit court concluded she "failed to plead facts sufficient to establish the heightened standard of proof required." The court found Doe failed to allege Respondents' employees acted with the intent to cause her severe emotional distress or that they were certain or substantially certain their actions would cause her such distress. The circuit court determined "no reasonable person could determine that [complying with] the instructions of a law enforcement officer regarding the handling of evidence of a crime would be considered 'extreme and outrageous conduct.'" The court further found Doe failed to allege such "severe" emotional distress "that no reasonable [person] could be expected to endure it" because many victims of

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[3] We note GHS argued the Hospital was not an independent legal entity capable of being sued but was instead a facility that GHS owned and operated. The circuit court's order acknowledged this, but the case caption was not changed to remove the Hospital, and counsel for Respondents represents both of the named defendants in his appeal. We assume this will be addressed on remand.
[4] 377 S.C. 31, 34-36, 659 S.E.2d 122, 123-24 (2008) (acknowledging our state does not recognize the tort of negligent spoliation and declining to adopt it).
[5] 394 S.C. 144, 150-54, 714 S.E.2d 537, 540-42 (2011) (declining to recognize the tort of negligent spoliation).

sexual assault had to "deal with emotions associated with their attacker not being held accountable." Finally, the circuit court concluded "GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act," and was therefore immune from liability "for employee conduct outside the scope of his official duties or which constitutes actual malice or intent to harm."

Doe filed a motion to reconsider, arguing (1) the circuit court failed to rule upon her motion to amend her complaint, (2) she met her burden of pleading the duty and damages elements of her negligence claims, (3) the public duty rule did not apply, (4) she alleged facts to support a claim for intentional infliction of emotional distress, and (5) dismissal was improper because the circuit court had not yet addressed her motion to amend. The circuit court summarily denied the motion. This appeal followed.[6]

ISSUES ON APPEAL

1. Did the circuit court err in dismissing Doe's negligence claims?

2. Did the circuit court err in dismissing Doe's claim for intentional infliction of emotional distress?

3. Did the circuit court err in dismissing Doe's action when her motion to amend was still pending?

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in

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[6] After appealing the 12(b)(6) dismissal, Doe initiated two additional actions against Respondents and additional defendants. Doe's appeals of the circuit court's orders in those actions were also pending at the time we considered this appeal. We decided those appeals in *Doe v. Oconee Memorial Hospital*, Op. No. 2022-UP-357 (S.C. Ct. App. filed Sept. 21, 2022) and *Doe v. Oconee Memorial Hospital*, Op. No. 2022-UP-358 (S.C. Ct. App. filed Sept. 21, 2022).

the complaint." *Id.* "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." *Id.* "Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim." *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019). "[T]he complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

LAW AND ANALYSIS

A. Negligence Claims

Doe concedes South Carolina does not recognize negligent spoliation as an independent tort but argues the circuit court erred in characterizing her negligence claims as claims for spoliation of evidence. Doe next contends the circuit court erred in concluding the public duty rule applied and in finding she failed to plead sufficient facts to show Respondents owed a duty to her individually. Doe argues her complaint included no factual allegations to support the circuit court's conclusion that Respondents were acting on behalf of law enforcement. Doe further asserts the circuit court erred in holding she failed to allege a cognizable injury when the nature of her injuries was a question of fact and she did not narrowly state she sustained only emotional injury. Finally, Doe argues the circuit court erred in dismissing her complaint when her Rule 15(a), SCRCP, motion to amend was still pending. We find the circuit court erred in dismissing Doe's complaint without allowing her the opportunity to amend her complaint.

"When a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." *Skydive Myrtle Beach, Inc.*, 426 S.C. at 179, 826 S.E.2d at 587. "Rule 15(a) provides that when a party asks to amend his pleading, 'leave shall be freely given when justice so requires and does not prejudice any other party.'" *Patton v. Miller*, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017) (quoting Rule 15(a), SCRCP). "[Rule 15(a)] strongly favors amendments and the court is encouraged to freely grant leave to amend." *Id.* at 489-90, 804 S.E.2d at 261 (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607

S.E.2d 711, 717 (Ct. App. 2005)). "In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion." *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988). "The prejudice contemplated in Rule 15 is not that the non-moving party is forced to defend the merits of a valid claim." *Patton*, 420 S.C. at 491, 804 S.E.2d at 262. Rather, it "is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend." *Id.* at 493, 804 S.E.2d at 263 (holding the circuit court did not err in allowing the plaintiff to amend her complaint "[b]ecause the record contain[ed] no basis for a conclusion the defendants would have been prejudiced" by allowing her to do so).

"To state a cause of action for negligence the plaintiff must allege facts [that] demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach." *Kleckley v. Nw. Nat'l Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000).

We conclude the circuit court erred in dismissing Doe's negligence claims pursuant to Rule 12(b)(6), SCRCP, without allowing her an opportunity to amend her pleadings. Even assuming Doe's complaint failed to allege facts sufficient to state a claim for negligence, Doe requested leave to amend her complaint immediately prior to and during the hearing on Respondents' motion to dismiss and stated she sought to further clarify her claims for negligence. We cannot determine whether the amendment would be clearly futile because the circuit court dismissed Doe's complaint with prejudice without first giving her an opportunity to submit a proposed amended complaint. *See Skydive Myrtle Beach, Inc.*, 426 S.C. at 183 n.3, 826 S.E.2d at 589 n.3 (noting "an appellate court must consider the merits of an amendment to a complaint that in fact failed to state a claim, but was improperly dismissed 'with prejudice' without granting leave to amend, in determining whether to remand to permit the plaintiff to amend"); *id.* at 185, 826 S.E.2d at 590 (stating the appellate court "must remand unless [it] find[s] any amendment would be clearly futile"). Further, nothing in the record suggests Respondents would have suffered prejudice if Doe were permitted to amend her complaint. Based on the foregoing, we conclude the circuit court abused its discretion by failing to allow

Doe an opportunity to amend her complaint, and we reverse and remand this matter to the circuit court.[7]

B. Intentional Infliction of Emotional Distress Claim

Doe argues the circuit court erred in dismissing her claim for intentional infliction of emotional distress because the court applied a heightened standard of proof. She next asserts the circuit court erred by dismissing this claim on the basis that, under the Act, Respondents were immune from liability for an employee's conduct outside the scope of his official duties or conduct that constituted actual malice or intent to harm. Doe contends she did not allege any employee acted outside the scope of his or her official duties or that an employee acted "with actual malice . . . or intent to harm." Although we agree the circuit court erred in applying a heightened standard of proof, we affirm the circuit court's dismissal of this claim because Doe failed to allege sufficient facts to support a claim for intentional infliction of emotional distress.

> To state a claim for intentional infliction of emotional distress, a plaintiff must show (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Bergstrom v. Palmetto Health All., 358 S.C. 388, 401, 596 S.E.2d 42, 48 (2004). In *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 72 (2007), our supreme court noted:

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[7] We note neither the circuit court nor the parties had the benefit of our supreme court's *Skydive* decision when the motion to dismiss was heard.

> Under the heightened standard of proof for emotional distress claims emphasized in *Ford*[*v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981)], a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, "I suffered emotional distress" would be irreconcilable with this Court's development of the law in this area.

As an initial matter, we find the circuit court erred in applying a higher burden of proof for an intentional infliction of emotional distress claim at the 12(b)(6) stage. *See Hansson*, 374 S.C. at 357-58, 650 S.E.2d at 71-72 (discussing a heightened burden of proof but applying it in the context of a motion for summary judgment); *see also Ford*, 276 S.C. at 159, 276 S.E.2d at 777 (reviewing the circuit court's ruling on a motion for a new trial). In addition, we question whether the circuit court's conclusion that Respondents were entitled to immunity under the Act was proper at that stage.

Nevertheless, we affirm the circuit court's dismissal of this claim because Doe failed to allege facts to suggest that the employees, by following the instructions of law enforcement to give her the examination kit, intended to inflict or recklessly inflicted severe emotional distress upon Doe.[8] We find Doe's allegations were insufficient to support a claim that hospital employees "intentionally or recklessly inflicted severe emotional distress" or that they "were certain or substantially certain that such distress would result from their conduct." Doe did not seek to amend her complaint as to this claim, and we cannot conceive of an amendment to this cause of action that would not be futile. Therefore, we affirm the circuit court's dismissal of Doe's claim for intentional infliction of emotional distress.

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[8] We do not understand how Georgia authorities thought it appropriate to instruct hospital staff to provide a victim alleging sexual assault with the blood sample taken for her rape kit. As noted at oral argument, the nurse rightfully questioned this instruction, and the chain of custody concerns are obvious.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's order as to its dismissal of Doe's claim for intentional infliction of emotional distress, and we reverse the court's order as to the dismissal of Doe's negligence claims and remand to the circuit court to allow Doe an opportunity to amend her complaint. Accordingly, the circuit court's ruling is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Frankie Lee Davis, III, Appellant.

Appellate Case No. 2019-000416

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 5946
Heard March 15, 2022 – Filed September 28, 2022

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter and Appellate Defender Adam Sinclair Ruffin, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

MCDONALD, J.: Frankie L. Davis, III, appeals his conviction for resisting arrest, arguing the circuit court erred in: (1) finding probable cause for his arrest; (2) denying his motions to suppress, for a directed verdict, and to compel the

personnel records of the arresting officer; and (3) refusing to allow him to question the arresting officer about a prior incident for which he was disciplined. We affirm the conviction.

Facts and Procedural History

In the early morning hours of August 19, 2018, Davis ordered two shots of Fireball Cinnamon Whisky and one Budweiser at the Silver Dollar bar on King Street in Charleston. Leanne Benware, a bartender and manager, saw the bar owner take Davis's order. When Davis was given his tab, his card was declined, and Davis then refused to pay. After repeatedly asking Davis to pay his tab, Benware asked him to leave. Again, Davis refused. At that point, Benware called for her bouncers to escort Davis out and requested law enforcement. It took two bouncers to remove Davis from the Silver Dollar.

Officer Nicholas Fusco of the City of Charleston Police Department (CPD) was patrolling Upper King when a Silver Dollar bouncer flagged him down.[1] The bouncer told Fusco a patron had refused to pay his tab and Silver Dollar staff were ejecting him. The bouncer gave Officer Fusco no additional information at that time, such as why the man had refused to pay his tab.

At first, Davis cooperated with the bouncers in leaving, but as the three approached the door—where uniformed police officers were waiting—Davis began struggling against the bouncers. Officer Fusco initially thought the bouncers were kicking out an unrelated customer, but Benware then identified Davis as the person who had refused to pay and would not leave. Fusco testified,

> We attempted to place him in handcuffs at that point, but he was resisting, he was pulling away. He was trying to actively get away, trying to slip out of my grasp, my partner's grasp, at that point.
>
> . . .

[1] Officer Fusco's body camera footage was admitted as State's Exhibit 4. His testimony was consistent with the circumstances surrounding Davis's arrest as shown on the body camera footage.

> At this point, we were trying to place him in custody, because at that point they told me that he had not paid his tab. He was actively trying to flee, which would have furthered the fact that he wasn't going to pay his tab.

Benware testified Davis "was fighting with them, trying to get away. He kept grabbing at his waistband, just not cooperating at all." And, as Silver Dollar bouncer Garland Jackson described, "He was flailed out, stretched out, trying to just not be taken under the control that they were trying to do." Due to Davis's combative behavior, officers wrestled him to the ground, and Officer Fusco requested a patrol car meet them in front of the Silver Dollar. Fusco noted it would have been hazardous to attempt to walk Davis to his own patrol car, half a block away, during the early morning hours when the Upper King "entertainment district" is so crowded. Davis was charged with disorderly conduct, defrauding a public accommodation, resisting arrest, and unlawful carrying of a pistol.[2]

Initially, the officers' primary concern was keeping Davis contained until backup arrived. When they attempted to search Davis, officers had to hold him up by his pants because he would not cooperate with the search and kept folding his knees. Officers recovered a gun from the ground during the search; however, Fusco admitted he did not feel a gun on Davis when he first patted him down. Benware saw the gun fall from Davis's pants during the struggle; Jackson also saw the gun as Davis struggled with the officers.

Davis moved to suppress any evidence obtained as a result of the search and his arrest, arguing officers lacked reasonable suspicion to detain him outside the bar and lacked probable cause to arrest him.

On March 1, 2019, the Honorable R. Markley Dennis, Jr., held a pretrial hearing on Davis's motion to suppress. Davis argued all evidence obtained as a result of the arrest should be suppressed because he was unlawfully seized and arrested without probable cause. He further asserted the police officers lacked reasonable

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[2] Davis's charges for defrauding a public accommodation and disorderly conduct were addressed in municipal court and are not at issue in this appeal.

suspicion to detain him under *Terry v. Ohio*.[3] Noting *Terry* was inapplicable because Davis was arrested for failing to pay his bill, the circuit court found Davis's arrest was supported by probable cause and denied the motion to suppress.

The case was tried before the Honorable Jennifer B. McCoy on March 7, 2019. Pretrial, Davis moved to compel Officer Fusco's CPD personnel records, arguing the records were relevant because Fusco was disciplined on a prior occasion for his "failure to comply with probable cause determinations." In Davis's view, this prior disciplinary incident was probative as to whether his own arrest was lawfully supported by probable cause. The State argued the incident did not relate to Officer Fusco's propensity for truthfulness, and the circuit court had already found probable cause existed for Davis's arrest. Judge McCoy reviewed the personnel records in camera and found nothing probative as to Officer Fusco's veracity or the legitimacy of Davis's arrest.[4] Thus, the circuit court denied the motion to compel but noted it would determine later in the trial whether Davis could cross-examine Fusco about the prior reprimand.

On cross-examination, Officer Fusco agreed CPD had a disciplinary process for officers alleged to have violated department procedures. When Davis asked Fusco whether he had been the subject of such a disciplinary investigation, the State objected, referencing Rule 403, SCRE. The circuit court sustained the objection and held a bench conference.

At the close of the State's case, the circuit court allowed Davis to further set forth his argument regarding his request to cross-examine Officer Fusco about the prior incident. Davis stated:

> I think I've stated the argument fairly concisely. I mean, just to—just to frame it, we have an argument here that there was an unlawful arrest. The lawfulness of an arrest is going to—it's almost entirely dependent on whether probable cause existed at the time of the arrest.

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[3] 392 U.S. 1 (1968) (addressing the reasonable suspicion required for a safety pat down or weapons frisk).

[4] Officer Fusco's personnel records were filed under seal.

The circuit court explained:

> I sustained the objection pursuant to Rule 403. I found that it was more prejudicial than probative. And for this incident, having reviewed the personnel files previously in camera, I determined that incident had no bearing whatsoever on this incident so I sustained the State's objection. Understanding, obviously, over your argument that it was [relevant] and probative.

Ultimately, the jury found Davis guilty of resisting arrest and acquitted him of unlawful carrying of a pistol. The circuit court sentenced Davis to one year of imprisonment with credit for 201 days served.

Standard of Review

"On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error." *State v. Alston*, 422 S.C. 270, 279, 811 S.E.2d 747, 751 (2018) (quoting *Robinson v. State*, 407 S.C. 169, 180–81, 754 S.E.2d 862, 868 (2014)). "However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *Id.* (quoting *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)).

Law and Analysis

I. Probable Cause

Davis argues the circuit court erred in denying his pretrial motion to suppress because Officer Fusco lacked probable cause to arrest him for defrauding a public accommodation. Davis contends the bar staff's affirmation that he was the person who refused to pay his tab, without more, was insufficient to support a finding of probable cause for his arrest. He asserts the circuit court erred in failing to suppress State's Exhibit 4—Fusco's body camera footage—because the video was obtained as the result of the unlawful arrest.[5] We disagree.

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[5] Davis also contends the pistol should have been suppressed. Because Davis was acquitted of the weapon charge, we focus on the body camera footage.

The Fourth Amendment to the United States Constitution grants citizens the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV.

> The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested.

State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006).

"The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision." *Florida v. Harris*, 568 U.S. 237, 243–44 (2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (omission by court) (alteration by court)).

Section 45-1-50(A)–(B) of the South Carolina Code (2017) codifies the offense commonly known as "defrauding an innkeeper":

> (A) A person who:
>
> (1) obtains food, lodging or other service, or accommodation at any hotel, motel, inn, boarding or rooming house, campground, cafe, or restaurant and intentionally absconds without paying for it; or
>
> (2) while a guest at any hotel, motel, inn, boarding or rooming house, campground, cafe, or restaurant,

> intentionally defrauds the keeper in a transaction arising out of the relationship as guest, is guilty of a misdemeanor
>
> . . . .
>
> (B) For purposes of this section prima facie evidence of intent to defraud is shown by:
>
> (1) the second refusal of payment upon presentation when due and the return unpaid of any bank check or order for the payment of money given by a guest to any hotel, motel, inn, boarding or rooming house, campground, cafe, or restaurant in payment of an obligation arising out of the relationship as guest. These facts also are prima facie evidence of an intent to abscond without payment;
>
> (2) the failure or refusal of any guest at a hotel, motel, inn, boarding or rooming house, campground, cafe, or restaurant to pay, upon written demand, the established charge for food, lodging or other service, or accommodation;
>
> . . . .
>
> (4) the drawing, endorsing, issuing, or delivering to any hotel, motel, inn, boarding or lodging house, campground, cafe, or restaurant of any check, draft, or order for payment of money upon any bank or other depository in payment for established charges for food, lodging, or other service or accommodation, knowing at the time that there is not sufficient credit with the drawee bank or other depository for payment in full of the instrument drawn.

Officer Fusco testified regarding his probable cause determination:

> At the time that I affected [sic] the arrest, I was approached by one of the doormen that works for the Silver Dollar, told me that there was somebody inside that had not paid for the tab, they wanted us to come over there. So we approached.
>
> The security brought out the individual, which was later identified as Frankie Lee Davis, and then specifically said this is the guy that did not pay.
>
> At that point, we went to place him in custody. And also due to the fact that he was trying to flee from us and up the road so we knew that he wasn't going to pay anyway. So at that point, we went to place him into custody and that's when he resisted us.

Evidence supports the circuit court's finding that a reasonable person with Officer Fusco's knowledge would believe Davis had committed a crime by repeatedly refusing to pay his tab at the Silver Dollar. Under § 45-1-50(B), a second refusal to pay a check when presented is "prima facie evidence of an intent to abscond without payment." A Silver Dollar bouncer flagged down Officer Fusco for assistance, Fusco saw bouncers escorting a recalcitrant patron from the establishment, and Benware identified the patron as the customer who had refused to pay his tab and her requests that he leave. Fusco's body camera footage supports the witness accounts. Based on these facts and circumstances, the circuit court properly found probable cause existed for Davis's arrest. *See State v. Manning*, 400 S.C. 257, 267, 734 S.E.2d 314, 319 (Ct. App. 2012) ("The finding that an arrest was made based upon probable cause is conclusive on appeal where supported by evidence."); *see also State v. Retford*, 276 S.C. 657, 660, 281 S.E.2d 471, 472 (1981) (reiterating "the legality of the arrest is to be determined under the facts and circumstances which existed at the time and place of arrest"); *Lapp v. S.C. Dep't of Motor Vehicles*, 387 S.C. 500, 505, 692 S.E.2d 565, 568 (Ct. App. 2010) ("An officer may lawfully arrest for a misdemeanor not committed within his presence where the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed.").

Davis argues § 45-1-50 requires evidence that he "intentionally absconded" without payment and because he did not willingly leave the bar, he did not violate

the statute. We reject this argument because to interpret the statute to address only a willing exit—and not the forced ejection of an uncooperative patron refusing to pay—would achieve an absurd result the Legislature could not possibly have intended. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."). Davis's refusal to pay—followed by his refusal to leave and his scuffle with the bouncers as he was shown the door—provided the probable cause necessary for the responding officers to arrest him not only for the violation of § 45-1-50, but for disorderly conduct as well. Thus, the circuit court did not err in denying Davis's motion to suppress evidence obtained pursuant to his lawful arrest.

II. Directed Verdict

For the reasons discussed above, Davis's argument that the circuit court erred in denying his motion for a directed verdict must also fail. "On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State." *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Harris*, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015) (quoting *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011)).

Davis moved for a directed verdict at the close of the State's case, arguing the only information Officer Fusco had to support his arrest was the communication that Davis failed to pay his bar tab, which he contends was insufficient to constitute an intent to defraud under § 45-1-50. Davis claims he had a right to resist the arrest because it was not supported by probable cause and was, thus, unlawful. As noted in Section I, the circuit court properly found Officer Fusco had probable cause to arrest Davis. The witness testimony and body camera footage provided abundant evidence requiring the circuit court to submit the resisting arrest charge to the jury.

III. Personnel Records and Prior Disciplinary Incident

Davis next challenges the circuit court's denial of his motion to compel Officer Fusco's personnel file, specifically the record of the prior incident for which Fusco was disciplined for detaining and searching a different individual without probable cause. Davis further argues the circuit court erred in refusing to allow him to cross-examine Officer Fusco about this prior incident. Again, we disagree.

Although the parties did not specifically reference Rule 608, SCRE, before the circuit court, the State argued Fusco's personnel records were not exculpatory and the prior incident did not "go towards truthfulness." The circuit court found the personnel file documents inadmissible under Rule 403, SCRE, and further noted, "I've reviewed the file and I've determined that there's nothing within these files that reflect on and of these officers' v[e]racity or anything of that nature."

Rule 403 provides, in pertinent part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. Fusco was disciplined in 2016 for attempting to search an individual in Marion Square without cause; however, the circumstances surrounding that search in a dissimilar situation are not relevant here because they do not make it more or less likely that Fusco had (or lacked) probable cause for the arrest and search of Davis outside the Silver Dollar. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). "Evidence which is not relevant is not admissible." Rule 402, SCRE.

"The relevancy of evidence is an issue within the trial judge's discretion." *State v. Gillian*, 373 S.C. 601, 612, 646 S.E.2d 872, 878 (2007). Here, the circuit court properly found admission of the prior disciplinary matter was not relevant and would be highly prejudicial and likely misleading to the jury regarding the objective probable cause standard. *See Pringle*, 540 U.S. at 371 ("To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause."); *Mack v. Lott*, 415 S.C. 22, 23, 780 S.E.2d 761 (2015) (per

curiam) ("[T]he proper standard for determining probable cause is
an objective standard; that is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.").

Moreover, as the circuit court recognized, the personnel files contain no record probative of Officer Fusco's truthfulness or untruthfulness. *See e.g.*, Rule 608(b), SCRE ("Specific instances of conduct of a witness . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . ."); *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000) ("The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness or untruthfulness . . ."). Accordingly, the circuit court did not abuse its discretion in denying Davis's motion to compel the personnel file and in declining to allow Davis to question Officer Fusco about the prior incident. *See Burgess*, 408 S.C. 421, 442, 759 S.E.2d 407, 418 (2014) ("As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion." (quoting *Quattlebaum*, 338 S.C. at 450, 527 S.E.2d at 109)).

Conclusion

Based on the foregoing, Davis's conviction for resisting arrest is

AFFIRMED.

THOMAS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Walter Meier and the Estate of William Carl Meier, by and through Conrad Meier, its Personal Representative, Appellants,

v.

Mary J. Burnsed, Respondent.

Appellate Case No. 2019-000518

Appeal From Beaufort County
Marvin H. Dukes, III, Special Circuit Court Judge

Opinion No. 5947
Heard February 9, 2022 – Filed September 28, 2022

REVERSED

H. Fred Kuhn, Jr., of Moss & Kuhn, PA, of Beaufort, for Appellants.

Peggy McMillan Infinger, of Belk Cobb Infinger & Goldstein, PA, of Charleston; Paul H. Infinger, of Paul H. Infinger, LLC, of Beaufort; and James B. Richardson, Jr., of Columbia; all for Respondent.

KONDUROS, J.: In this dispute over the proceeds of a life insurance policy, Richard Walter Meier and the Estate of William Carl Meier, by and through Conrad Meier, its personal representative, (collectively, the Meiers) appeal the

circuit court's grant of summary judgment to Mary J. Burnsed. They contend the court erred in finding section 62-2-507 of the South Carolina Code (2022) did not apply to revoke a beneficiary designation made before a divorce when both the beneficiary designation and divorce occurred prior to the effective date of the statute. We reverse.

FACTS/PROCEDURAL HISTORY

William Carl Meier (William) and Burnsed married on July 19, 1997. On June 16, 1998, William obtained a $250,000 life insurance policy (the Policy) from Western Reserve Life Assurance Company of Ohio.[1] He designated Burnsed as the primary beneficiary and his brother Richard as the contingent beneficiary.[2] William and Burnsed divorced on November 26, 2002. The family court stated in the divorce decree: "Neither party desires spousal support or alimony from the other party, and each party waives any claim he/she may have against the other party. . . . Neither party has acquired assets or debts during the marriage in which the other party would have an equitable interest." William paid the premiums for the Policy and maintained the Policy until his unexpected death on December 26, 2017.

On February 5, 2018, the Meiers filed an action against Burnsed and Transamerica asserting there exists a justiciable controversy over the proper beneficiary of the Policy. They asserted the divorce of William and Burnsed revoked William's designation of Burnsed as beneficiary under section 62-2-507(c) of the South Carolina Code (2022), which codifies the presumption an insured does not intend his or her former spouse to remain a beneficiary of any insurance policies after divorce. S.C. Code Ann. § 62-2-507 reporter's cmt. (2022).

On April 12, 2018, Burnsed filed an answer, counterclaim, and cross-claim, asserting section 62-2-507 did not operate to revoke her as primary beneficiary of the Policy. She counterclaimed for tortious interference with a contract and cross-

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[1] Western merged into Transamerica Premier Life Insurance Company effective October 1, 2014. Transamerica assumed all rights and obligations of the insurer under the Policy.
[2] The Meiers maintain William named Richard instead of Conrad, his son from a previous marriage, because Conrad was a minor at the time William obtained the Policy.

claimed against Transamerica for breach of contract and unreasonable and bad faith refusal to pay benefits under contract.

On April 20, 2018, the Meiers filed a motion for summary judgment, asserting William and Burnsed's divorce revoked the designation of Burnsed as the beneficiary, pursuant to section 62-2-507(c). They requested the circuit court declare Burnsed was not a beneficiary of the Policy and order Transamerica to pay Richard the proceeds from the Policy as alternate beneficiary.

On April 23, 2018, Transamerica filed an answer, counterclaim in interpleader, and cross-claim in interpleader. It asserted it was "unable to determine the correct recipient of the death benefit payable under the Policy[] and the correct recipient should be determined by" the court. It maintained all issues alleged in the complaint should be resolved through interpleader. Transamerica requested the court order it to pay $250,000 into the registry of the court and discharge it from further liability and dismiss it as a party with prejudice. On May 11, 2018, Transamerica filed an answer to Burnsed's cross-claims, requesting they be dismissed.

On May 30, 2018, Burnsed filed a motion for summary judgment, arguing South Carolina Act Number 100 of 2013 (the Act),[3] codified as section 62-2-507, does not retroactively apply in the case of any divorce entered before January 1, 2014, the effective date of the statute.

Burnsed and the Meiers submitted affidavits with their motions for summary judgment. The Meiers' affidavits asserted William wanted his son to receive the Policy's proceeds whereas Burnsed's affidavits described her continuing close relationship with William after their divorce and stated William "frequently reminded" her that she was the beneficiary of his Policy. Burnsed also submitted

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[3] Act No. 100, § 1, 2013 S.C. Acts 529, 588-91. The legislature later amended section 62-2-507 again and that amendment went into effect on May 18, 2018. The second amendment added only the following language to subsection (a)(4) of the section: "'Governing instrument' does not include a beneficiary designation made in connection with a governmental employee benefit plan established or maintained for employees of the government of the State or a political subdivision thereof, or by an agency or instrumentality of any of the foregoing." Act No. 250, § 1, 2018 S.C. Acts 1816, 1816-17.

emails and text messages she and William exchanged in the years after their divorce.

On June 18, 2018, with the consent of the parties, the circuit court granted Transamerica's motion to deposit the $250,000 payable under the Policy along with any applicable interest into the registry of the court.

On June 26, 2018, the circuit court[4] held a hearing[5] on the Meiers' motion for summary judgment. On August 10, 2018, the circuit court filed an order denying the Meiers' motion. The court found: "The question presented by this case is whether [section 62-2-507] can apply to [a] life insurance policy when both the policy and the divorce occurred before this statute was enacted, yet the death of the owner of the insurance policy occurred after the enactment of the statute." The court found section "62-2-507 is not retroactive under th[o]se facts." The court looked at several cases from other jurisdictions. One of those cases, *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311 (10th Cir. 2003), from the United States Court of Appeals for the Tenth Circuit, which examined a Utah statute. The circuit court found that unlike the Utah statute, which explicitly stated that amendments to the statute applied to "governing instruments executed before" the amendments, "the South Carolina probate code has no equivalent provision in the language of the code itself." The court noted however, that the "language [referenced by the Tenth Circuit] does appear in the Reporter's Comment of some acts that were later codified into the probate code, but it does not appear in [the Act] [section] 1, which was codified as . . . [section] 62-2-507, the statute in dispute here." The circuit court determined "the [Utah] statutory language upon which the Tenth Circuit relied does not exist in the South Carolina code." The court also looked at the United States Supreme Court case of *Sveen v. Melin*, 138 S. Ct. 1815 (2018), which examined the constitutionality of retroactively applying a revocation-upon-divorce statute. The court distinguished *Sveen*, noting that "while the retroactive application of the revocability statute might not have been unconstitutional in [*Sveen*], there are reasons to believe that, under the circumstances currently before the court, . . .

[4] The Honorable Perry M. Buckner heard the motion.
[5] The transcript of this hearing is not contained in the record; this hearing only involved the Meiers' motion for summary judgment and not Burnsed's, which was heard later.

[section] 62-2-507 does change [William's] contractual relationship with the insurance company."

On March 11, 2019, the circuit court[6] held a hearing on Burnsed's motion for summary judgment. On March 21, 2019, the circuit court filed an order granting Burnsed's motion. The court found section 62-2-507(c) "was not intended by the General Assembly to apply retroactively in the case of a divorce entered before the effective date of the statute." This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "When the parties file cross-motions for summary judgment, the issue becomes a question of law for the [c]ourt to decide de novo." *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021); *see also Quicken Loans, Inc. v. Wilson*, 425 S.C. 574, 579, 823 S.E.2d 697, 700 (Ct. App. 2019) ("Whe[n] cross[-]motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." (quoting *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011))).

"[T]he interpretation of a statute is a question of law for the [c]ourt to review de novo." *Calhoun Cnty. Council*, 432 S.C. at 495, 854 S.E.2d at 837. "Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." *Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 417 S.C. 562, 566, 790 S.E.2d 783, 785 (Ct. App. 2016) (quoting *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014)), *aff'd as modified*, 424 S.C. 542, 819 S.E.2d 124 (2018). "Questions of law may be decided with no particular deference to the trial court." *Wilson*, 425 S.C. at 579, 823 S.E.2d at 700 (quoting *Wiegand*, 391 S.C. at 163, 705 S.E.2d at 434). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Buchanan*,

[6] The Honorable Marvin H. Dukes III, sitting as special circuit court judge, heard this motion.

417 S.C. at 566, 790 S.E.2d at 785 (quoting *Lambries*, 409 S.C. at 7-8, 760 S.E.2d at 788). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the [c]ourt's sense of law, justice, and right." *Id*. at 567, 790 S.E.2d at 785 (quoting *Lambries*, 409 S.C. at 8, 760 S.E.2d at 788).

"Generally, an action on a life insurance policy is a legal action involving a question of contract law." *Est. of Revis ex rel. Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997). "Thus, for example, where the action involves the question of the entitlement of a widow to life insurance proceeds after she has caused the death of her spouse, the action is one at law." *Id.*

LAW/ANALYSIS

The Meiers contend the circuit court erred in concluding section 62-2-507 of the South Carolina Code (2022) did not revoke the designation of Burnsed as beneficiary of the Policy and accordingly granting summary judgment to Burnsed. They maintain the circuit court incorrectly determined that applying section 62-2-507 to the facts of this case would be a retroactive application and that such retroactive application would be wrong because retroactive application was neither expressly nor impliedly authorized. They assert retroactive application of the statute is not required to revoke the designation simply because the divorce preceded the statute's enactment. They contend the death of the insured was the event that triggered the application of the statute. Additionally, they argue the statute itself expresses it applies retroactively because it states the Act applies to "governing instruments," i.e., a life insurance beneficiary designation, "executed before the effective date of the act unless there is a clear indication of a contrary intent" in the terms of the life insurance beneficiary designation. We agree.

"The primary rule of statutory construction is to ascertain the intent of the General Assembly." *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 497, 854 S.E.2d 836, 838 (2021). "Whe[n] the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (quoting *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). "Accordingly, courts will 'give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *Id.* (quoting *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010)). "A

statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Ga.-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "Once the Legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989).

Section 62-2-507 of the South Carolina Code states a "divorce . . . revokes any revocable . . . beneficiary designation made by a divorced individual to the divorced individual's former spouse in a governing instrument," "[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage[] [or] divorce." S.C. Code Ann. § 62-2-507(c)(1)(i).[7] The statute defines governing instrument as "an instrument executed by the divorced individual before the divorce. . . [from] the individual's former spouse including, but not limited to wills, revocable inter vivos trusts, powers of attorney, life insurance beneficiary designations, annuity beneficiary designations, retirement plan beneficiary designations[,] and transfer on death accounts." S.C. Code Ann. § 62-2-507(a)(4).

The Reporter's Comment to the section states, "The 2013 amendment expand[ed] this section to cover life insurance . . . beneficiary designations . . . to the former spouse that the divorced individual established before the divorce . . . ." S.C. Code

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[7] Prior to the enactment of section 62-2-507, this court held, "Generally, in South Carolina, divorce does not per se affect the rights of a beneficiary interest." *Stribling v. Stribling*, 369 S.C. 400, 405, 632 S.E.2d 291, 293 (Ct. App. 2006). "However, it is generally recognized that a beneficiary may contract away the beneficiary interest through a separation or property settlement agreement, even if the beneficiary designation is not formally changed." *Id.* at 405, 632 S.E.2d at 294. In *Davis v. Southern Life Insurance Co.*, our supreme court ruled that during the lifetime of the insured, the named beneficiary has no vested property right in a life insurance contract, but merely an expectancy, when a right to change the beneficiary has been reserved to the insured in the policy. 249 S.C. 194, 199, 153 S.E.2d 399, 401 (1967); *see also Stribling*, 369 S.C. at 406, 632 S.E.2d at 294 (noting the beneficiary to a life insurance policy merely has an expectancy interest in the policy until the owner's death).

Ann. § 62-2-507 reporter's cmt. (2022). The comment further provides, "This section effectuates a decedent's presumed intent: without a contrary indication by the decedent, a former spouse will not receive any probate or nonprobate transfer as a result of the decedent's death." *Id.* The Act indicated it took effect on January 1, 2014 and on that date, unless otherwise provided in the Act, "any rule of construction or presumption provided in this act *applies to governing instruments executed before the effective date of the act* unless there is a clear indication of a contrary intent in the terms of the governing instrument," subject to item (5) and subsection (C).[8] Act No. 100, § 4(A), (B)(4), 2013 S.C. Acts 529, 1038-39 (emphasis added).

Justice Breyer has explained the reasoning behind states enacting statutes like section 62-2-507 that revoke life insurance beneficiary designations of a spouse upon divorce: "As many jurisdictions have concluded, divorced workers more often prefer that a child, rather than a divorced spouse, receive those assets. Of course, an employee can secure this result by changing a beneficiary form; but doing so requires awareness, understanding, and time." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 158-59 (2001) (Breyer, J., dissenting). "That is why . . . many . . . jurisdictions have created a statutory assumption that divorce works a revocation of a designation in favor of an ex-spouse." *Id.* at 159. "That assumption is embodied in the Uniform Probate Code; it is consistent with human experience; and those with expertise in the matter have concluded that it 'more often' serves the cause of '[j]ustice.'" *Id.* (alteration by dissent) (quoting John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1135 (1984)).[9]

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[8] Item (5) provides "an act done and any right acquired or accrued before the effective date of the act is not affected by this act." Act No. 100, § 4(B)(5), 2013 S.C. Acts 529, 1039. Subsection (C) states, "If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded." Act No. 100, § 4(C), 2013 S.C. Acts 529, 1039.

[9] An opinion from a New York surrogate's court has also recognized the same reasons for enacting these types of statutes. *See In re Est. of Sugg*, 12 N.Y.S.3d 842, 847 (Sur. Ct. 2015) ("Revocation-by-divorce statutes adopt the presumption that in the vast majority of cases the testator's failure to revoke his will subsequent to divorce is due to neglect." (quoting Alan S. Wilmit, *Applying the Doctrine of*

"Retroactive legislation, though frequently disfavored, is not absolutely proscribed." *Kirven v. Cent. States Health & Life Co., of Omaha*, 409 S.C. 30, 40, 760 S.E.2d 794, 799 (2014) (quoting *In re Marriage of Bouquet*, 546 P.2d 1371, 1376 (Cal. 1976)), *opinion after certified question answered*, No. 3:11-CV-2149-MBS, 2014 WL 12734325 (D.S.C. Dec. 12, 2014). "Indeed, a state may pass retrospective laws absent direct constitutional prohibition." *Id.* "In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary." *Hercules Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). "A principal exception to . . . [this] presumption is that remedial or procedural statutes are generally held to operate retrospectively." *Id.*; *see also Goff v. Mills*, 279 S.C. 382, 386, 308 S.E.2d 778, 780 (1983) (noting the supreme "[c]ourt has consistently approved retroactive application of statutes [that] provide procedural or remedial benefits as opposed to statutes affecting vested or substantial rights").

"No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt . . . ." *Boyd v. Boyd*, 277 S.C. 416, 418, 289 S.E.2d 153, 154 (1982) (omission by court) (quoting *Hyder v. Jones*, 271 S.C. 85, 88, 245 S.E.2d 123, 125 (1978)). In *Boyd*, the court found the statute at issue "contain[ed] no specific provision mandating retroactive application, and [the court was] unable to glean any legislative intention from the statute other than that of prospective application." *Id.*; *see also Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 650, 300 S.E.2d 735, 737 (1983) (holding that when the act enacting a statute contained nothing "beyond a statement of its 'effective date,' we must follow the well-settled rule that a statute may not be applied retroactively in the absence of specific provision or clear legislative intent to the contrary"); *Fid. & Cas. Ins. Co. of N.Y. v. Nationwide Ins. Co.*, 278 S.C. 332, 334, 295 S.E.2d 783, 784 (1982) ("[T]he language of the . . . amendment to [a statute] d[id] not indicate an intention

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Revocation by Divorce to Life Insurance Policies, 73 Cornell L. Rev. 653, 659 (1988))); *id.* ("[A] person is as likely to neglect to change the beneficiary of a life insurance policy as to neglect to change a will." (alteration by court) (quoting Wilmit, 73 Cornell L. Rev. at 671-72)); *id.* ("Even with ample time to notify the insurance company, divorced spouses procrastinate or neglect their personal financial matters." (quoting Susan N. Gary, *Applying Revocation-On-Divorce Statutes to Will Substitutes*, 18 Quinnepac Prob. L.J. 83, 95 (2004))).

by the legislature to give the amendment retroactive effect. In the absence of a clear indication of such an intention, statutes will not be given retroactive effect.").

"In addition to looking at whether the statute is remedial in nature, the United States Supreme Court has enunciated a test to determine if an injustice would occur as a result of the retroactive application of a law." *SCDSS/Child Support Enf't v. Carswell*, 359 S.C. 424, 431, 597 S.E.2d 859, 862 (Ct. App. 2004). "The three factors to consider are: the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in law upon those rights." *Id.* (citing *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 717 (1974)).

This case is the first time a South Carolina appellate court has examined amended section 62-2-507.[10] However, two federal district courts for South Carolina have considered whether the amendment applies retroactively and reached different

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[10] Burnsed has provided this court with a supplemental citation to a recent Alabama federal district court case that looked at the application of this statute when a couple divorced in South Carolina before the Act took effect. *State Farm Life Ins. Co. v. Benham*, No. 2:21-CV-00695-AKK, 2021 WL 5989081, at *2-3 (N.D. Ala. Dec. 17, 2021). However, in that case, the divorce agreement required the life insurance policy designating the wife as the beneficiary remain in effect. *Id.* at *4. Much of the dispute in that case concerned if the wife was entitled to all $100,000 of the policy's proceeds because the divorce agreement required the policy be in the amount of at least $50,000. *Id.* at *1-5. The Alabama district court ultimately made its decision without relying on South Carolina's revocation-upon-divorce statute but noted it had "serious doubts about the retroactivity of the amended [South Carolina] law." *Id.* at *5. The court noted that no South Carolina appellate court had examined this issue but pointed to the circuit court's ruling in the present case, which concluded the statute "does not apply retroactively to divorces entered before the effective date of the amendment." *Id.* at *5 n.8. The district court found that "reviewing the express terms of the statute, and considering the implications of retroactivity, the court agrees that the revocation-upon-divorce statute is best read as applying prospectively." *Id.* The court found, "The statute's terms do not state otherwise, and it would be illogical to apply a statute meant to 'effectuate[ ] a decedent's presumed intent' to life insurance beneficiary designations in divorce agreements formed before the amendment of the statute to include them." *Id.* (alteration by court) (quoting S.C. Code Ann. § 62-2-507 reporter's cmt.).

conclusions. The court first considered the issue in *State Farm Life Insurance Co. v. Murphy*, No. 2:15-CV-04793-DCN, 2017 WL 4551489 (D.S.C. Oct. 12, 2017). In that case, the district court stated, "The court is making somewhat of an educated guess as to the intent of South Carolina's legislature in drafting this statute, as there are only three cases interpreting [section] 62-2-507." *Id.* at *3. The court noted, "Of these cases, one is this court's own ruling in this case dismissing [an ex-spouse's] breach of contract and civil conspiracy claims against third-party defendants. The other two cases have addressed whether the statute is preempted by the Employment Retirement Income Security Act of 1974 ('ERISA')." *Id.* The *Murphy* case largely focused on whether a "final court order mandating the equitable distribution of all marital property and debt is a 'divorce or annulment' within the meaning of the statute," which the court determined it was.[11] *Id.* Following that determination, the court then found the parties "were divorced before the January 1, 2014 effective date of the amended . . . [section] 62-2-507. Therefore, . . . [section] 62-2-507 does not bar [the ex-spouse]'s claim for the $100,000 in policy proceeds." *Id.* at *4.

The second South Carolina district court case to consider the amended statute was *Protective Life Insurance Co. v. LeClaire*, No. 7:17-CV-00628-AMQ, 2018 WL 3222796 (D.S.C. July 2, 2018). In that case, the couple divorced on August 20, 2003; the insured died on July 18, 2016; and the action was brought on March 7, 2017. *Id.* at *3. The court noted the effective date of the Act was January 1, 2014. *Id.* The court stated "(1) th[e] [A]ct applies to any estates of decedents dying thereafter and to all trusts created before, on, or after its effective date; (2) the [A]ct applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date," except as otherwise provided in the Act. *Id.* (quoting S.C. Code Ann. tit. 62, art. 2(B)). One side "argue[d] that the statute should apply retroactively and that doing so does not violate the constitutional prohibition against impairment of contracts" and the ex-spouse did "not respond directly to this motion, but file[d] a motion for summary judgment arguing that, inter alia, the statute does not apply." *Id.* The district court determined, "the statute and the associated legislative notes shows that the South Carolina Legislature intended for a divorce or annulment to revoke the disposition or appointment of property, including beneficiary interests to a former spouse, unless

[11] The family court issued a final order approving a separation agreement and adopting it as the order of the court on August 5, 2010; the family court issued a final order of divorce on March 17, 2014. *Murphy*, 2017 WL 4551489, at *1.

expressly provided otherwise." *Id.* at *4. The court further found, "The statute applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after the effective date of January 1, 2014. As the Decedent passed away after the effective date, the instant matter must be considered within the purview of the statute."[12] *Id.*

In *Sveen*, the United States Supreme Court looked at "whether applying Minnesota's automatic-revocation rule[[13]] to a beneficiary designation made before the statute's enactment violates the Contracts Clause of the Constitution." 138 S. Ct. at 1818. The Court "granted certiorari . . . to resolve a split of authority over whether the Contracts Clause prevents a revocation-on-divorce law from applying to a pre-existing agreement's beneficiary designation." *Id.* at 1821.

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[12] The court also addressed whether the life insurance designation in the policy was irrevocable, which is not an issue in the present case. *LeClaire*, 2018 WL 3222796, at *5. Additionally, the court examined whether retroactively applying section 62-2-507 to the policy would impair the obligations of the contracts between the ex-spouse and the life insurance company "in violation of the Contracts Clauses of the state and federal constitutions." *Id.* at *4. The court noted the United States Supreme Court had "addressed this question squarely in an opinion," which "specifically referenced South Carolina as one of 26 states having adopted a 'revocation-on-divorce' law substantially similar to the one at issue in that case." *Id.* (citing *Sveen v. Melin*, 138 S. Ct. 1815 (2018)). The district court stated the Supreme "Court concluded that such a statute does not substantially impair pre-existing contractual arrangements even where the designation under the policy was made before the statute was enacted"; "such a law merely puts in place a presumption about what an insured wants after divorcing, which, as is the case here, may be changed by the insured with 'the stroke of a pen.'" *Id.* (quoting *Sveen*, 138 S. Ct. at 1823). The court determined the *Sveen* opinion settled that section 62-2-507 did not violate the Contracts Clause. *Id.* The court also noted because "the South Carolina Supreme Court applies the same standard for analyzing contract clause claims under the state constitution as federal courts apply to the Contract Clause under the federal constitution," the contract clause under the state constitution is not violated. *Id.* at *5. We discuss *Sveen* in depth below.

[13] "In 2002, Minnesota amended its probate code to apply the revocation-upon-divorce statute to life insurance beneficiary designations . . . ." *Metro. Life Ins. Co. v. Melin*, 853 F.3d 410, 411 (8th Cir. 2017), *rev'd sub nom. Sveen*, 138 S. Ct. at 1821.

In that case, the couple married in 1997, and the husband bought a life insurance policy in 1998. *Id.* The husband named the then-wife as the primary beneficiary and designated his two children from a prior marriage as the contingent beneficiaries. *Id.* The couple divorced in 2007, the divorce decree did not mention the insurance policy, the husband did nothing at that time or later to revise his beneficiary designations, and the husband passed away in 2011. *Id.* The husband's children and the now ex-wife both filed claims for the insurance proceeds. *Id.*; *Metro. Life Ins. Co.*, 853 F.3d at 411. The children "contend[ed] that under Minnesota's revocation-on-divorce law, their father's divorce canceled [the ex-wife's] beneficiary designation and left . . . them as the rightful recipients." *Sveen*, 138 S. Ct. at 1821. The ex-wife noted the Minnesota law did not exist when the husband bought the policy and named her as the primary beneficiary and argued "applying the later-enacted law to the policy would violate the Constitution's Contracts Clause, which prohibits any state 'Law impairing the Obligation of Contracts.'" *Id.* (quoting U.S. Const. art. I, § 10, cl. 1).

The *Sveen* Court held the application of the revocation-upon-divorce statute in that case did not violate the Contracts Clause. *Id.* at 1818. The Court found the Minnesota statute, as well as the model code it followed, applied the following understanding, which had previously been applied to wills, to beneficiary designations in life insurance policies: most parties following a divorce do not wish to enrich their former spouse. *Id.* at 1822-23. The Court found that the ex-wife correctly "notes that this extension raises a brand-new constitutional question because 'an insurance policy is a contract under the Contracts Clause, and a will is not.'" *Id.* at 1823. However, the Court indicated the old legislative presumption needs to "equally fit the new context: A person would as little want his ex-spouse to benefit from his insurance as to collect under his will. Or said otherwise, the insured's failure to change the beneficiary after a divorce is more likely the result of neglect than choice." *Id.* The Court found "that means the Minnesota statute often honors, not undermines, the intent of the only contracting party to care about the beneficiary term." *Id.* The Court noted "[t]he law no doubt changes how the insurance contract operates," but found "for lots of policyholders" it does not impair the contract and instead does "the opposite." *Id.*

The Court further recognized that "even when presumed and actual intent diverge, the Minnesota law is unlikely to upset a policyholder's expectations at the time of contracting" "because an insured cannot reasonably rely on a beneficiary

designation remaining in place after a divorce" due to divorce courts' "wide discretion to divide property between spouses when a marriage ends." *Id.* Additionally, the Supreme Court observed the "statute places no greater obligation on a contracting party" and "impos[es] a lesser penalty for noncompliance. Even supposing an insured wants his life insurance to benefit his ex-spouse, filing a change-of-beneficiary form with an insurance company is as 'easy' as . . . providing a landowner with notice or recording a deed." *Id.* at 1824 (quoting *Curtis v. Whitney*, 80 U.S. 68, 71 (1871)). The Court noted that "with only 'minimal' effort, a person can 'safeguard' his contractual preferences. And here too, if he does not 'wish to abandon his old rights and accept the new,' he need only 'say so in writing.'" *Id.* at 1824-25 (first quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982); and then quoting *Gilfillan v. Union Canal Co. of Pa.*, 109 U.S. 401, 406 (1883)).

The Court further noted that if a decedent wants an ex-spouse to remain as beneficiary but does not send in the form, the "worst" consequence that could occur "pales in comparison with the losses incurred in . . . earlier cases." *Id.* at 1825. The Court observed that in those earlier cases, "[w]hen a person ignored a recording obligation," that person "could forfeit the sum total of his contractual rights." *Id.* But the Court contrasted that with the result "when a policyholder in Minnesota does not redesignate his ex-spouse as beneficiary"; in that situation, the policy holder's "right to insurance does not lapse; . . . his contingent beneficiaries . . . receive the money." *Id.* The Court expounded, "That redirection of proceeds is not nothing; but under our precedents, it gives the policyholder—who, again, could have 'easily' and entirely escaped the law's effect—no right to complain of a Contracts Clause violation." *Id.* (quoting *Conley v. Barton*, 260 U.S. 677, 681 (1923)).[14]

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[14] In a Minnesota federal district court case, the court noted that even if applying a revocation-upon-divorce statute did substantially impair a deceased former spouse's contractual rights, any impairment would "survive a constitutional challenge because the impairment is justified and reasonable in that it serves important public purposes, including promoting uniformity among state law treatment of probate and non-probate transfers and implementing a rule of construction that reflects legislative judgment that ex-spouses often intend to change their beneficiaries." *Lincoln Benefit Life Co. v. Heitz*, 468 F. Supp. 2d 1062, 1069 (D. Minn. 2007) (citations omitted).

Many states and also federal courts have examined whether particular statutes revoking a beneficiary designation of a spouse following divorce apply in situations with timing similar to the one here. Based on our research, the majority of those decisions find that statutes apply to revoke the beneficiary designation. Most if not all of these statutes are based on the Uniform Probate Code. We examine a few of those cases here because we find their reasoning helpful in light of the fact that no South Carolina appellate court has previously considered the application of our state's version of the statute.

The Colorado Supreme Court has discussed the application of a revocation-upon-divorce statute under facts similar to those here and held its legislature intended its statute "to be retroactive and that such retroactive application is neither unconstitutionally retrospective nor unconstitutionally impairs contracts." *In re Est. of DeWitt*, 54 P.3d 849, 853 (Colo. 2002) (en banc). The court stated that "[p]rior to July 1, 1995, Colorado law provided that the dissolution of marriage did not revoke a former spouse's designation as beneficiary of a life insurance policy absent an intent to the contrary expressed by the insured." *Id.* at 852. However, in 1995, the general assembly enacted a statute based on the Uniform Probate Code that "represent[ed] a legislative determination that the failure of an insured to revoke the designation of a spouse as beneficiary after dissolution of the marriage more likely than not represents inattention." *Id.* The court determined the statute accordingly "attempt[ed] to give effect to the presumptive intent of the decedent" by "revok[ing] all probate and non-probate transfers to a spouse upon dissolution of a marriage, thus preventing an individual from receiving property from her former spouse's estate at death unless certain express provisions to the contrary apply." *Id.*

The court found the statute "specifically provides that it applies to estates, wills, and governing instruments of decedents who die on or after July 1, 1995." *Id.* The court noted that in the cases it was examining on appeal, the decedents had "died after July 1, 1995, but their marriages to the beneficiaries [were] dissolved before July 1, 1995." *Id.* Accordingly, the court stated it needed to decide "whether [the statute] automatically revoked the designation of a former spouse as the beneficiary of a life insurance policy, whe[n] the designation and the dissolution of marriage occurred before the statute's effective date, but the decedent's death occurred after the statute's effective date." *Id.*

The court "first determine[d] that the general assembly intended [the statute] to be applied retroactively." *Id.* at 853. The court then found that based on that determination, it next needed to "decide whether such application is unconstitutionally retrospective." *Id.* The court stated that because of "the unique nature of a life insurance policy, which concerns not only the insurer and the insured but also the named beneficiary," it needed to analyze the statute's impact on two different groups in regards to the retrospectivity. *Id.* The court first "consider[ed] [the statute's] impact on the named beneficiaries and determine[d] that it [wa]s not retrospective." *Id.* The court next "consider[ed] [the statute]'s impact on the decedents and determine that it [also] [wa]s not retrospective." *Id.*

The court recognized, "Absent legislative intent to the contrary, a statute is presumed to operate prospectively, meaning it operates on transactions occurring after its effective date. A statute is retroactive if it operates on transactions that have already occurred or on rights and obligations that existed before its effective date." *Id.* at 854 (citations omitted). The court noted that while "[r]etroactive application of statutes is generally disfavored by both common law and statute," it "is not necessarily unconstitutional; it is permitted where the statute effects a change that is procedural or remedial." *Id.* The court further observed that "[b]ecause some retroactively applied legislation is constitutional while some is not, Colorado courts have marked this distinction by evoking the term contained in the constitutional provision—'retrospective'—to describe a statute whose retroactive application is unconstitutional."[15] *Id.*

The *DeWitt* court determined that for the facts in the cases before it, the application of the statute was "retroactive because it w[ould] operate on a transaction that occurred before the effective date of the statute, namely the designation of a beneficiary to a life insurance policy by the decedent." *Id.* at 855. Thus, it needed to examine "whether [the statute] is retrospective," which required it to "consider the different interests that are implicated by the life insurance policies at issue." *Id.*

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[15] South Carolina does not distinguish between the terms retroactive and retrospective. Additionally, Black's Law Dictionary does not distinguish between the two terms. *See* RETROACTIVE, Black's Law Dictionary (11th ed. 2019) (defining retroactive as "extending in scope or effect to matters that have occurred in the past.—Also termed *retrospective*."). However, despite Colorado's particular use of retrospectivity to only describe the unconstitutional application for retroactive applications, its reasoning is still persuasive.

The court recognized, "There are three sets of interests implicated by life insurance policies, namely the interests of the insurer, the insured-decedent, and the named beneficiary." *Id.* The court noted that because the argument being made in the cases before it was that the statute was "retrospective as to the beneficiaries and as to the insured-decedents," its retrospectivity inquiry would "consider[] [the statute]'s impact on both the named beneficiaries and the decedents, an analytical framework that has been utilized by other courts considering this issue." *Id.* The court explained, "A finding of retrospectivity with regard to either of these interests will render the statute unconstitutionally retrospective for all purposes." *Id.* at 855-856.

The court further reiterated that its "first inquiry in a retrospectivity analysis is whether the general assembly intended retroactivity" and explained that to "discern[] the general assembly's intent, [it] look[ed] to the statutory section in question." *Id.* at 856. The court determined "the general assembly expressed its intent that the statute applies when a decedent died on or after July 1, 1995," with the following statutory language: "Except as provided elsewhere in this code and except as provided otherwise in this section, parts 1 to 9 of article 11, as reenacted effective July 1, 1995, *shall apply to the estates, wills, or governing instruments of decedents dying on or after July 1, 1995*." *Id.* (emphasis added by court) (quoting Colo. Rev. Stat. § 15-17-102(1) (2001)).

The court determined "the plain language . . . indicates the general assembly's intent that the *death* of an insured-decedent on or after July 1, 1995, triggers application of the statute." *Id.* The court found the fact "that the insurance contract may have been entered into, and the divorce may have occurred, before the effective date of the statute" did not make any difference; "the statute will be retroactive under such circumstances." *Id.* The court accordingly held "the general assembly intended [the statute] to operate retroactively." *Id.*

The court noted that "a beneficiary to a life insurance contract does not possess a vested interest in that contract" but "merely possesses an expectancy, or contingent, interest." *Id.* The court therefore concluded "retroactive application of [the statute] does not impair a vested right of the named beneficiaries, which in turn mandates our conclusion that it is not retrospective under the 'vested right' prong of the retrospectivity inquiry." *Id.* The court recognized that although "the retroactive application of the statute would result in a named beneficiary not being able to collect the proceeds, the nature of the named beneficiary's interest was a

mere expectancy." *Id.* at 857. Accordingly, the court noted it had previously "held that [the beneficiary's] interest may be defeated 'in the manner prescribed in the policy . . . or by statute.'" *Id.* (omission by court) (quoting *Johnson v. N.Y. Life Ins. Co.*, 138 P. 414, 416 (Colo. 1913)). The court found that although in the present case "the statute acts to defeat [the beneficiary's] expectancy interest in the proceeds, it cannot be reasoned that [the beneficiary's] inability to receive such proceeds unconstitutionally imposes a new disability." *Id.* The court noted that it had "long recognized that the general assembly may regulate the insurance industry" and determined that "[i]n this case, [in which] the general assembly acted to regulate the insurance contract in order to give effect to the presumptive intent of the insured-decedents, [the court] decline[d] to conclude that such regulation imposed a 'disability' of constitutional magnitude upon the named beneficiaries with a mere expectancy interest." *Id.*

The court further held that applying "the statute imposes neither a new duty nor a new obligation upon the named beneficiaries: Any duty or obligation pursuant to the statute would be upon the decedent, as the insured, to follow the statutorily mandated procedure for ensuring that his former spouse remained the beneficiary to the policy." *Id.* The court accordingly determined "the retroactive application of [the statute] is not retrospective with regard to the beneficiaries' interests." *Id.* The court found that even though "the statute created new requirements in order for the decedents to maintain their designations of beneficiary . . . the imposition of those new requirements [was not] retrospective." *Id.*

The court reiterated "the retroactive application of a statute is not [unconstitutional] whe[n] it effects a change that is procedural or remedial as opposed to substantive" and stated it "consider[ed] [the statute] to be procedural because it relates only to a mode of procedure to enforce the right of each decedent to designate a beneficiary." *Id.* The court held the statute causes "the automatic revocation of a beneficiary designation of a former spouse upon divorce," as a matter of procedure, but "also provides for additional procedures through which the insured may preserve the designation of his former spouse as a beneficiary," i.e., "divorcing parties may add an express provision to the insurance contract, or specify in a separation agreement, or obtain a court order, stating that [the statute] does not act to automatically revoke a spouse's designation as beneficiary." *Id.* The court further noted its jurisprudence regarding retrospectivity "requires that any new obligation, duty, or impairment that is asserted on behalf of the decedents be balanced against the public interest and statutory objectives of [the statute]. The

statute at issue must be reasonably related to the asserted public interest and statutory objectives." *Id.* (citation omitted).

The court noted the statute results in "a change in beneficiary of an insurance policy." *Id.* The court found that because "[b]oth the insurance industry and the probate process is highly regulated by statute in" the state, "the decedents in these cases could reasonably expect that their life insurance policies would be regulated by statute, including the possibility of a statute addressing procedural changes in beneficiary designation." *Id.* at 857-58. Further, the court determined "the public interest and statutory objectives of (1) giving finality to divorce disputes; and (2) recognizing that the presumptive intent of a divorced spouse is to revoke the designation of his former spouse as a beneficiary are rationally related to the procedures and effect of [the statute]." *Id.* at 858. The court therefore held "that the application of [the statute] to the decedents in these cases is not unconstitutionally retrospective." *Id.*

The Tenth Circuit Court of Appeals has addressed the application of a revocation-upon-divorce statute in relation to annuity contracts. *Stillman v. Tchrs. Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311 (10th Cir. 2003). After acknowledging "[c]ourts generally construe statutes to avoid retroactive application," the court noted, "The principal difficulty in applying the nonretroactivity presumption is in determining what constitutes retroactivity in a particular context." *Id.* at 1315. The court provided that to determine if a statute is being applied retroactively, a court must compare "the date the statute went into effect and . . . the date of the activity to which the statute applies." *Id.* The court indicated the effective date is generally not an issue; the issue is more often "about what activity is targeted by the statute." *Id.* The court observed, "No one has succeeded in formulating a test for retroactivity that performs well in all contexts." *Id.* (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) ("Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.")). The court recognized the "various formulations" did "reflect a common core concern—fairness." *Id.*

In the *Stillman* case, the retroactivity issue concerned if a revocation-upon-divorce provision enacted in 1998 could revoke a spouse's designation as beneficiary "when both the conduct giving rise to the designation (the purchase of the annuity contracts . . .) and the conduct giving rise to its potential revocation (the . . .

divorce) occurred many years before the" law went into effect "but the event that vested the parties' rights ([the] death) postdated the enactment." *Id.* at 1316. The court in that case found the husband "had the right to change beneficiaries at any time during his lifetime." *Id.* at 1318. The court noted "[t]he purpose of the [Utah Uniform Probate Code] was to effectuate his intent at the time of his death." *Id.* The court held that "presuming . . . his desires (if he had stopped to consider them) regarding the beneficiaries changed when he was divorced" was not unfair. *Id.* The court recognized, "it is theoretically possible that [the husband] wished to maintain [the ex-wife] as his beneficiary and that his reason for not making this desire explicit is that he was relying on the pre-1998 presumption in Utah law that his pre-divorce designation would continue after the divorce." *Id.* However, the court found "as long as [it was] considering theoretical possibilities, one who was familiar with pre-1998 case law is likely also to know of the 1998 statute, and [the husband] had sufficient time to adjust to the statutory reversal of presumptions" and noted that the husband had "met with a lawyer and prepared a new will—excluding not only [the ex-wife] but also his children by her—after enactment of the 1998 amendments." *Id.*

The Supreme Judicial Court of Massachusetts has very recently looked at the application of that state's revocation-upon-divorce statute. *Am. Fam. Life Assurance Co. of Columbus v. Parker*, 178 N.E.3d 859 (Mass. 2022). The court acknowledged that its "retroactivity analysis must also address the purpose and effect of [the act], which states that 'any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date unless there is a clear indication of contrary intent.'" *Id.* at 865 (quoting 2008 Mass. Acts 1754, 1914, c. 521, § 43(5)). The court noted, "This provision, on its face, appears to be directed at the various provisions in the act that are expressly defined as rules of construction or presumptions with language indicating that they apply absent a clear indication of contrary intent." *Id.* The court stated that because the act "seems just to make clear that these provisions apply retroactively the same way they apply prospectively," "the combination of [subsections] (1) and (5) [of the act] render the entire act retroactive." *Id.* at 865-66.

The court concluded that "[b]ased on the language and purpose of [the statute]," "the Legislature intended for [the statute] to be retroactive and it did so pursuant to [subsection] (1)" of the act. *Id.* at 866. The court further determined subsection (5) of the act "is limited to those sections expressly defined as rules of construction or presumptions applicable absent contrary intent and thus does not apply to [the

statute], which is not described as a rule of construction or presumption and does not employ the open-ended absence of contrary intent formulation." *Id.* The court noted that instead the statute "includes its own more specific rules of application and exception, thereby displacing a generalized contrary intent inquiry." *Id.*

The court recognized that in some other situations, in order to provide for the retroactive application of the statute, some courts and commentators have interpreted the statute as a rule of construction. *Id.* The court provided the *Stillman* case as an example of that but distinguished *Stillman* finding, "Utah's Uniform Probate Code differed from the Massachusetts Uniform Probate Code in that [Utah's] equivalent of [subsection] (1) [of the act] was limited to 'wills.'" *Id.* The court noted "[t]he only retroactivity provisions applicable to other instruments in Utah were provisions related to rules of construction. In this context, where [the statute] would not otherwise be retroactive, the Tenth Circuit interpreted [the statute] as a rule of construction." *Id.* (citation omitted). The court also looked at a statement the chief reporter for the Uniform Probate Code editorial board made "in defending the constitutionality of the retroactive application of the Uniform Probate Code prior to the Supreme Court's decision in *Sveen*": Waggoner stated that the statute "'merely establishes a rule of construction designed to implement intention. It reflects a legislative judgment that when the insured leaves unaltered a will, trust, or insurance-beneficiary designation in favor of an ex-spouse, the insured's failure to designate substitute takers more likely than not represents inattention rather than intention.'" *Id.* (quoting Lawrence Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683, 700 (1992)). The court provided Waggoner further stated, "The legislative judgment yields to a contrary intention." *Id.* (quoting Waggoner, 26 Real Prop. Prob. & Tr. J. at 700).

The court found even though it did find those interpretations "instructive on the importance of applying [the statute] retroactively, [it] decline[d] to adopt such an expansive and unnecessary interpretation of rules of construction and presumptions in the context of [subsections] (1) and (5) of the . . . act, [and decided to] rely[] instead on the plain language of [the] statute." *Id.* The court determined subsection "(1) clearly encompasses [the statute], rendering it fully retroactive. [Subsection] (5), on its face, applies only to those rules of construction and presumptions so entitled." *Id.* The court found that if subsection "(5) were applicable to [the statute], it would also limit and not expand the retroactive effect of [the statute], which cuts against the thrust of the Tenth Circuit and Waggoner

interpretations." *Id.* The court "conclude[d] that [the statute] is to be applied retroactively, pursuant to [subsection] (1), according to the terms of both provisions." *Id.*

The court found in the case before it, "[u]nless one of the statute's express exceptions applie[d], the beneficiary designation to . . . the divorced spouse[] would be revoked as a matter of law." *Id.* The court noted one of those exceptions would be a "disposition made by a divorced individual to a former spouse . . . if 'provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment.'" *Id.* at 866-67 (footnote omitted) (quoting Mass. Gen. Laws ch. 190B, § 2-804(b) (West, Westlaw through Ch. 125 of the 2022 2nd Ann. Sess.)). Additionally, the court noted because the statute "only applies to governing instruments 'executed by the divorced individual <u>before</u> the divorce or annulment,'" "another method of avoiding application of [the statute] is redesignating the ex-spouse as beneficiary <u>after</u> the divorce; [the statute] does not apply to such 'beneficiary designations.'" *Id.* at 867 (emphases added by court) (first quoting Mass. Gen. Laws ch. 190B, § 2-804(a)(4) (West, Westlaw through Ch. 125 of the 2022 2nd Ann. Sess.); and then quoting Mass. Gen. Laws ch. 190B, § 1-201(4) (West, Westlaw through Ch. 125 of the 2022 2nd Ann. Sess.)).

The Montana Supreme Court has addressed whether that state's revocation-upon-divorce statute "appl[ied] to a life insurance policy owner's designation of his spouse as the beneficiary, where the parties were later divorced prior to enactment of [the statute] and the policyholder died after enactment of the statute." *Thrivent Fin. for Lutherans v. Andronescu*, 300 P.3d 117, 118 (Mont. 2013) (italics omitted). The court found the statute applied in that situation because the statute "operates at the time of the insured's death and applies to any divorce that took place during the insured's lifetime." *Id.*

The Montana court noted, "Montana adopted the revocation-upon-divorce statute from the Uniform Probate Code . . . in order to 'unify the law of probate and nonprobate transfers.'" *Id.* at 119 (quoting Tit. 72, ch. 2, Mont. Code Ann., *Annotations*, Official Comments at 635 (2012)). The court stated, "The Comments indicate that the revocation statute operates at the time the 'governing instrument is given effect' and the provision to the former spouse is to be treated 'as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed

the revoked provisions[.]'" *Id.* (alteration by court) (quoting Tit. 72, ch. 2, Mont. Code Ann., *Annotations*, Official Comments at 636 (2012)).

The court indicated "[t]he Comments reference two law review articles that provide '[t]he theory of this section'" and "discuss the history and purpose of revocation-upon-divorce statutes and confirm that, under those statutes, life insurance is to be treated in the same manner as a will." *Id.* (citing Tit. 72, ch. 2, Mont. Code Ann., *Annotations*, Official Comments at 636 (2012) (citing Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 Iowa L. Rev. 223 (1991), and Langbein, 97 Harv. L. Rev. at 223-72)). The court noted that Langbein had explained "life insurance is functionally indistinguishable from a will, for it satisfies the twin elements of the definition of a will." *Id.* (quoting Langbein, 97 Harv. L. Rev. at 1110). The court observed Langbein further stated, "We say that a will is revocable until the death of the testator and that the interests of the devisees are ambulatory—that is, *nonexistent until the testator's death*. Unless specially restricted by contract, the life insurance beneficiary designation operates identically." *Id.* (emphasis added by court) (quoting Langbein, 97 Harv. L. Rev. at 1110). The court found, "This commentary is consistent with the interpretation of other jurisdictions that apply the revocation-upon-divorce statute as a rule of construction at the time the governing instrument is given effect." *Id.* Additionally, the court noted that although the law in some of those other jurisdictions include the Uniform Probate Code's "'rule of construction' statute expressly providing that the law applies to governing instruments executed before its effective date" and "Montana's code lacked the express statutory provision, the Official Comments [to the Montana code] nonetheless suggest that the statute operates at the time the instrument is given effect—i.e., upon death." *Id.* at 119 n.2.

The court further provided, "A statute is retroactive if it 'takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions already past.'" *Id.* at 119-20 (quoting *Allen v. Atl. Richfield Co.*, 124 P.3d 132, 135 (Mont. 2005)). However, the court explained, "A statute is not given retroactive effect 'merely because it is applied in a case arising from conduct antedating the statute's enactment.'" *Id.* at 120 (quoting *Porter v. Galarneau*, 911 P.2d 1143, 1148 (Mont. 1996)). The court found that "[b]ecause [the statute] operates at the time of the transferor's death, the statute is not given retroactive effect when applied to

a divorce predating its enactment." *Id.* The court determined that in that case "[p]rior to [the husband's] death, [the wife] had no vested rights in the proceeds of his insurance policy. Instead, her property interest was equivalent to that of a devisee under a will—'ambulatory' and 'nonexistent.'" *Id.* (citation omitted) (quoting Langbein, 97 Harv. L. Rev. at 1110). The court held "[t]he operation of the revocation-upon-divorce statute therefore does not 'impair [ ] vested rights' and did not result in a different legal effect from that which the transaction had under the law at the time it occurred"—"[t]he designation of [the wife] as beneficiary had no legal effect before the date of [the husband]'s death." *Id.* (second alteration by court) (quoting *Porter*, 911 P.2d at 1148-49).

In a South Dakota case, an ex-spouse contended that applying the revocation-upon-divorce statute in that case "violate[d] the fundamental rule of statutory construction that statutes are to only have prospective effect unless a retroactive effect is clearly intended." *Buchholz v. Storsve*, 740 N.W.2d 107, 111 (S.D. 2007). However, the court found the legislature had made "clear that it intended [the Uniform Probate Code] rules of construction . . . to apply retroactively," when the code stated that it took "'effect on July 1, 1995'" and "'except as provided elsewhere in [the] code,'" it "'applie[d] to governing instruments executed by decedents dying on or after July 1, 1995, no matter when executed,'" and "'*[a]ny rule of construction or presumption provided in this code applies to governing instruments executed before July 1, 1995, unless there is a clear indication of a contrary intent*.'" *Id.* (emphasis added by court) (quoting S.D. Codified Laws § 29A-8-101(a), (b)(2) (West, Westlaw through laws of the 2022 Reg. Sess. and Sup. Ct. Rule 22-10)). The court noted the deceased spouse who executed the governing instrument—in that case a retirement account—had died eleven years after the date of enactment of the code. *Id.* The court determined the revocation statute "applie[d] to the governing instrument[,] provided it is considered a 'rule of construction.'" *Id.* The court, relying on *Stillman*, stated that because "the revocation-upon-divorce statute attempts to effectuate the intention of the donor, it is a rule of construction." *Id.* (citing *Stillman*, 343 F.3d at 1317).

In the present case, we find the South Carolina version of the revocation-upon-divorce statute, section 62-2-507, applies and revokes William's designation of Bursed as the beneficiary of the Policy, despite the fact that their divorce occurred before the enactment of the amendment to the statute. Based on our reading of the South Carolina statute, which is supported by other states' reading of their versions of the statute, because William's death occurred after the date the amendment took

effect, the statute applies and revokes the designation. Further, Burnsed had no vested interest in the policy until such time as William died. *See Davis*, 249 S.C. at 199, 153 S.E.2d at 401 (recognizing that during the lifetime of an insured, a named beneficiary has no vested right in a life insurance contract, but merely an expectancy, when the insured reserves the right to change the beneficiary in the policy). Accordingly, section 62-2-507 applies here to revoke William's designation of Burnsed as beneficiary to his life insurance policy. Therefore, the circuit court's grant of summary judgment to Burnsed is

REVERSED.

WILLIAMS, C.J., and VINSON, J., concur.