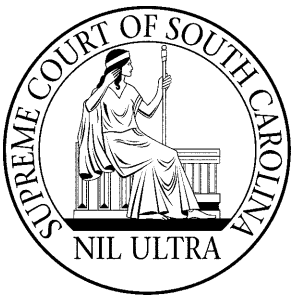


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 42**
**November 28, 2011**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

## CONTENTS

## THE SUPREME COURT OF SOUTH CAROLINA

## PUBLISHED OPINIONS AND ORDERS



## UNPUBLISHED OPINIONS



## PETITIONS – UNITED STATES SUPREME COURT



## PETITIONS FOR REHEARING

# The South Carolina Court of Appeals

## PUBLISHED OPINIONS



## UNPUBLISHED OPINIONS



## PETITIONS FOR REHEARING

| | |
|---|---|
| 4862-5 Star v. Ford Motor Company | Pending |
| 4864-Singleton v. Kayla R. | Pending |
| 4875-Powell v. Bank of America | Pending |
| 4876-Crosby v. Prysmian Comm. | Pending |
| 4880-Gordon v. Busbee | Pending |
| 4887-West v. Morehead | Pending |
| 4888-Pope v. Heritage Communities | Pending |
| 4891-SCDSS v. Carpenter | Pending |
| 4892-Sullivan v. Hawker Beech Craft | Pending |
| 4894-State v. A. Jackson | Denied 11/18/11 |
| 4895-King v. International Knife | Pending |
| 4897-Tant v. SCDC | Pending |
| 4902-Kimmer v. Wright | Pending |

| | |
|---|---|
| 2011-UP-397-Whitaker v. UPS Freight | Pending |
| 2011-UP-418-F. DeLeon v. State | Pending |
| 2011-UP-425-State v. V. Ravenel | Pending |
| 2011-UP-427-Port City v. City of Charleston | Denied 11/18/11 |
| 2011-UP-428-Murphy v. Bi-Lo, Inc. | Denied 11/18/11 |
| 2011-UP-432-Pittman v. Lowcountry | Denied 11/18/11 |
| 2011-UP-433-SCDSS v. Anderson-Cook | Pending |
| 2011-UP-436-In the matter of A. Chisolm | Denied 11/28/11 |
| 2011-UP-438-Carroll v. Johnson | Pending |
| 2011-UP-439-Deese v. Schmutz | Pending |
| 2011-UP-441-Babb v. Graham | Denied 11/28/11 |
| 2011-UP-445-McMasters v. Charpia | Denied 11/18/11 |
| 2011-UP-455-State v. J. Walker | Pending |
| 2011-UP-461-State v. Eddie Evans | Denied 11/18/11 |
| 2011-UP-462-Bartley v. Ford Motor Co. | Denied 11/18/11 |
| 2011-UP-463-State v. Rebekah Rogers | Denied 11/18/11 |
| 2011-UP-468-Johnson v. BMW Manuf. | Pending |
| 2011-UP-471-State v. T. McCoy | Pending |
| 2011-UP-475-State v. J. Austin | Pending |
| 2011-UP-480-James, R. v. State | Pending |
| 2011-UP-481-State v. Norris Smith | Denied 11/18/11 |

2011-UP-483-Deans v. SCDC Pending

2011-UP-484-Plough v. SCDC Pending

2011-UP-491-Atkins v. G., K. & SCDSS Pending

2011-UP-495-State v. A. Rivers Pending

2011-UP-496-State v. Coaxum Pending

2011-UP-503-State v. W. Welch Pending

**PETITIONS-SOUTH CAROLINA SUPREME COURT**

4526-State v. B. Cope Pending

4529-State v. J. Tapp Pending

4592-Weston v. Kim's Dollar Store Pending

4605-Auto-Owners v. Rhodes Pending

4609-State v. Holland Pending

4616-Too Tacky v. SCDHEC Pending

4617-Poch v. Bayshore Pending

4633-State v. G. Cooper Pending

4635-State v. C. Liverman Pending

4637-Shirley's Iron Works v. City of Union Pending

4659-Nationwide Mut. V. Rhoden Pending

4670-SCDC v. B. Cartrette Pending

4675-Middleton v. Eubank Pending

4680-State v. L. Garner Pending

4685-Wachovia Bank v. Coffey, A Pending

| | |
|---|---|
| 4687-State v. Taylor, S. | Pending |
| 4688-State v. Carmack | Pending |
| 4691-State v. C. Brown | Pending |
| 4697-State v. D. Cortez | Pending |
| 4698-State v. M. Baker | Pending |
| 4699-Manios v. Nelson Mullins | Pending |
| 4700-Wallace v. Day | Pending |
| 4705-Hudson v. Lancaster Convalescent | Pending |
| 4706-Pitts v. Fink | Pending |
| 4711-Jennings v. Jennings | Pending |
| 4716-Johnson v. Horry County | Pending |
| 4725-Ashenfelder v. City of Georgetown | Pending |
| 4732-Fletcher v. MUSC | Pending |
| 4737-Hutson v. SC Ports Authority | Pending |
| 4742-State v. Theodore Wills | Pending |
| 4746-Crisp v. SouthCo | Pending |
| 4747-State v. A. Gibson | Pending |
| 4750-Cullen v. McNeal | Pending |
| 4752-Farmer v. Florence Cty. | Pending |
| 4753-Ware v. Ware | Pending |
| 4756-Neeltec Enterprises v. Long | Pending |

| | |
|---|---|
| 4760-State v. Geer | Pending |
| 4761-Coake v. Burt | Pending |
| 4763-Jenkins v. Few | Pending |
| 4764-Walterboro Hospital v. Meacher | Pending |
| 4765-State v. D. Burgess | Pending |
| 4766-State v. T. Bryant | Pending |
| 4769-In the interest of Tracy B. | Pending |
| 4770-Pridgen v. Ward | Pending |
| 4779-AJG Holdings v. Dunn | Pending |
| 4781-Banks v. St. Matthews Baptist Church | Pending |
| 4785-State v. W. Smith | Pending |
| 4787-State v. K. Provet | Pending |
| 4789-Harris v. USC | Pending |
| 4790-Holly Woods Assoc. v. Hiller | Pending |
| 4792-Curtis v. Blake | Pending |
| 4794-Beaufort School v. United National Ins. | Pending |
| 4798-State v. Orozco | Pending |
| 4799-Trask v. Beaufort County | Pending |
| 4805-Limehouse v. Hulsey | Pending |
| 4800-State v. Wallace | Pending |
| 4808-Biggins v. Burdette | Pending |
| 4810-Menezes v. WL Ross & Co. | Pending |

| | |
|---|---|
| 4815-Sun Trust v. Bryant | Pending |
| 4820-Hutchinson v. Liberty Life | Pending |
| 4823-State v. L. Burgess | Pending |
| 4824-Lawson v. Hanson Brick | Pending |
| 4826-C-Sculptures, LLC v. G. Brown | Pending |
| 4828-Burke v. Anmed Health | Pending |
| 4830-State v. J. Miller | Pending |
| 4831-Matsell v. Crowfield Plantation | Pending |
| 4832-Crystal Pines v. Phillips | Pending |
| 4833-State v. L. Phillips | Pending |
| 4842-Grady v. Rider (Estate of Rider) | Pending |
| 4847-Smith v. Regional Medical Center | Pending |
| 4851-Davis v. KB Home of S.C. | Pending |
| 4857-Stevens Aviation v. DynCorp Intern. | Pending |
| 4859-State v. Garris | Pending |
| 4863-White Oak v. Lexington Insurance | Pending |
| 4877-McComb v. Conard | Pending |
| 4879-Wise v. Wise | Pending |
| 4889-Team IA v. Lucas | Pending |
| 2010-UP-090-F. Freeman v. SCDC (4) | Pending |
| 2010-UP-141-State v. M. Hudson | Pending |

| | |
|---|---|
| 2010-UP-196-Black v. Black | Pending |
| 2010-UP-232-Alltel Communications v. SCDOR | Pending |
| 2010-UP-287-Kelly, Kathleen v. Rachels, James | Pending |
| 2010-UP-308-State v. W. Jenkins | Pending |
| 2010-UP-331-State v. Rocquemore | Pending |
| 2010-UP-339-Goins v. State | Pending |
| 2010-UP-352-State v. D. McKown | Pending |
| 2010-UP-355-Nash v. Tara Plantation | Pending |
| 2010-UP-356-State v. Robinson | Pending |
| 2010-UP-369-Island Preservation v. The State & DNR | Pending |
| 2010-UP-378-State v. Parker | Pending |
| 2010-UP-382-Sheep Island Plantation v. Bar-Pen | Pending |
| 2010-UP-406-State v. Larry Brent | Pending |
| 2010-UP-425-Cartee v. Countryman | Pending |
| 2010-UP-427-State v. S. Barnes | Pending |
| 2010-UP-437-State v. T. Johnson | Pending |
| 2010-UP-440-Bon Secours v. Barton Marlow | Pending |
| 2010-UP-437-State v. T. Johnson | Pending |
| 2010-UP-448-State v. Pearlie Mae Sherald | Pending |
| 2010-UP-449-Sherald v. City of Myrtle Beach | Pending |
| 2010-UP-461-In the interest of Kaleem S. | Pending |

| | |
|---|---|
| 2010-UP-464-State v. J. Evans | Pending |
| 2010-UP-494-State v. Nathaniel Noel Bradley | Pending |
| 2010-UP-504-Paul v. SCDOT | Pending |
| 2010-UP-507-Cue-McNeil v. Watt | Pending |
| 2010-UP-523-Amisub of SC v. SCDHEC | Pending |
| 2010-UP-525-Sparks v. Palmetto Hardwood | Pending |
| 2010-UP-547-In the interest of Joelle T. | Pending |
| 2010-UP-552-State v. E. Williams | Pending |
| 2011-UP-005-George v. Wendell | Pending |
| 2011-UP-006-State v. Gallman | Pending |
| 2011-UP-017-Dority v. Westvaco | Pending |
| 2011-UP-024-Michael Coffey v. Lisa Webb | Pending |
| 2011-UP-038-Dunson v. Alex Lee Inc. | Pending |
| 2011-UP-039-Chevrolet v. Azalea Motors | Pending |
| 2011-UP-041-State v. L. Brown | Pending |
| 2011-UP-052-Williamson v. Orangeburg | Pending |
| 2011-UP-059-State v. R. Campbell | Pending |
| 2011-UP-071-Walter Mtg. Co. v. Green | Pending |
| 2011-UP-076-Johnson v. Town of Iva | Pending |
| 2011-UP-084-Greenwood Beach v. Charleston | Pending |
| 2011-UP-091-State v. R. Watkins | Pending |

| | |
|---|---|
| 2011-UP-095-State v. E. Gamble | Pending |
| 2011-UP-108-Dippel v. Horry County | Pending |
| 2011-UP-109-Dippel v. Fowler | Pending |
| 2011-UP-110-S. Jackson v. F. Jackson | Pending |
| 2011-UP-112-Myles v. Main-Waters Enter. | Pending |
| 2011-UP-115-State v. B. Johnson | Pending |
| 2011-UP-121-In the matter of Simmons | Pending |
| 2011-UP-125-Groce v. Horry County | Pending |
| 2011-UP-127-State v. B. Butler | Pending |
| 2011-UP-130-SCDMV v. Brown | Pending |
| 2011-UP-131-Burton v. Hardaway | Pending |
| 2011-UP-132-Cantrell v. Carolinas Recycling | Pending |
| 2011-UP-136-SC Farm Bureau v. Jenkins | Pending |
| 2011-UP-137-State v. I. Romero | Pending |
| 2011-UP-138-State v. R. Rivera | Pending |
| 2011-UP-140-State v. P. Avery | Pending |
| 2011-UP-145-State v. S. Grier | Pending |
| 2011-UP-147-State v. B. Evans | Pending |
| 2011-UP-148-Mullen v. Beaufort County School | Pending |
| 2011-UP-152-Ritter v. Hurst | Pending |
| 2011-UP-161-State v. Hercheck | Pending |

| | |
|---|---|
| 2011-UP-162-Bolds v. UTI Integrated | Pending |
| 2011-UP-173-Fisher v. Huckabee | Pending |
| 2011-UP-174-Doering v. Woodman | Pending |
| 2011-UP-175-Carter v. Standard Fire Ins. | Pending |
| 2011-UP-185-State v. D. Brown | Pending |
| 2011-UP-199-Davidson v. City of Beaufort | Pending |
| 2011-UP-205-State v. D. Sams | Pending |
| 2011-UP-208-State v. L. Bennett | Pending |
| 2011-UP-218-Squires v. SLED | Pending |
| 2011-UP-225-SunTrust v. Smith | Pending |
| 2011-UP-229-Zepeda-Cepeda v. Priority | Pending |
| 2011-UP-242-Bell v. Progressive Direct | Pending |
| 2011-UP-263-State v. P. Sawyer | Pending |
| 2011-UP-264-Hauge v. Curran | Pending |
| 2011-UP-268-In the matter of Vincent Way | Pending |
| 2011-UP-285-State v. Burdine | Pending |
| 2011-UP-291-Woodson v. DLI Prop. | Pending |
| 2011-UP-304-State v. B. Winchester | Pending |
| 2011-UP-305-Southcoast Community Bank v. Low-Country | Pending |
| 2011-UP-328-Davison v. Scaffe | Pending |
| 2011-UP-333-State v. W. Henry | Pending |

| | |
|---|---|
| 2011-UP-334-LaSalle Bank v. Toney | Pending |
| 2011-UP-346-Batson v. Northside Traders | Pending |
| 2011-UP-359-Price v. Investors Title Ins. | Pending |
| 2011-UP-363-State v. L. Wright | Pending |
| 2011-UP-372-Underground Boring v. P. Mining | Pending |
| 2011-UP-380-EAGLE v. SCDHEC and MRR | Pending |
| 2011-UP-383-Belk v. Weinberg | Pending |
| 2011-UP-389-SCDSS v. S. Ozorowsky | Pending |
| 2011-UP-398-Peek v. SCE&G | Pending |

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Beaufort County, Scott Marshall, individually and as Director of the Beaufort County Board of Elections and Registration, Chester County, James E. Moore, Sr., individually and as Director of the Registration and Election Commission of Chester County, Greenville County, Joseph Conway Belangia, Jr., individually and as Director of the Greenville County Election Commission and Greenville County Board of Registration, Spartanburg County, Henry M. Laye, III, individually and as Director of Spartanburg County Election Commission, Petitioners,

v.

South Carolina State Election Commission, Marci Andino, as Executive Director of the South Carolina State Election Commission and as a representative of the South Carolina State Election Commission, South Carolina Republican Party, Chad Connelly, as Chairman of the Executive Committee of the

South Carolina Republican Party and as a representative of the South Carolina Republican Party, the South Carolina Democratic Party, and Richard A. Harpootlian, as Chair of the Executive Committee of the South Carolina Democratic Party and as a representative of the South Carolina Democratic Party, Respondents.

Glenn F. McConnell, in his capacity as President Pro Tempore of the South Carolina Senate, and Robert W. Harrell, Jr., in his capacity as Speaker of the South Carolina House of Representatives, Respondents-Intervenors.

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**JUDGMENT FOR RESPONDENTS**

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Opinion No. 27069
Heard November 14, 2011 – Filed November 22, 2011

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Joel W. Collins, Jr., Christian Stegmaier, and James L. Floyd, III, all of Collins & Lacy, of Columbia, for Petitioners.

Attorney General Alan Wilson, Deputy Attorney General Robert D. Cook, Assistant Deputy Attorney General J. Emory Smith, and Assistant Attorney General J.C. Nicholson, III, of Columbia, for

Respondents South Carolina State Election Commission, Marci Andino, as Executive Director of the South Carolina State Election Commission and as a representative of the South Carolina State Election Commission; Kevin A. Hall, Karl S. Bowers, Jr., and M. Todd Carroll, all of Hall & Bowers, of Columbia, for Respondents South Carolina Republican Party, Chad Connelly, as Chairman of the Executive Committee of the South Carolina Republican Party and as a representative of the South Carolina Republican Party; John T. Lay, Jr., of Gallivan, White & Boyd, wof Columbia, for Respondents the South Carolina Democratic Party, and Richard A. Harpootlian, as Chair of the Executive Committee of the South Carolina Democratic Party and as a representative of the South Carolina Democratic Party; Michael R. Hitchcock and John P. Hazzard, V, for Respondent-Intervenor Glenn F. McConnell, in his capacity as President Pro Tempore of the South Carolina Senate; and Bradley S. Wright, and Charles F. Reid, of Columbia, for Respondent-Intervenor Robert W. Harrell, Jr., in his capacity as Speaker of the South Carolina House of Representatives.

Robert E. Lyon, Jr., M. Clifton Scott, and John K. DeLoache, of Columbia, for Amicus Curiae South Carolina Association of Counties.

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**CHIEF JUSTICE TOAL:** Petitioners seek a declaration from this Court in its original jurisdiction that the General Assembly has neither authorized the State Election Commission or the County Election Commissions to conduct a Presidential Preference Primary in 2012, nor mandated that petitioners bear the financial burden of conducting the primary. Because we are firmly persuaded that the General Assembly, through passage of Provisos 79.6 and 79.12 for fiscal year 2011-2012, intended to suspend the temporal limitation in S.C. Code Ann. § 17-11-20(B)(2) (Supp. 2010), we enter judgment for respondents.

## FACTS

The South Carolina Republican Party has scheduled a Presidential Preference Primary for January 21, 2012. In the 2011-2012 Appropriations Act, the General Assembly provided that filing fees received from candidates to run in primary elections may be used by the State Election Commission to conduct the 2012 Presidential Preference Primary elections. Act No. 73, 2011 S.C. Acts § 79.6. In addition, the State Election Commission is authorized to use funds originally appropriated for ballot security to conduct the Presidential Preference Primary elections and the statewide primaries and runoffs. Act No. 73, 2011 S.C. Acts § 79.12.

Petitioners contend the General Assembly has not authorized the State Election Commission or the County Election Commissions to conduct a Presidential Preference Primary in 2012 or any election cycle thereafter. In addition, petitioners argue the amount set forth in the Appropriations Act will be insufficient to cover the actual costs to the counties of conducting the 2012 primary.

## QUESTIONS PRESENTED

I. Are the State Election Commission and the County Election Commissions authorized and required to conduct a 2012 Presidential Preference Primary?

II. Has the General Assembly appropriated sufficient funds for the State Election Commission and the County Election Commissions to conduct a 2012 Presidential Preference Primary?

## ANALYSIS

### I. Authorization and Requirement to Conduct Presidential Preference Primary

South Carolina Code Ann. § 17-11-20(B)(2) provides, in part:

> ***For the 2008 election cycle***, if the state committee of a certified political party which received at least five percent of the popular vote in South Carolina for the party's candidate for President of the United States decides to hold a presidential preference primary election, the State Election Commission ***must conduct*** the presidential preference primary in accordance with the provisions of this title and party rules provided that a registered elector may cast a ballot in only one presidential preference primary. However, notwithstanding any other provision of this title, (a) the State Election Commission and the authorities responsible for conducting the elections in each county shall provide for cost-effective measures in conducting the presidential preference primaries including, but not limited to, combining polling places, while ensuring that voters have adequate notice and access to the polling places; and (b) the state committee of the party shall set the date and the filing requirements, including a certification fee. . . . Political parties may charge a certification fee to persons seeking to be candidates in the presidential preference primary for the political party. A filing fee not to exceed twenty thousand dollars, as determined by the State Election Commission, for each candidate certified by a political party must be transmitted by the respective political party to the State Election Commission and must be used for conducting the presidential preference primaries.

(emphasis added). Section 7-11-20(B)(4) states, "Nothing in this section prevents a political party from conducting a presidential preference primary ***for the 2008 election cycle*** pursuant to the provisions of Section 7-11-25." (emphasis added).[1]

[1] Section 7-11-25 provides, "Except for the provisions of Section 7-11-20 related to presidential preference primaries, nothing in this chapter nor any other provision of law may be construed as either requiring or prohibiting a political party in this State from conducting advisory primaries according to the party's own rules and at the party's expense."

Although Petitioners admit these provisions authorized the State Election Commission and the County Election Commissions to conduct the 2008 Presidential Preference Primaries, they argue these provisions applied only to the 2008 primaries and not to any subsequent primaries. Accordingly, petitioners contend the State Election Commission and the County Election Commissions have no authority to conduct the 2012 Presidential Preference Primary or any future Presidential Preference Primaries. Petitioners argue the statute should be construed to create a limited exception, solely for the 2008 election cycle, to the traditional practice of political parties conducting their own Presidential Preference Primaries.

We would agree with Petitioners if § 17-11-20(B)(2) were the only expression of legislative intent before us. But, as discussed below, we must consider the operative budget provisos for the current fiscal year, as well as our precedent that speaks to the relationship of a legislative proviso juxtaposed to a permanent statute.

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). This Court has held that a statute shall not be construed by concentrating on an isolated phrase. *Laurens County Sch. Dists.* 55 & 56 *v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent."); *see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v.*

*Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Moreover, it is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

Section 7-11-20(B)(2) is included in the permanent laws of this state. Following the limitation to the 2008 election cycle, § 7-11-20(B)(2) speaks more broadly to a general application, where it states in part, "[h]owever, notwithstanding any other provision of this *title* . . . ." (emphasis added). The statute must be construed in light of the entirety of Chapter 11 of Title 7. Although the body of § 7-11-20(B)(2) refers to the 2008 election cycle, the title of the act does not indicate that the General Assembly intended to limit the provisions to 2008. Instead, the title states the act is:

> AN ACT TO AMEND SECTIONS 7-11-20 AND 7-13-15, BOTH AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PARTY CONVENTIONS AND PARTY PRIMARY ELECTIONS CONDUCTED BY THE STATE ELECTION COMMISSION AND COUNTY ELECTION COMMISSIONS, SO AS TO PROVIDE THAT THE STATE ELECTION COMMISSION CONDUCT PRESIDENTIAL PREFERENCE PRIMARIES, THAT THE STATE COMMITTEE OF THE PARTY SET THE DATE, FILING REQUIREMENTS AND CERTIFICATION FEE FOR THE PRESIDENTIAL PREFERENCE PRIMARIES, TO PROVIDE A PROCEDURE FOR VERIFICATION OF THE QUALIFICATION OF CANDIDATES, TO CLARIFY CERTAIN EXISTING PROVISIONS CONCERNING PRIMARIES, AND TO SPECIFY WHICH PRIMARIES MUST BE CONDUCTED BY THE STATE ELECTION COMMISSION AND COUNTY ELECTION COMMISSION; TO DESIGNATE SECTION 14 OF ACT 253 OF 1992 AS SECTION 7-11-25, RELATING TO POLITICAL PARTIES NOT PROHIBITED FROM CONDUCTING PRESIDENTIAL

PREFERENCE OR ADVISORY PRIMARIES, SO AS TO DELETE THE REFERENCES TO PRESIDENTIAL PREFERENCE PRIMARIES; AND BY ADDING SECTION 7-9-110 SO AS TO AUTHORIZE A POLITICAL PARTY OR STATE ELECTION COMMISSION TO CONDUCT A PRIMARY OR ELECTION, WITHOUT CHARGE, IN A FACILITY THAT RECEIVES STATE FUNDS FOR SUPPORT OR OPERATION.

A recent opinion of the Attorney General states the statute is a permanent statute and is not limited to the 2008 Presidential Preference Primary. 2011 Op. Att'y Gen. dated June 27, 2011, 2011 WL 2648710. The opinion refers to the fact that the title does not contain the 2008 limitation[2] as well as the fact that the statute was codified at the direction of the General Assembly in the permanent laws of the State rather than as a local or temporary law. *Id.* We agree with the Attorney General insofar as he recognizes the statute was codified by the General Assembly as a permanent statute and the title contains no temporal limitation. However, absent the current provisos, the temporal limitation in § 7-11-20(B) would be respected. This brings us to discerning legislative intent and the effect of Provisos 79.6 and 79.12.

We reject any suggestion that the entirety of § 7-11-20(B) is meaningless when viewed through the lens of the current budget provisos. As noted, § 7-11-20(B) is a permanent statute. We hold the provisos of the 2011-2012 Appropriations Act allowing the State Election Commission to use funds toward a Presidential Preference Primary suspend the temporal limitation of § 7-11-20(B) and authorize the State Election Commission and the County Election Commissions to conduct a Presidential Preferential Primary in 2012.

Proviso 79.6 provides:

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[2] This Court may, of course, consider the title or caption of an act in determining the intent of the Legislature. *Joytime Distrib. & Amusement Co., Inc. v. State,* 338 S.C. 634, 528 S.E.2d 647 (1999).

> Filing fees received from candidates filing to run in statewide or special primary elections may be retained and expended by the State Election Commission to pay for the conduct of primary elections. Any balance in the filing fee accounts on June thirtieth, [sic] of the prior fiscal year may be carried forward and expended for the same purposes during the current fiscal year. In addition, any balance in the Primary and General Election Accounts on June thirtieth, [sic] of the prior fiscal year may be carried forward and expended for the same purposes during the current fiscal year. In addition, the aforementioned funds may also be utilized ***to conduct the 2012 Presidential Preference Primary elections***.

(emphasis added). Proviso 79.12 provides, "The State Election Commission is authorized to carry forward and ***use funds*** originally appropriated for Ballot Security ***to conduct*** the 2012 Presidential Preference Primary elections and the 2012 Statewide Primaries/Runoff." (emphasis added).

As a permanent statute, the portions of § 7-11-20(B)(2) which do not conflict with the 2011-2012 Appropriations Act remain viable. Only the terms of that section which conflict with the current budget are suspended. *State ex rel. McLeod v. Mills*, 256 S.C. 21, 26, 180 S.E.2d 638, 640 (1971) (finding only the provisions of the permanent statute that conflicted with the budget provisos were suspended during the fiscal year). We must reject petitioners' invitation to view the statute and budget provisos in isolation, a position which violates our rules of statutory construction. We must not only seek to discern legislative intent from all lawful enactments of the General Assembly - the statutory scheme *and* budget provisos - but we must also respect our settled law that suspends a conflicting permanent statutory provision while a proviso is in effect. *Id.* Accordingly, only the language limiting that section to the 2008 election cycle must be stricken as that is the only provision of the statute in conflict with the current budget provisos.

Moreover, we cannot ignore the final provision of the 2011-2012 Appropriations Act in which the General Assembly stated, "All acts or parts of acts inconsistent with any of the provisions of Parts IA or IB of this act are suspended for Fiscal Year 2011-2012." By passing the relevant budget provisos, the General Assembly, thus, has expressly provided that the temporal limitation in § 17-11-20(B)(2) must be suspended during the current fiscal year. *See McLeod*, 256 S.C. at 26, 180 S.E.2d at 640 ("There is no doubt that the legislature has the power, where there is no constitutional prohibition, to suspend the operation of a statute. When such intention is clearly manifest this court has no choice but to give force and effect thereto.").

As additional evidence of legislative intent, it is instructive to note that the Governor vetoed provisos 79.6 and 79.12. In her veto message, the Governor wrote:

> Prior to 2008, the taxpayers of South Carolina had never funded the First in the South Presidential Primary – instead, the political parties did. As I have made clear throughout the budget process, I believe private dollars are the appropriate way to fund a partisan Presidential Primary. The Attorney General of South Carolina has recognized that the State GOP can contract with the State Election Commission to run the primary. The United States Department of Justice has cleared an election conducted by the Election Commission and funded by a political party. The bottom line is this: South Carolina will host the First in the South Presidential Primary in 2012 and will be as successful as it always has been, but it should not fall on the taxpayers to cover the expense. For these reasons, we are vetoing these provisos.

Governor's Message to the Members of the General Assembly Transmitting Line-Item Vetoes of Portions of the 2011-2012 General Appropriations Act (June 28, 2011).

The Governor clearly understood the intent of the General Assembly to adhere to the 2008 public funding approach in fiscal year 2011-2012 and sought to oppose it.[3] The General Assembly, in turn, clearly understood the import and consequences of overriding the Governor's veto - the effect of the budget provisos was to suspend the temporal limitation in § 17-11-20(B)(2). A contrary construction of legislative intent would mean the Governor and the General Assembly were not aware what was intended by the provisos, a result which would border on frivolity.

Accordingly, we hold that provisos 79.6 and 79.12 suspend the temporal limitation in § 7-11-20(B)(2) and authorize the State Election Commission and the County Election Commissions to conduct Presidential Preference Primaries in 2012.[4] If they were not so construed, the provisos

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[3] Whether the expense of a Presidential Preference Primary should be borne by the political parties or the taxpayers is a policy decision, one that lies exclusively in the General Assembly.

[4] The dissent accepts petitioners' argument that the budget provisos are merely permissive, allowing the State Commission to participate in the primaries should it choose to do so. We respectfully disagree. Ostensibly, the words "may" and "authorize" appear permissive, but such terms are commonly invoked in the context of budget provisos. The General Assembly, for example, routinely uses the word "may" in budget provisos in connection with an agency's ability to utilize a designated funding source. In the 2011-2012 Appropriations Act, the General Assembly used the word "may" in multiple budget provisos in addition to the ones in section 79. *See* Act No. 73, 2011 S.C. Acts §§ 1.7 (Governor's School for Science & Math); 1.13 (School Lunch Program Aid); 4.1 (School for the Deaf and the Blind); 22.36 (Department of Health & Environmental Control); 26.4 (Department of Social Services); 28.1 (Department of Archives & History); 38.1 (Sea Grant Consortium); 39.13 (Department of Parks & Recreation); 46.4 (Prosecution Coordination Commission); 65.1 (Department of Labor, Licensing & Regulation); 66.4 (Department of Motor Vehicles); 74.1 (Secretary of State). The General Assembly's approach to budget provisos for fiscal year 2011-2012, with its common usage of the term "may," was no different than its approach in prior years. Simply stated, the word "may" should not be viewed out of the budget proviso context in which it appears. An agency's authority to utilize a particular funding source does not transform the underlying legislation from a mandatory one to a permissive one.

Because we are tasked with ascertaining legislative intent, we further point to the fact that the House of Representatives rejected a proposed amendment to the provisos, which would have stricken the State Election Commission's and the County Election Commissions' duty to conduct

would authorize the State Election Commission to carry over certain funds to perform an unauthorized act, which would be an absurd result. *See Lancaster County Bar Ass'n v. S.C. Comm'n on Indigent Defense,* 380 S.C. 219, 670 S.E.2d 371 (2008) (holding that, in construing a statute, this Court will reject an interpretation which leads to an absurd result which could not have been intended by the General Assembly); *Gordon v. Phillips Util., Inc.,* 362 S.C. 403, 608 S.E.2d 425 (2005) (noting it is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing); *Denene, Inc. v. City of Charleston,* 352 S.C. 208, 574 S.E.2d 196 (2002) (finding that this Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something).

## II. Sufficiency of Funds Appropriated for Presidential Preference Primary

Petitioners' argument that the funds appropriated for conducting a 2012 Presidential Preference Primary are insufficient presents a nonjusticiable political question. Accordingly, we decline to address that argument. *Segars-Andrews v. Judicial Merit Selection Comm'n.,* 387 S.C. 109, 691 S.E.2d 453 (2010); *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n,* 369 S.C. 139, 632 S.E.2d 277 (2006); *see also State ex rel. Condon*

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the Presidential Preference Primaries. A statement by Representative Quinn and others was included in the House Journal:

> While I support the idea of raising private funds to save tax dollars, I voted to table [the proposed amendment] for two major reasons. First, conducting elections is a core function of government. And no election is more important than the Presidency of the United States. Second, recent federal court cases and justice department decisions will potentially make a purely privately paid for election infeasible.

2011 House Journal March 15, 2011, p.97 (statement of Rep. Richard Quinn, et al., regarding Amendment No. 71).

*v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002); *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992) (holding the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481 (1935) (noting the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation).

## CONCLUSION

Having held the General Assembly has authorized and directed that Presidential Preference Primaries be conducted in South Carolina in 2012 by the State Election Commission and the County Election Commissions, we declare that such Presidential Preference Primaries shall be conducted in accordance with the provisions of S.C. Code Ann. § 17-11-20(B)(2) (Supp. 2010) and Provisos 79.6 and 79.12 of Part II of the 2011-2012 General Appropriations Act, Act. No. 73, 2011 S.C. Acts §§79.6 and 79.12.

At the present time, the practical effect of this declaratory judgment is as follows: For the 2012 election cycle, the state committee of the Republican Party of South Carolina, a certified political party which received at least five percent of the popular vote in South Carolina for its presidential candidate in the 2008 General Election, has decided to hold a Republican Presidential Preference Primary Election on January 21, 2012. The State Election Commission and the County Election Commissions for each of the 46 counties must conduct this Presidential Preference Primary.

The only other political party in South Carolina which is eligible to conduct a Presidential Preference Primary is the South Carolina Democratic Party. Thus far, it has not decided to conduct such a primary. If it decides to do so, the State Election Commission and the County Election Commissions will also be required to conduct such a primary pursuant to the above set forth provisions of state law.

Finally, it has been brought to the attention of the Court that the State Election Commission's website (www.scvotes.org) advises that the proposed

ballot for the January 21, 2012, South Carolina Republican Presidential Preference Primary will include candidates as follows: Michele Bachmann, Herman Cain, Newt Gingrich, Jon Huntsman, Gary Johnson, Ron Paul, Rick Perry, Mitt Romney, and Rick Santorum, and will also include four (4) nonbinding advisory questions. Nothing in the statutes upon which this declaratory judgment is rendered and no provision of South Carolina law would allow the ballot for a publically funded Presidential Preference Primary to include anything other than the names of candidates for a qualifying political party's nominee for President of the United States. Accordingly, the State Election Commission and the County Election Commissions are hereby directed that they may not print such ballots or conduct such primaries for any matter other than the nomination of party candidates for President of the United States. No advisory questions may be included on any such primary ballots. Additionally, no other advisory elections, straw polls, or the like on any question may be conducted at the various Presidential Preference Primary polling places or within 200 feet of the entrance to such polling places.

**JUDGMENT FOR RESPONDENTS.**

**PLEICONES and KITTREDGE, JJ., concur. HEARN, J., dissenting in a separate opinion in which BEATTY, J., concurs.**

**JUSTICE HEARN:** Respectfully, I concur in part and dissent in part. While I agree with the majority that the plain language of Section 7-11-20(B)(2) of the South Carolina Code (Supp. 2010) is limited only to the 2008 election cycle, I believe the majority misapplies our precedents concerning appropriations provisos and erroneously concludes Provisos 79.6 and 79.12 suspend this temporal limitation. I would therefore find no requirement that either the State Election Commission or the county election commissions conduct the 2012 Presidential Preference Primary.

I note at the outset that this case involves a non-binding presidential preference primary, rather than general elections and regular primaries which are unquestionably core functions of our State government. Hence, presidential preference primaries are excepted from the general statutes mandating the State and county commissions conduct primaries. *See* S.C. Code Ann. § 7-13-15(A)(2), (B)(1) (Supp. 2010). I therefore begin with the premise that the State Commission and county commissions have no involvement in these preference primaries absent specific statutory authority.[5]

It has long been the law in this State that an appropriation act "has equal force and effect as a permanent statute" and can suspend the operation of a general law while it is in effect. *Plowden v. Beattie*, 185 S.C. 229, 236, 193 S.E. 651, 654 (1937). However, there must be an "irreconcilable conflict" between the appropriation and the general law before the latter is temporarily suspended. *Id*. We must therefore attempt to harmonize the statute and the budget proviso, for "'[i]f, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the

[5] This is not to suggest that preference primaries are not elections. They are elections and accordingly are subject to state and federal laws concerning the electoral process. Nevertheless, they are subject to a different set of statutory procedures under our Code than regular primaries.

case may be.'" *State ex rel. McLeod v. Mills*, 256 S.C. 21, 26, 180 S.E.2d 638, 641 (1971) (quoting *State ex rel. Buchanan v. Jennings*, 68 S.C. 411, 415, 47 S.E. 683, 684 (1904)). Furthermore, "[i]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

A review of the cases from our jurisprudence where a proviso has suspended a general law all involve precise and direct conflicts that are incapable of being harmonized. In *Buchanan*, the General Assembly passed an act setting the salary of a circuit judge at $3,000 per year. 68 S.C. at 412, 47 S.E. at 683. The next day, the General Assembly approved an appropriation which set a judge's salary at $3,500 per year. *Id.* As there was no possible way to harmonize this conflict, this Court held the appropriation suspended the statute. *Id.* at 415, 47 S.E. at 684. Similarly, in *Brooks v. Jones*, 80 S.C. 443, 61 S.E. 946 (1908), the General Assembly set the annual salary of the clerk of the Supreme Court at $800 by statute, but later passed an appropriation setting his salary at $1,000 per year. *Id.* at 448-49, 61 S.E. at 947 (Jones, J., concurring in part and dissenting in part). Once again, the Court held the appropriations bill could not be reconciled and suspended the operation of the statute. *Id.* at 449, 61 S.E. at 947.[6] The issue in *Plowden* was identical, with an appropriations bill changing (this time lowering) the salary for the Auditor of Clarendon County. 185 S.C. at 234, 193 S.E. at 653-54. After citing *Brooks*, *id.* at 236-37, 193 S.E. at 654-55, the Court held the appropriation act prevailed, *id.* at 241-42, 193 S.E. at 657. Finally, *McLeod* cited *Buchanan*, *Brooks*, and *Plowden* to hold that an appropriation's reduction of a salary set by statute controlled as long as the appropriation was in effect. 256 S.C. at 26-28, 180 S.E.2d at 640-42. Thus, in order for the

[6] Chief Justice Pope and Acting Justice Gary simply adopted the order of the circuit court, which is not included in the Reporter. *Brooks*, 80 S.C. at 448, 61 S.E. at 947. Justice Jones, joined by Justice Woods, agreed that the appropriation could suspend the general law, and his vote made this the holding of the Court. *See id.* at 449, 61 S.E. at 947. (Jones, J., concurring in part and dissenting in part). His only disagreement was whether the appropriation could operate retroactively. *Id.* at 450, 61 S.E. at 947.

majority's position to be correct, the provisos must be completely at odds with the general law.

As a threshold matter, I note that the majority and the parties themselves mistakenly identify the source of the perceived conflict with the provisos as being section 7-11-20(B)(2). As the majority correctly holds, that section by its very terms does not operate past the 2008 election cycle. Thus, the current budget provisos cannot conflict with the language "[f]or the 2008 election cycle"—or indeed any language in section 7-11-20(B)(2)—because it is not in effect for the 2011-2012 fiscal year. In other words, the notion that the provisos can suspend the temporal limitation in section 7-11-20(B)(2) is spurious because it is impossible to suspend something that is no longer in effect, as a prerequisite to finding a conflict is the existence of something to conflict with. Any conflict therefore must be between the provisos and the law as it currently stands, which is that the political parties themselves are responsible for the primaries.[7] *See* S.C. Code Ann. § 7-11-20(B)(1) (Supp. 2010).

When the provisos are read together with the current law, I find no conflict. Proviso 79.6 states that filing fees from the political parties seeking to hold primaries "*may* also be utilized [by the State Commission] to conduct the 2012 Presidential Preference Primary elections." 2011 Act No. 73, Pt. 1B § 79.6 (emphasis added). Proviso 79.12 provides that the State Commission is "*authorized* to carry forward and use funds originally appropriated for

[7] As to the majority's contention that we must compare the provisos to section 7-11-20(B)(2) because the latter is part of the permanent laws of this State, I believe the Code Commissioner's designation as such is of no moment. This subsection, by its very terms, is specifically limited to the 2008 election cycle and therefore does not survive following that election as posited by the majority. Moreover, contrary to the majority's suggestion, I do not believe that section 7-11-20(B) is inapplicable in its entirety. Instead, the only portion no longer in effect is what is limited to 2008, namely the requirements contained in subsection (B)(2). The remainder of the statute remains in effect and grants the political parties full authority to conduct the primary.

Ballot Security to conduct the 2012 Presidential Preference Primary elections." *Id.* § 79.12 (emphasis added). Rather than infringing at all on the responsibility of the political parties to conduct and run their primaries, Provisos 79.6 and 79.12 merely grant the State Commission the authority to participate should it choose to do so. Because the provisos complement the current law, I would hold that each should be given full effect. Thus, the responsibility for conducting the 2012 Presidential Preference Primary falls on the political parties, only to be supplemented by the State Commission in its discretion. Moreover, there is nothing in the provisos which would require the county commissions, or the State Commission for that matter, to shoulder the economic burden of a presidential preference primary. It is clear to me that the provisos envisioned different roles for the State and county commissions in 2012 than in 2008, and they provide no basis for us to resurrect and breathe new life into section 7-11-20(B)(2).

It is true that the General Assembly often uses the words "may" and "authorize" in various appropriations, and I agree that the recipient of those funds can be mandated to use them for a particular purpose. But for that to be true, a mandate must already exist. If not, all provisos would be converted into express commands that the funds appropriated must be spent. The fallacy in this case of concluding these permissive provisos are part of a mandate that the State Commission conduct the upcoming primary is the assumption that there is already a valid and existing mandate. The majority recognizes that outside of the provisos, no such mandate exists for 2012. Because the plain language of the provisos is purely permissive, I accordingly decline to read any compulsory terms into them. Finding otherwise is directly contrary to the cases holding we follow the plain language of a statute and that a general law is suspended only to the extent there is an "irreconcilable conflict."[8]

[8] While the General Assembly did include language in the appropriations bill stating conflicting provisions in the general law are suspended, that is nothing more than a recognition of the general rule. Nothing in this portion of the bill speaks to section 7-11-20(B)(2). Thus, the General Assembly did not "expressly provide[] that the temporal limitation in section 7-11-20(B)(2) must be suspended during the current fiscal year" as the majority contends.

Not surprisingly, the majority fails to identify just what conflict requires the suspension of the temporal limitation. While an appropriations bill can certainly speak to other issues than salaries, I believe our prior cases are instructive because they illustrate just how irresoluble a conflict must be in order to suspend a general law. Commands to pay different salaries cannot be reconciled or harmonized, and therefore this Court correctly held in all of those cases that the salary provided for in the appropriations bill, be it higher or lower than that already provided by statute, controlled. No such conflict exists here. Had the provisos never been enacted, there would be no authority for either the State or county commissions to conduct the 2012 Presidential Preference Primary since the prior mandate imposed by section 7-11-20(B)(2) was limited to just "the 2008 election cycle." Consistent with years of prior practice and statutory authority, it is therefore the responsibility of the political parties to conduct the upcoming primary. Provisos 79.6 and 79.12, merely authorize the State Commission—and only the State Commission as they do not speak about the county commissions at all—to participate. These are readily harmonized, and I decline to read anything more into the provisos or out of the statute.

In support of its position, the majority turns to the statement of the Governor in her veto of the provisos and the General Assembly's override of that veto. However, the resolution of this important question turns solely on the impact of the provisos themselves, not on their veto by the Governor or the legislative override of that veto. Indeed, the fact that the majority must resort to such extrinsic aids is proof that the perceived conflict is not as self-evident as the majority suggests. In my view, holding that a subsequently enacted proviso supersedes a prior law is an extraordinary measure to be undertaken only when the conflict is clear on its face. I am also not persuaded that we should speculate as to what the override meant based on the limited record before us. *Cf. CFRE, LLC v. Greenville Cnty. Assessor*, Op. No. 27032 (S.C. Sup. Ct. filed Aug. 29, 2011) (Shearouse Adv. Sh. No. 29 at 28-29) (holding that where the failure of the General Assembly to enact

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Rather, the General Assembly merely provided generally that to the extent there is any conflict with the provisos, the provisos control.

certain legislation could work equally to the advantage of both parties, it is error to rely on it).

The majority also writes that absent a suspension, the State Commission could carry over funds to do something it is not authorized to do, which would be an absurd result. However, the provisos themselves are sufficient to confer upon the State Commission the ability to participate in the 2012 primary even if section 7-11-20(B)(2) is no longer in effect. Thus, there is no absurd result because it can carry over funds for an authorized act. However, whether it and the county commissions are *required* to do so is an entirely different question. Because the provisos neither mention the county commissions nor speak in mandatory terms, I believe it is error to insert these requirements into section 7-11-20. *See Berkebile v. Outen*, 311 S.C. 50, 55-56, 426 S.E.2d 760, 763 (1993) (stating it is "improvident to judicially engraft extra requirements into legislation which is clear on its face").

As a final matter, I note that the majority is permitting Respondents to accomplish judicially what they either could not or would not do legislatively, despite repeated attempts. In enacting section 7-11-20(B)(2), a bill was proposed that would have eliminated any references to the 2008 election cycle. S. 1279 117th Gen. Assem. (S.C. 2008). Another bill was introduced in 2011 that would have done the same. S. 794 119th Gen. Assem. (S.C. 2011). In rejecting these proposals, the General Assembly manifested its intent that mandatory involvement on the part of the State and county commissions was limited to 2008. *See Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 385 & n.13, 556 S.E.2d 357, 361 & n.13 (2001) (noting that the General Assembly's failure to enact two acts contemporaneous with the act in question is evidence that the provisions in the failed bills were not meant to be included). While the General Assembly very well could have required this again in 2012, either through another statutory amendment or the budget provisos, it did not do so.

In conclusion, I would hold that Provisos 79.6 and 79.12 merely grant the State Commission the authority to participate in the 2012 Presidential

Preference Primary. [9] However, I do not believe this grant of authority revives section 7-11-20(B)(2) because that provision was, by its terms, limited to the 2008 election cycle. Moreover, what the provisos *permit* the State Commission to do is not what the statute *required* the State and county commissions to do during the 2008 election cycle. While the counties should work with the political parties to ensure the smooth operation of the primary and access to polling places, I would hold that there is no statutory mandate that they conduct the primary at their own expense. Most assuredly, I would not place an even greater financial burden on the counties by permitting the inclusion of advisory questions on the primary ballot, and on that issue, I concur with the majority.

**BEATTY, J., concurs.**

[9] In light of my resolution of this question, I would not reach the issue of the sufficiency of the funds appropriated for the presidential preference primary. However, if I were to reach it, I would agree with the majority that it presents a nonjusticiable political question.

**IN THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Howard Hammer, Respondent.

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Opinion No. 27070
Heard November 2, 2011 – Filed November 28, 2011

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**DEFINITE SUSPENSION**

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

Thomas H. Pope, III, of Pope & Hudgens, PA, of Newberry, for respondent.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to any sanction ranging from an admonition to a definite suspension not to exceed six (6) months. Respondent requests any suspension be imposed retroactively to June 12, 2008, the date of his interim suspension. In the Matter of Hammer, 378 S.C. 413, 663 S.E.2d 37 (2008). In addition, respondent agrees to complete the Ethics School portion of the Legal Ethics and Practice Program within

one (1) year of the date of his reinstatement to the practice of law and, further, to any terms of psychological counseling the Court might deem appropriate.

We accept the Agreement and impose a six (6) month suspension from the practice of law. As explained hereafter, we decline to impose the suspension retroactively to the date of respondent's interim suspension. In addition, respondent shall complete the Ethics School portion of the Legal Ethics and Practice Program within one (1) year of the date of his reinstatement to the practice of law. Finally, respondent shall continue psychological counseling for two (2) years; his counselor shall file quarterly reports addressing his progress with the Commission on Lawyer Conduct (the Commission); and, an Investigative Panel of the Commission may extend the counseling requirement at the conclusion of the two (2) year period if it deems it necessary. The facts, as set forth in the Agreement and as admitted in argument, are as follows.

## FACTS

### Matter I

In 2005, respondent and his wife separated and, in 2007, became involved in a contentious divorce. Between July 2007 and February 2008, respondent was charged with criminal domestic violence, two counts of trespassing, second degree burglary, stalking, and simple assault. As a result of these arrests, respondent was placed on interim suspension. Id. The criminal charges involved matters with respondent's former wife and former sister-in-law.

All charges against respondent were later dismissed with prejudice and the solicitor issued a letter stating that, after thorough and complete investigation, he believed that the matters did not rise to the level of criminal wrongdoing and that all of the matters should be dealt with by the Family Court.

Respondent denies he committed any crimes as alleged by his former wife and former sister-in-law. However, he admits he could have used better judgment.

Matter II

In 2010, after the criminal charges were dismissed, respondent filed a pro se action against the City of Columbia alleging false arrest. In the course of representing himself in the matter, respondent subpoenaed Witness A, a former neighbor and long-time friend of both he and his former wife, to give a deposition. Witness A was not a witness to any of the matters out of which the criminal charges against respondent arose; however, Witness A had provided an affidavit in support of respondent's former wife during the divorce proceeding. Respondent also subpoenaed two other former neighbors who had supported his former wife during the divorce proceedings. Respondent admits he subpoenaed the three witnesses to take their depositions as he believed that they might have information regarding the allegations of criminal wrongdoings made by his former wife.[1] Respondent fails to explain why the testimony of any of these witnesses was pertinent to his suit against the City.

Over the course of two days, respondent deposed Witness A for over five hours, including breaks. Respondent admits he asked improper questions during the deposition. He further admits that there were times when he talked over the deponent and there were instances where he did not let Witness A finish his answer.

In addition, respondent admits he asked a number of improper questions of Witness A. In particular, he asked Witness A about his sexual orientation and whether he had been tested for HIV. He also asked Witness A whether he had Alzheimer's Disease when the witness' recollection was incomplete. Respondent admits the question should not have been asked in this fashion.

[1] Respondent did not depose the two other witnesses.

Respondent regrets and apologizes for his questions during the deposition. He submits that the stress of his divorce and of deposing a former friend who had sided with his former wife in their divorce caused his emotions to get the better of him.

Respondent has since signed a Settlement Agreement and Release and Stipulation of Dismissal concluding the matter against the City of Columbia and its police department.

## LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a) (5)(it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state) In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 4.4(a) (in representing client, lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden third person, or use methods of obtaining evidence that violate the legal rights of person), Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct), and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

## CONCLUSION

We accept the Agreement for Discipline by Consent and impose a six (6) month definite suspension from the practice of law. We decline to impose the suspension retroactively, primarily because of respondent's deposition misconduct which occurred while he was on interim suspension. Further, respondent shall complete the Ethics

School portion of the Legal Ethics and Practice Program within one (1) year of the date of his reinstatement to the practice of law.

Although we accept the Agreement, the Court is deeply concerned about respondent's emotional state and his ability to execute sound judgment. As evidenced by the facts presented in the Agreement and respondent's testimony during oral argument, respondent is obsessed with regaining his reputation in the community and with his ex-wife from whom he has been separated and/or divorced for approximately six years. Further, during argument, he initially refused to accept any responsibility with regard to the instances which led to his several arrests and, instead, characterized himself as the victim in each of the situations. Consequently, we order respondent to continue psychological counseling for two (2) years, require respondent's counselor to file quarterly reports addressing respondent's progress with the Commission, and authorize the Investigative Panel of the Commission to extend the counseling requirement at the conclusion of the two (2) year period if it deems it necessary.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

**DEFINITE SUSPENSION.**

**TOAL, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The Nutt Corporation d/b/a
TNC Engineering, Respondent,

v.

Howell Road, LLC, Appellant.

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Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

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Opinion No. 4911
Heard September 14, 2011 – Filed November 23, 2011

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**REVERSED**

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James A. Blair, Manton M. Grier, Jr., and Kirsten Small, all of Greenville, for Appellant.

W. Douglas Smith and Shane William Rogers, both of Spartanburg, for Respondent.

**PIEPER, J.:** This appeal arises from a bench trial resulting in an order awarding an equitable lien to Respondent The Nutt Corporation d/b/a TNC Engineering (the Nutt Corporation). Appellant Howell Road, LLC (Howell Road) argues the trial court erred in allowing the Nutt Corporation to proceed on an equitable claim because an adequate remedy at law was available.

Alternatively, Howell Road argues there was insufficient evidence to justify the creation of an equitable lien and the trial court erred in denying its request to assert a laches defense. We reverse.

## FACTS

In 1998, Howell Road purchased a parcel of land in Spartanburg County (the Property) and hired the Nutt Corporation to provide engineering services for the development of the Property. The parties orally agreed that the Nutt Corporation's fee for its services would be six percent of the construction costs of developing the land. At the outset of the project, Howell Road had to determine what type of development it wanted to build and the Nutt Corporation provided Howell Road with multiple options. Howell Road chose to proceed with a mobile home rental park layout and instructed the Nutt Corporation to move forward with the roads and storm water design.[1] The design plans were subsequently completed, approved by Spartanburg County, submitted to Howell Road, and used to obtain a grading permit. However, Howell Road never moved forward with the grading.

On July 9, 1999, the Nutt Corporation sent Howell Road an invoice in the amount of $34,398.00 for its services related to the roads and storm water design plans. Howell Road never paid the Nutt Corporation, but the parties proceeded as if the entire project would eventually be completed. On November 19, 2001, the parties memorialized much of their earlier oral agreement regarding the project in a signed written agreement. Under the terms of the written agreement, Howell Road agreed to pay six percent of the total construction costs of the project to the Nutt Corporation in exchange for its engineering services. The agreement provided such payment was owed whether or not the project was ever constructed and would become due and payable upon each construction invoice received or when the property was

[1] According to the testimony of the Nutt Corporation's sole shareholder Frank Nutt, after an owner decides on a preliminary layout, the development of a parcel of land is comprised of the following three distinct phases: (1) roads and storm water plan; (2) sewer plan; and (3) water plan.

sold. Howell Road never moved forward with completing the project, and the Nutt Corporation never received payment for the services it provided.

On April 25, 2003, the Nutt Corporation filed a complaint against Howell Road for breach of contract. Howell Road answered, denying the allegations in the complaint. After discovery began, the Nutt Corporation filed a motion to amend its complaint, which Howell Road opposed. Following a hearing on the matter, the trial court granted the Nutt Corporation's motion, and the Nutt Corporation subsequently filed an amended complaint. The amended complaint sought a declaratory judgment establishing the debt and an equitable lien against the Property; it did not assert a cause of action for breach of contract. Howell Road filed an amended answer and counterclaims for breach of contract and violation of Rule 11, SCRCP.[2] The parties subsequently filed cross-motions for summary judgment. Howell Road moved for partial summary judgment, arguing the Nutt Corporation's claims were barred by the statute of limitations, lack of consideration, the statute of frauds, and failure to establish a meeting of the minds. The Nutt Corporation moved for summary judgment in regard to Howell Road's counterclaims. After a hearing on the matter, the trial court granted the Nutt Corporation's motion for summary judgment and denied Howell Road's motion for partial summary judgment.

Howell Road filed a Rule 59(e), SCRCP, motion to alter or amend the order granting summary judgment on its counterclaims. Howell Road argued the trial court erred in determining the Nutt Corporation's claims were equitable in nature, and therefore, not barred by the statute of limitations. Howell Road also argued the Nutt Corporation's claims were not ripe. The trial court disagreed and issued an order denying Howell Road's motion to alter or amend the judgment. Howell Road then appealed to this court. In an unpublished opinion, this court affirmed the trial court's order on the following grounds: (1) Howell Road failed to assert its claim for breach of contract within the three-year statute of limitations and (2) the denial of summary judgment is not directly appealable. The Nutt Corporation, d/b/a

[2] Howell Road later withdrew its counterclaim for sanctions under Rule 11.

TNC Engineering, v. Howell Road, LLC, Op. No. 2008-UP-195 (S.C. Ct. App. filed March 20, 2008).

After a bench trial on the Nutt Corporation's cause of action for declaratory judgment, the court found the Nutt Corporation was entitled to an equitable lien in the amount of $34,398.00 against the Property. Howell Road then filed a Rule 59(e), SCRCP, motion to alter or amend the judgment. After a hearing on the matter, the trial court issued an order denying Howell Road's motion. This appeal followed.

## STANDARD OF REVIEW

We review factual findings and legal conclusions in an equitable action de novo. Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Id. 392 S.C. at 390, 709 S.E.2d at 654. However, this broad standard of review does not require the appellate court to disregard the factual findings of the trial court or ignore the fact that the trial court is in the better position to assess the credibility of the witnesses. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

## ANALYSIS

Howell Road argues the trial court erred in granting the Nutt Corporation an equitable lien because an adequate remedy at law was available. We agree.

"For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt." Regions Bank v. Wingard Props., Inc., Op. No. 4846 (S.C. Ct. App. filed June 22, 2011) (Shearouse Adv. Sh. No. 21 at 83, 87-88) (quoting First Fed. Sav. & Loan Ass'n of S.C. v. Finn, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989)). "The function of equity is to supplement the law, not to displace it." Wigfall v. Tideland Utilities, Inc.,

354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003) (internal quotations and citation omitted). The basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law. Monteith v. Harby, 190 S.C. 453, __, 3 S.E.2d 250, 251 (1939). Accordingly, equity is generally only available when a party is without an adequate remedy at law. EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011). "[E]quity will not impose an equitable lien where there is an adequate remedy at law." Carolina Attractions, Inc. v. Courtney, 287 S.C. 140, 146, 337 S.E.2d 244, 247 (Ct. App. 1985). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." Milliken & Co. v. Morin, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) (internal quotations omitted).[3]

First, we find a remedy at law was available because there was a contractual agreement between the parties. There is evidence to support the trial court's finding that there was a meeting of the minds as to the terms and conditions of the parties' original agreement. See Player v. Chandler, 299 S.C. 101, 106, 382 S.E.2d 891, 893 (1989) (holding that for there to be a

[3] Similar to a constructive trust, an equitable lien is a special restitutionary remedy that may supplement the law. We can envision certain situations where these special restitutionary remedies, arguably, should not turn solely on the inadequacy of a legal remedy, especially where real estate or trust assets are involved. Equity should always act on a case by case basis. The Restatement (Third) of Restitution & Unjust Enrichment § 4 (2011), provides "[a]lthough some remedies in restitution are indeed equitable in origin, there is no requirement that a claimant who seeks any of the remedies [in restitution] must first demonstrate the inadequacy of a remedy at law." However, this proposition has not been adopted by most, if any, states based on our research. See In re Light Cigarettes Mktg. Sales Practices Litig., 751 F. Supp.2d 183, 190 n.8 (D. Me. 2010) (analyzing the Restatement (Third) of Restitution and Unjust Enrichment § 4 (Tentative Draft No. 7, 2010)). Notwithstanding, those potential scenarios are not present in this case and we find it appropriate here to decline equitable relief in the face of an adequate remedy at law.

valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement). The record contains evidence that the parties both orally and expressly agreed Howell Road would pay the Nutt Corporation six percent of construction costs as consideration for the engineering services related to the Property. See Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("The necessary elements for a contract are an offer, acceptance, and valuable consideration."). Furthermore, in its amended complaint, the Nutt Corporation specifically references the November 19, 2001 letter as a contract entered into for good and valuable consideration. See Verenes v. Alvanos, 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010) ("Characterization of an action as equitable or legal depends on the appellant's 'main purpose' in bringing the action. The main purpose of the action should generally be ascertained from the body of the complaint." (internal quotations omitted)). Therefore, an action at law was available from which the Nutt Corporation could have sought to recover contractual damages. See Ahrens v. State, 392 S.C. 340, 347-48, 709 S.E.2d 54, 58 (2011) ("An action seeking damages for breach of contract is an action at law.").

We also find contractual damages provided the Nutt Corporation an adequate legal remedy. The trial court found the invoiced amount of $34,398.00 was a reasonable amount of compensation for the engineering services rendered, and we see no reason why a judgment for this amount would have provided a remedy any less certain, practical, complete, or efficient as an equitable lien. We also note that the possibility the statute of limitations may have potentially barred the Nutt Corporation from obtaining a legal remedy is no ground in itself for allowing the Nutt Corporation to seek equitable relief. See Stewart v. Seigle, 274 P.2d 395, 397-98 (Okl. 1954) (finding no basis existed to exercise the equitable power of the court where the plaintiff failed to exercise his statutory remedy within the time prescribed by the statute of limitations); U.S. v. Cent. Livestock Corp., 616 F. Supp. 629, 633 (D. Kan. 1985) (holding equity will not intervene if it appears the absence of a remedy at law is due to the plaintiff's failure to pursue that remedy); Witmer v. Exxon Corp., 394 A.2d 1276, 1286 (Pa. Super. Ct. 1978) (holding it is not proper to seek equitable relief where no pursuit has been

made of available contractual remedies because equity aids the vigilant and not those who slumber on their rights); McKittrick v. Bates, 132 A. 610, 612 (R.I. 1926) ("When one who has a clear method of fully determining his rights at law voluntarily adopts improper procedure, or pursues proper procedure negligently or mistakenly, without any inducement from one having adversary interests, it is no function of equity to relieve him from the result of his erroneously conducted lawsuit."). For these reasons, we find an adequate remedy at law was available, and therefore, the trial court erred in granting the Nutt Corporation an equitable lien on the Property.[4]

## CONCLUSION

For the foregoing reasons, the decision of the trial court is hereby

**REVERSED.**

**HUFF and LOCKEMY, JJ., concur.**

[4] In light of our disposition herein, we decline to address Howell Road's remaining arguments, as they are not necessary to the decision of this appeal. See Rule 220(b), SCACR.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Appellant,

v.

Justin Elwell, Respondent.

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Appeal From Chester County
Brooks P. Goldsmith, Circuit Court Judge

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Opinion No. 4912
Heard September 13, 2011 – Filed November 23, 2011

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**REVERSED AND REMANDED**

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Solicitor Douglas A. Barfield, Jr., of Lancaster, for Appellant.

Michael Langford Brown, Jr., of Rock Hill, for Respondent.

**THOMAS, J.:** The State appeals the dismissal of the charge against Justin Elwell for driving under the influence of alcohol (DUI), second offense. The State argues the trial court erred in holding the State failed to comply with subsection 56-5-2953(A)(2)(d) of the South Carolina Code (Supp. 2007) by turning off a breath test video recorder after Elwell refused to take the test and before the expiration of twenty minutes. We reverse and remand for trial.

## FACTS & PROCEDURAL HISTORY

On January 3, 2009,[1] Elwell was arrested for DUI and subsequently taken to a breath-testing site. While there, the arresting officer informed Elwell that he was being videotaped, gave Elwell his Miranda[2] rights, and asked Elwell if he would submit to a breath test. Elwell refused the test, affirming that he understood his driver's license would be suspended as a result. The officer turned off the video recorder after Elwell's refusal and before twenty minutes had elapsed.

Elwell was subsequently indicted for DUI, second offense. During a pretrial hearing, he moved to dismiss the charge because his conduct at the breath-testing site was not videotaped for the entire "twenty-minute pre-test waiting period," which he alleged is mandated in all situations covered by subsection 56-5-2953(A)(2)(d). The State argued dismissal was not appropriate for two reasons. First, the waiting period is not required under that subsection when a person refuses to submit to a breath test. Second, subsection 56-5-2953(B) permits the trial court to excuse the failure to

[1] An amended videotape statute became effective after Elwell's arrest. See S.C. Code Ann. § 56-5-2953 (Supp. 2010) (effective February 10, 2009).

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

produce the mandated videotape for other "valid reasons," and a person's refusal to take the test constitutes a valid reason.

The trial court granted Elwell's motion to dismiss the charge, holding a suspect must be videotaped for twenty minutes even when the suspect refuses to take a breath test. The court also made a summary assertion that "none of the exceptions [under subsection 56-5-2953(B)] apply" to the case at hand. This appeal followed.

## ISSUES ON APPEAL

1. Did the State comply with subsection 56-5-2953(A)(2)(d)?

2. If the State did not comply with subsection 56-5-2953(A)(2)(d), was Elwell's refusal to take the breath test a "valid reason" to turn off the video recorder under subsection 56-5-2953(B)?

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Winkler, 388 S.C. 574, 582, 698 S.E.2d 596, 600 (2010) (internal quotation marks omitted).

### I. Subsection 56-5-2953(A)(2)(d)

The State argues the trial court erred in holding the State failed to comply with subsection 56-5-2953(A)(2)(d) because the statute does not require the videotape to include a twenty-minute waiting period when a suspect refuses to take a breath test.[3] We agree.

[3] During oral argument, the State sought to supplement the record with a DVD of the breath test to prove Elwell was videotaped for twenty minutes. Defense counsel objected. This court did not rule on the motion, and the State did not follow-up with a written motion. In any event, both parties agreed during oral argument that the court could access an online version of the video using information properly included in the record. The

Under our principles of statutory construction, the court must "look to the plain language of the statute" to determine its meaning. State v. Branham, 392 S.C. 225, 231, 708 S.E.2d 806, 810 (Ct. App. 2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (citation and internal quotation marks omitted). "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." Id. at 351, 688 S.E.2d at 575.

"Our appellate courts have strictly construed section 56-5-2953 . . . ." Town of Mount Pleasant v. Roberts, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011). Pursuant to that statute, a person arrested for DUI "must have his conduct at . . . the breath test site videotaped." S.C. Code Ann. § 56-5-2953(A) (Supp. 2007). "The videotaping at the breath site . . . must include the person taking or refusing the breath test . . . ." S.C. Code Ann. § 56-5-2953(A)(2)(c) (Supp. 2007).

As for the provision in issue, subsection 56-5-2953(A)(2)(d) says the videotape must include a suspect's conduct "during the required twenty-minute pre-test waiting period." S.C. Code Ann. § 56-5-2953(A)(2)(d) (Supp. 2007) (emphases added). The use of these two modifiers, "required" and "pre-test," limits the application of the subsection. First, the use of "pre-test" indicates the entire waiting period must precede a breath test. Second,

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record included an internet link, username, and password to access the video, and the court has reviewed the online video. However, whether the videotape in fact depicts the entire waiting period is unpreserved. The State did not contest that issue before the trial court, and its oral argument before this court was the first time the issue was raised. See State v. Carmack, 388 S.C. 190, 200, 694 S.E.2d 224, 229 (Ct. App. 2010) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

the use of "required" indicates the waiting period must be videotaped only if the waiting period itself is required. Whether the waiting period is required can be traced to two implied consent cases.

In State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (1978), our supreme court fashioned a four-part test for laying a breath test foundation:

> Prior to admitting such evidence, the State may be required to prove (1) that the machine was in proper working order at the time of the test; (2) that the correct chemicals had been used; (3) that the accused was not allowed to put anything in his mouth for 20 minutes prior to the test[;] and (4) that the test was administered by a qualified person in the proper manner.

Id. at 163, 245 S.E.2d at 906. In State v. Jansen, 305 S.C. 320, 408 S.E.2d 235 (1991), the court held the State need not comply with the waiting period requirement in implied consent cases when a suspect refuses to take a breath test. Id. at 322, 408 S.E.2d at 237. The court reasoned, "[T]he Parker precautions are intended to ensure that the results of the breathalyzer test if given are accurate and reliable as evidence at trial," and the precautions are pointless when the test is not given. Id.

Although Parker and Jansen involved the implied consent statute, no provisions in subsection 56-5-2953(A)(2)(d) other than the waiting period provision are modified by the term "required." Further, subsection 56-5-2953(A)(2)(d) was promulgated in 1998 and written with the implied consent statute in mind. See S.C. Code Ann. § 56-5-2950(a) (Supp. 1997) ("The arresting officer may not administer the [breath, blood, or urine] tests."), amended by S.C. Code Ann. § 56-5-2950(a) (Supp. 1998) ("The arresting officer may administer the [breath] test[] if the person's conduct during the twenty-minute pre-test waiting period is videotaped pursuant to [subs]ection 56-5-2953(A)(2)(d)."). Thus, we believe subsection 56-5-2953(A)(2)(d)'s phrase "required twenty-minute pre-test waiting period" is a direct reference

to Parker and Jansen.[4] When the breath test is refused, the twenty-minute waiting period is not required and, therefore, need not be videotaped.[5]

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[4] Our conclusion that the above phrase refers to the parameters established by Parker and Jansen is also supported by considering the effect of omitting the term "required" from the statute. If the statute did not include "required," it would provide as follows: "The videotaping at the breath site . . . must also include the person's conduct during the twenty-minute pre-test waiting period." Under such a version of the statute, the "must also include" language would itself mandate the waiting period be videotaped, and the term "required" would be unnecessary. We will not interpret the statute to include such a redundancy. See Sweat, 386 S.C. at 351, 688 S.E.2d at 575 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (citation and internal question marks omitted)).

[5] As a whole, subsection 56-5-2953(A)(2)(d) provides the following:

> The videotaping at the breath site . . . must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

The subsection establishes when the waiting period must be videotaped, and it limits when an affidavit may be introduced in lieu of the videotape. If the waiting period's videotaping was required but was physically impossible, an affidavit to that effect may be introduced. However, the affidavit may not be introduced in lieu of a videotape if the arresting officer administered the breath test. The current version of subsection 56-5-2953(A)(2) does not preclude the arresting officer from using the affidavit when the arresting officer administered the breath test. See S.C. Code Ann. § 56-5-

This reading of the statute is consistent with the legislature's intent. Generally, "[t]he legislature is presumed to intend that its statutes accomplish something." State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005). Here, the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence.[6] As it relates to the waiting period, the statute ensures the attempt to establish the breath test's reliability need not endure such swearing contests. If a breath test is administered, the waiting period's videotaping provides evidence that helps resolve credibility disputes as to the procedure used in administering the breath test. Cf. Jansen, 305 S.C. at 322, 408 S.E.2d at 237 ("[T]he Parker precautions are intended to insure that the results of the breathalyzer test if given are accurate and reliable as evidence at trial."). If the breath test is not administered, none of those credibility disputes will arise.

The statute must be interpreted with realistic circumstances and rationales in mind, and this interpretation follows that approach. See State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Our interpretation does not require a police officer to turn off the video recorder after the person refuses to take the test, nor does it frustrate the statute's general requirement that a person arrested for DUI "have his conduct at . . . the breath test site

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2953(A)(2)(c) (Supp. 2010) ("The video recording at the breath test site must . . . also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.").

[6] The introductory sentence of subsection 56-5-2953(A) frames the rest of the subsection's provisions, stating "[a] person [arrested for DUI] must have his conduct at the incident site and the breath test site videotaped." § 56-5-2953(A). The statute protects both the State and the defendant from sometimes unreliable memories of those testifying during trial.

videotaped." § 56-5-2953(A). In all cases, the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so.[7] See S.C. Code Ann. § 56-5-2953(A)(2)(b)-(c) (Supp. 2007). Accordingly, if a person refuses to take the breath test, dismissal of a DUI charge is not warranted for the failure to videotape the person's conduct for twenty minutes so long as the other requirements of subsection 56-5-2953(A)(2) are satisfied. The trial court erred in dismissing Elwell's DUI charge.

## II. Subsection 56-5-2953(B)

As an alternative to its first argument, the State contends Elwell's refusal to consent to the breath test was a "valid reason" to stop videotaping the waiting period under subsection 56-5-2953(B). However, because we reverse on the above issue, we need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

## CONCLUSION

For the aforementioned reasons, we reverse the trial court's dismissal of the DUI charge against Elwell and remand for trial.

**REVERSED AND REMANDED.**

**FEW, C.J., and KONDUROS, J., concur.**

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[7] The amended version of subsection 56-5-2953(A)(2) removes the requirement that the videotape include the reading of Miranda rights. Compare S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2007), with S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2010). However, that alteration does not affect our interpretation of the statute's waiting period videotape requirement.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

In the Interest of Jamal G., a Juvenile Under the Age of Seventeen, Appellant.

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Appeal from Charleston County
Jack Alan Landis, Family Court Judge

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Opinion No. 4913
Heard October 6, 2011 – Filed November 23, 2011

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**AFFIRMED**

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Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Assistant Attorney General Salley W. Elliott, Assistant Attorney General Alphonso Simon, Jr., all of Columbia, and Scarlett Anne Wilson, of Charleston, for Respondent.

**LOCKEMY, J.:** In this appeal from the family court involving a juvenile criminal matter, Jamal G. contends the family court erred in failing

to reduce the charge of murder to the lesser charge of voluntary manslaughter. We find this issue is not preserved for our review.

## FACTS

Around 6 p.m. on February 10, 2008, Jamal G. (Jamal), Terrell W.,[1] and Jamal's brother (Michael) were outside a neighborhood convenience store. Around the same time, Trammel (Victim), Victim's younger brother (Telvin), and their uncle (Troy), were standing in a yard a few houses away from the store.

Kim, one of the state's witnesses, testified to an ongoing dispute between Telvin and Terrell's brother (Timmy). Jamal called Telvin a derogatory name in front of Kim and a few other witnesses, and then asked Brittany Lesston if she would call Telvin to the store. Kim stated Jamal and Terrell indicated they were going to take care of "Timmy's business." Kim said she interpreted one of Jamal's statements to mean Jamal and Terrell could beat Telvin in a fight one on one. Kim then walked over to Victim, Telvin, and Troy and told them to ignore Jamal and Terrell. However, Victim stated he was going to "squash this right now." Kim said Victim went to Terrell trying to be a peacemaker, but Terrell became agitated, at which point Telvin ran over and started fighting with Terrell. Kim heard Jamal tell Terrell to "chill," but Terrell took a gun from Jamal's person and fired it once. Subsequently, Kim saw Jamal get the gun back from Terrell, and she watched Jamal shoot the gun multiple times. Kim stated she then saw the victim collapse, but she did not know who fired the shot that hit Victim. During cross-examination Kim testified the victim did not attempt to break up the fight between Telvin and Terrell, he was observing.

Brittany Lesston confirmed that Jamal asked her to call and ask Telvin to come to the corner store, however, she refused Jamal's request. Brittany also testified that Telvin and Terrell fought, and she heard Terrell yell, "Give me the f-ing gun." Brittany states there was a "scuffle" between Victim, Telvin, Jamal, Terrell, and three other men when she heard one shot, then multiple shots after that.

[1] Terrell was charged as a co-defendant in this case.

Condenia Lesston testified Terrell yelled expletives at Telvin for not coming out of his yard to fight. At that point, Victim "calmly" walked out to speak with Terrell. She observed Terrell become agitated with Victim, and then Telvin came out and began fighting Terrell. Condenia claims Terrell shot Victim while Victim was trying to break up the fight between Terrell and Telvin. Furthermore, Condenia stated Telvin took a gun out of Victim's holster after Victim was shot. On cross-examination, Condenia testified that Jamal told Terrell to calm things down, but that is when Terrell took the gun from Jamal's back pocket and shot it at Victim. She stated she saw Jamal grab the gun back from Terrell and shoot towards Victim as well.

Troy observed a fight between Terrell, Jamal, Michael, and Telvin. Troy also testified that he saw Terrell with the gun, and Terrell fired the gun once in the victim's direction. After that shot, Troy stated the victim slumped over while slightly backing up, and Jamal began firing a gun, although he was not sure where Jamal got the gun.

Carlos Jenkins, Sr. stated he saw Michael pulling Telvin off Terrell and Victim hit Michael in the back of the head with a gun. When the gun struck Michael, Jenkins testified the gun unloaded. Jenkins began running and could not see anything, but he heard more shots fired. Jenkins then said he turned back around and saw a man he did not know firing a gun, but did not see anyone get shot. Jenkins also stated he never saw Jamal or Terrell with a gun.

Jamal B., Jenkins' cousin, testified that while walking with Jenkins, he saw Michael try to intervene in a fight between Telvin and Terrell. Jamal B. stated he saw Victim pull out his gun and chop Michael in the back of the head with it, at which point the gun fired. Jamal B. then indicated he also saw another unidentified male firing a gun, but did not see the victim get shot. Jamal B. stated he did not see Terrell or Jamal fire a gun.

Detective Allen Kramitz arrived at the scene after the shooting and blamed the many conflicting accounts on there being "so many people and so much going on." Seven .380 millimeter casings, one .9 millimeter casing, and eight projectiles were found at the scene, in addition to one projectile discovered during the autopsy of Victim. Kramitz stated it was "highly

unlikely that the same person discharged both the .9 millimeter and the .380." The projectile recovered from the victim's autopsy was consistent with a .380 automatic weapon, fired by the same gun as the .380 projectiles recovered from the scene. Victim's 9 millimeter handgun, which was given to the police by Victim's family, fired one of the projectiles recovered from the scene.

After listening to all the evidence, the family court found the State's witnesses to be credible. The family court found the defense witnesses credible, to a certain extent, but did not find the testimony regarding the unknown, unidentified man believable. Furthermore, the court found as follows:

> What occurred on this particular evening was two young men came to this location armed with a weapon. They came seeking a confrontation, and they got it. There was no testimony that [victim] approached these young men in any sort of aggressive or hostile manner, although, he carried a weapon as well. What ensued from that is a fight that I [the family court judge] believe was being provoked and promoted by these two young men. [The victim's] brother decided that he was going to join in, and that was the match that lit the fire.

The family court then ruled as follows about voluntary manslaughter being a consideration in this case:

> The largest question with which I've had to grapple is whether the gun discharging - - the gun used by [the victim] discharging was sufficient provocation to reduce this from murder to manslaughter. After a great deal of deliberation and consideration on this issue, I do not find it to be sufficient provocation. I believe the discharge was accidental. Although the gun was being used as a weapon, it was not being used as a firearm.

> In return these two young men used a gun with malice with the intent to inflict serious injury or death. And no matter how sufficient the provocation, it cannot overcome their intent to inflict this serious injury or death. Therefore, I do find these defendants to be delinquent on the charge of murder.

The family court found Jamal delinquent on the charge of murder, unlawful possession of a handgun by a minor, unlawful possession of a handgun, and discharging or use of a firearm during the commission of a violent crime. Jamal was sentenced to the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first birthday.

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Rios, 388 S.C. 335, 337, 696 S.E.2d 608, 610 (Ct. App. 2010) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "Thus, this court is bound by the trial court's factual findings unless they are clearly erroneous." Id. (citing Baccus, 367 S.C. at 48, 625 S.E.2d at 220). "'On review, this [c]ourt is limited to determining whether the circuit court abused its discretion.'" Id. at 338, 696 S.E.2d at 610 (quoting State v. Simmons, 384 S.C. 145, 158, 682 S.E.2d 19, 26 (Ct. App. 2009)). "This [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence." Id. (quoting Simmons, 384 S.C. at 158, 682 S.E.2d at 26).

## LAW/ANALYSIS

### I. Voluntary manslaughter

Jamal argues the family court erred in finding "no matter how sufficient the provocation" was to reduce the crime from murder to voluntary manslaughter, Jamal's intent to inflict serious injury or death made the crime murder. This issue is not preserved for our review.

Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Arguments raised for the first time on appeal are not preserved for our review. See State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011). "Although this court has advocated excepting juvenile criminal matters from the strict rules of issue preservation, [our] supreme court has declined to address whether such an exception should be recognized." In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009); see In re Arisha K.S., 331 S.C. 288, 296, 501 S.E.2d 128, 133 (Ct. App. 1998) (inviting the supreme court to address the setting aside of the rules of issue preservation in the context of juvenile criminal matters). Thus, this court remains bound by this state's long-standing rules of issue preservation. See In re Walter M., 386 S.C. at 392-93, 688 S.E.2d at 136.

Jamal did not raise an objection to the court's consideration and ultimate rejection of the lesser-included offense of voluntary manslaughter during the reading of the verdict. Furthermore, Jamal did not make a post-trial motion requesting reconsideration of the denial to charge voluntary manslaughter. While the trial court may have made contradictory remarks and stated an improper standard for voluntary manslaughter, Jamal should have objected to those statements. Without an objection, the trial court had no opportunity to clarify its decision, and the issue is not appropriately preserved. Accordingly, we find the issue of reconsideration of the denial of a charge of voluntary manslaughter not preserved for appellate review; thus, we affirm the family court.

## CONCLUSION

Based upon the foregoing reasons, the family court is

**AFFIRMED.**

**HUFF and PIEPER, JJ., concur.**