The Supreme Court of South Carolina

In the Matter of Jean Croughan Gillis, Petitioner.

Appellate Case No. 2012-213342

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 2, 2009, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated November 2, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Jean Croughan Gillis shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

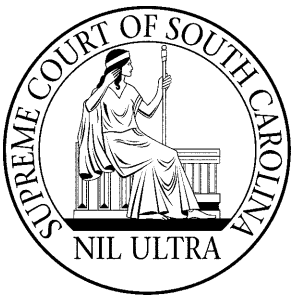
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 7, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
December 12, 2012
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UNPUBLISHED OPINIONS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

27195 - State v. K. C. Langford	Pending
27197 - Town of Mt. Pleasant v. Robert L. Chimento	Pending
2012-MO-035 – Julius Powell v. State	Pending
2012-MO-041 - Professional Financial Services v. Terry White	Denied 12/5/2012
2012-MO-049 - State v. Bryan Phillips	Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27187 - Robert W. Oskin v. Stephen Mark Johnson	Granted until 12/11/2012

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5008-Stephens v. CSX Transportation	Pending
5011-A. Dreher v. SCDHEC	Pending
5016-SC Public Interest Foundation v. Greenville County	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5041-Carolina First Bank v. BADD	Pending
5046-State v. Kendra Samuel	Pending
5048-State v. John Bendarian Bonner	Pending
5049-Paine Gayle Properties v. CSX Transporation	Pending
2012-UP-078-Tahaei v. Tahaei	Denied 12/05/12
2012-UP-267-State v. J. White	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-351-State v. K. Gilliard	Pending
2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending
2012-UP-462-Tennant v. Bd. of Zoning Appeals	Denied 12/05/12
2012-UP-475-Shah v. Palmetto Health Alliance	Pending
2012-UP-487-David Garrison and Diane G. Garrison v. Dennis Pagette and Melanie Pagette v. Nesbitt Surveying Co., Inc.	Pending
2012-UP-503-Isiah James v. SCDPPPS (5)	Denied 12/05/12
2012-UP-520-Johnson v. Mew	Pending
2012-UP-552-V. Miles v. Waffle House Inc.	Pending
2012-UP-563-State v. Marion Bonds	Pending

2012-UP-571-Sarah Jo Gaylord v. Jules Gaylord Pending

2012-UP-576-State v. Trevee J. Gethers Pending

2012-UP-585-State v. Rushan Counts Pending

2012-UP-595-State v. Anthony Linton Pending

2012-UP-600-Karen Irby v. Augusta Lawson Pending

2012-UP-603-Fidelity Bank v. Cox Investment Group et al. Pending

2012-UP-608-SunTrust Mortgage v. Mark Ostendorff Pending

2012-UP-609-Coghlan v. Coghlan Pending

2012-UP-610-Crenshaw's TV v. Jocassee Partners Pending

2012-UP-611-US Bank Association v. Christine Jolley Johnson Pending

2012-UP-614 - Charles Griggs v. Ashleytowne Development Pending

2012-UP-616-State v. Jamel Dwayne Good Pending

2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al. Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Pending

4705-Hudson v. Lancaster Convalescent Pending

4725-Ashenfelder v. City of Georgetown Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4819-Columbia/CSA v. SC Medical Pending

4823-State v. L. Burgess Pending

4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Granted 12/06/12
4859-State v. B. Garris	Pending
4861-Moeller v. Moeller	Denied 12/02/12
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. Jonathan Hill	Pending
4872-State v. Kenneth Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Stephen Wise v. Richard Wise	Pending
4880-Gordon v. Busbee	Pending
4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4889-Team IA v. Lucas	Granted 12/06/12
4890-Potter v. Spartanburg School	Pending

4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4897-David Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending

4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5021-Southern Glass & Plastics Co, Inc. v. Kemper	Pending

5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-137-State v. I. Romero	Denied 12/07/12
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-263-State v. Phillip Sawyer	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Bobby Lee Burdine	Pending
2011-UP-304-State v. Billy Winchester	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. Eric Dantzler	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending

2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Denied 12/07/12
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Harris	Pending
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Denied 12/07/12
2011-UP-463-State v. Rebekah Rogers	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. William Ricky Welch	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending

2011-UP-522-State v. Michael D. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-003-In the matter of the care and treatment of G. Gonzalez	Pending
2012-UP-008-SCDSS v. Michelle D.C.	Denied 12/07/12
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending

2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending

2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-443-Tony A. v. Candy A.	Denied 12/07/12
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-559-NAFH National Bank v. Israel Romero	Pending

The Supreme Court of South Carolina

Kareem J. Graves and Tara Graves, individually and as duly appointed personal representatives of the Estate of India Iyanna Graves, Appellants,

v.

CAS Medical Systems, Inc., Respondent.

Appellate Case No. 2010-161426

ORDER

The Petition for Rehearing in the above matter is denied and the attached opinion is substituted for the opinion previously filed on August 29, 2012.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 12, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kareem J. Graves and Tara Graves, individually and as duly appointed personal representatives of the Estate of India Iyanna Graves, Appellants,

v.

CAS Medical Systems, Inc., Respondent.

Appeal from Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 27168
Heard November 30, 2011 - Re-filed December 12, 2012

AFFIRMED AS MODIFIED

J. Edward Bell, III, of Georgetown, for Appellants.

Clarke W. DuBose, of Haynsworth Sinkler Boyd, of Columbia, and Sarah Spruill, of Haynsworth Sinkler Boyd, of Greenville, for Respondent.

John S. Nichols, of Bluestein, Nichols, Thompson, and Delgado, of Columbia, for Amicus Curiae Law Professors John F. Vargo, Paul J. Zwier, II, Richard W. Wright, Frank J. Vandall, Steven A. Saltzburg, Jay M. Feinman, Thomas A. Eaton and Carl T. Bogus.

A.Camden Lewis, of Lewis, Babcock & Griffin, of Columbia, for Amicus Curiae Francis M. Wells, Professor, Emeritus, of Electrical Engineering at the Vanderbilt University School of Engineering.

Kenneth M. Suggs, Janet, Jenner & Suggs, of Columbia, for Amicus Curiae Stephen G. Pauker, M.D., Professor of Medicine.

JUSTICE HEARN: India Graves, a six-month-old girl, died while being monitored by one of CAS Medical Systems' products. India's parents, Kareem and Tara Graves, subsequently filed a products liability lawsuit against CAS, contending the monitor was defectively designed and failed to alert them when India's heart rate and breathing slowed. The circuit court granted CAS's motion to exclude all of the Graves' expert witnesses and accordingly granted CAS summary judgment. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

India and her sisters, Asia and Paris, were triplets born prematurely to Kareem and Tara. All three girls spent the first six weeks of their lives in the hospital so they could be monitored, a standard practice for premature babies. When they were finally sent home, their doctor ordered that the Graves use a monitor manufactured by CAS to track their breathing and heart rates as a precaution. The monitor was designed to sound an alarm, which, by all accounts, is quite loud, if the subject were to experience an apneic,

bradycardia, or tachycardia event.[1] Once the breathing or heart rate returns to normal, the alarm stops. Each machine also keeps a log of any events, which is the term for when the alarm sounds, and records the pertinent data and vital signs.

As an additional safety measure, CAS installed not only a back-up alarm, but also a feature that records whether the alarm sounded. This system operates primarily through an independent and separate microphone specifically designed to listen for the alarm. If it hears the alarm, it then makes a notation in the monitor's internal log. If it does not hear the alarm, then it records "Front alarm not heard," and the monitor will sound the back-up alarm. A microphone listens for this back-up alarm as well and records whether it was heard. If the back-up alarm fails, all the lights on the front of the monitor flash.

On the night of April 10, 2004, India was hooked up to the monitor and fell asleep next to her father on his bed. At the time, Tara was awake doing chores.[2] Tara eventually moved India to her bassinet, and Tara herself went to sleep around 2:00 in the morning on April 11th. According to Tara, she woke up shortly before 4:00 a.m. from a bad dream and decided to go check on the babies. Paris and Asia responded to her touch, but India did not. When she realized India was not breathing, she immediately began CPR. Kareem woke up during the commotion and called 911. By the time EMS arrived, India was already dead. An autopsy revealed that she died from Sudden Infant Death Syndrome (SIDS), which essentially means that no attributable cause of death exists.

Tara and Kareem claim the monitor's alarm never sounded that night. Additionally, they testified that all the lights on the front of the monitor were

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[1] When one stops breathing, it is called apnea. Bradycardia is when an individual's heart rate slows, while tachycardia is when the heart rate gets too high.

[2] Due to the demands of raising triplets, the Graves received help from relatives. The relatives would generally care for the babies during the day while Tara slept, and Tara was on "night duty."

on, although they were solid and not flashing. Another family member who was asleep downstairs from India also could not recall hearing the alarm go off. Tara further testified the machine was not turned off until the next day, when the monitor was removed for testing.

India's monitor recorded the following events beginning the morning of April 11th. At 2:39 a.m., the monitor first detected a slow heart beat from India. Over the next thirteen minutes, the monitor recorded twenty-three separate apnea or bradycardia events. By 2:52 a.m., India had passed the point of resuscitation. The monitor recorded six more events before showing it was powered down at 3:50 a.m. The log shows it was then powered back up the next morning. For every event, the monitor recorded hearing the alarm properly sound and accurately traced India's slowing breathing and heart rate. As India's treating physician put it, the machine's performance was tragically perfect: "[A]s sad as it is, the tracing is beautiful. It is a – you watch the baby die on the leads."

The Graves subsequently filed a strict liability design defect claim against CAS, contending the monitor's software design caused the alarm to fail.[3] Their claim revolves around what is known as "spaghetti code," which is when computer code is unstructured and becomes "a rather tangled mess." Spaghetti code can result from the overuse of "goto" or "unconditional branch" statements, which causes a signal working its way through the code to jump around instead of following a linear path. Boiled down, the Graves' theory is that certain unknown external inputs occurring during India's apneic and bradycardia events triggered some of these goto statements as the signal

[3] The Graves also sued CAS for negligence and breach of warranty. CAS moved for summary judgment on all claims, and the Graves understood this to be the scope of the motion. The circuit court granted CAS's motion in full. On appeal, however, the Graves only argue the court erred in granting summary judgment on the design defect claim. Accordingly, the Graves have abandoned these other causes of action. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

was being sent to sound the alarm. This in turn caused the signal to be pushed off course and never reach its destination.

To support this theory, the Graves designated three software experts to testify regarding the alarm's failure: Dr. Walter Daugherity, Dr. William Lively, and Frank Painter. In arriving at their conclusions that a software defect caused the alarm to fail, none of the experts did much actual testing of the software. Instead, they used a "reasoning to the best inference" analysis, which is similar to a differential diagnosis in the medical field where potential causes of the harm are identified and then either excluded or included based on their relative probabilities. In this case, three potential causes were identified: hardware error, complaint error, and software error. Complaint error means that the monitor was misused or the alarm did sound and the Graves failed to hear it.[4] All the experts were able to dismiss hardware error as a cause because the machine was tested and shown to have functioned properly. Thus, the question became whether complaint error or a software error occurred.

Dr. Daugherity excluded complaint error because the machine was hooked up to India properly and he did not believe anyone could sleep through the alarm. In other words, because the Graves claim the alarm did

[4] While there is no evidence suggesting that the Graves misused the machine on the night in question, there is evidence that the alarm worked properly and the Graves failed to hear it. In addition to the monitor's recordation of hearing the alarm sound, India's pediatrician testified he believes Kareem and Tara simply slept through it. As the father of triplets himself, the doctor was aware of just how exhausted the Graves were. In his opinion, Tara woke up when the alarm was going off, turned it off, and then discovered India had passed away. Although the alarm is piercingly loud, if one is tired enough, he testified that it is possible to sleep through it. His opinion was bolstered by the fact that the machine seems to have worked just as it was supposed to and recorded India's passing perfectly. The log also seems to show the alarm managed to stimulate the baby into breathing normally at times. We recite this evidence only to demonstrate complaint error is a valid consideration in this case.

not wake them, that means it did not go off. After being confronted with the fact that the monitor listens for the alarm and separately records whether it was heard, Dr. Daugherity accordingly concluded it "is certain" the internal logs showing the alarm sounded on the morning of April 11th are not reliable "in light of the undisputed testimony that the alarm did not function."[5] Having dismissed hardware and complaint error, Dr. Daugherity ultimately concluded that software error was the most likely cause of the alleged failure based on his independent review of the code and other reported incidents of alarm failure.[6]

As to Dr. Lively, the record does not show he engaged in any analysis regarding complaint error. He did agree with Dr. Daugherity that the most likely cause was software error. In arriving at this conclusion, however, Dr. Lively relied only on Dr. Daugherity's review of the code and did nothing to search for a defect himself. In fact, he testified it was not his job to look through the code for errors, and that responsibility fell on Dr. Daugherity. He also relied on the same reports of other failures as Dr. Daugherity, but he admitted that he did not know whether these other reports had been substantiated.

Painter as well concluded a software error most probably caused the alarm to fail. He, like Dr. Daugherity, excluded complaint error because of the Graves' own statements that the alarm failed. Thus, during his deposition when he learned the monitor recorded hearing the alarm sound, Painter

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[5] Dr. Daugherity also averred the logs are incorrect because they too are the product of spaghetti code. However, he never addressed how the code's categorization leads to the conclusion that an independent microphone could record hearing the alarm when it did not actually sound. In any event, his final conclusion rested on the "undisputed testimony" from the Graves.

[6] The record contains approximately fifty reports from the Food and Drug Administration of incidents where the alarm on a CAS monitor purportedly failed to sound during an event. None of the reports identifies a software error as the cause, and except where a hardware problem was involved, CAS was never able to repeat the alleged failure. Furthermore, none of the reports contains a detailed factual background describing the failure.

summarily concluded this had "no effect" on his opinion. Specifically, even though he conceded that this ordinarily would show the alarm sounded, he maintained this was not the case here "because the Graves say they didn't hear the alarm." When explaining software error was the cause, Painter also admitted that he never examined the code in any detail and only "spent a half an hour just thumbing through it and looking at it." In an affidavit he filed early in the case, Painter instead stated his conclusion rested on the opinions of Dr. Daugherity and Dr. Lively. In his deposition, on the other hand, Painter testified that his opinion actually was not based on the work of Dr. Daugherity and Dr. Lively, but on the reports of other alarm failures submitted to the FDA.

Finally, the Graves designated Dr. Donna Wilkins as an expert to testify whether India could have been revived had Tara or Kareem been woken up by the alarm. Although Dr. Wilkins stated she was not an expert in SIDS, it was her belief, based on her many years of experience and training as a neonatologist, that it was more likely than not Tara and Kareem would have been able to revive India had they heard an alarm. She did acknowledge no proof existed that a monitor can prevent SIDS, but from her tenure in the neonatal intensive care unit babies experiencing apneic events can be resuscitated.

CAS moved to have all the Graves' experts excluded, arguing none of them met the reliability factors for scientific testimony set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). CAS also moved for summary judgment, contending that without expert testimony the Graves have no evidence of a design defect. The court agreed that the Graves' computer experts all sought to introduce scientific testimony, but it went on to hold their opinions were unreliable both as scientific evidence and as nonscientific evidence and thus were inadmissible. It also excluded Dr. Wilkins' testimony because she was not an expert on SIDS and did not satisfy *Council*. Having excluded the opinions of all the Graves' experts, the court granted CAS's motion for summary judgment.

The Graves filed a Rule 59(e), SCRCP, motion, arguing in particular that even without expert testimony, they still presented enough circumstantial evidence to survive summary judgment. The court disagreed, holding that a product defect case cannot be proven by circumstantial evidence. This appeal followed.

ISSUES PRESENTED

I. Did the circuit court err in excluding the opinions of the Graves' experts?

II. Did the circuit court err in granting CAS's motion for summary judgment?

LAW/ANALYSIS

I. EXPERT WITNESSES

The Graves first argue that the circuit court erred in excluding the testimony of their four experts. While we agree the court erred in finding Dr. Wilkins unqualified and in excluding her testimony, we find no abuse of discretion in excluding the opinions of Dr. Daugherity, Dr. Lively, and Painter that a software defect caused the alarm to fail as unreliable.[7]

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise. *State v. White*,

[7] In considering the reliability of Dr. Daugherity's and Dr. Lively's opinions, we have reviewed all of their depositions and affidavits. We therefore do not need to reach the Graves' additional argument that the circuit court erred in excluding some of their affidavits under *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004), because they are inadmissible regardless.

382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). The qualification of a witness as an expert is within the discretion of the circuit court, and we will not reverse absent an abuse of that discretion. *Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010). An abuse of discretion occurs when the circuit court's rulings "either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be reliable. *Id.* It is this final requirement of reliability which is the central feature of the inquiry. *White*, 382 S.C. at 270, 676 S.E.2d at 686.

If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in *Council*. *Id.* at 449–50, 699 S.E.2d at 177. Under *Council*, the court must consider the following: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517. However, these factors "serve no useful analytical purpose" for nonscientific evidence. *White*, 382 S.C. at 274, 676 S.E.2d at 688. In those cases, we have declined to offer any specific factors for the circuit court to consider due to "the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence." *Id.* Nevertheless, the court must still exercise its role as gatekeeper and determine whether the proffered evidence is reliable. *Id.* Thus, while a challenge to an opinion's reliability generally goes to weight and not admissibility, this "familiar evidentiary mantra" may not be invoked until the

circuit court has vetted its reliability in the first instance and deemed the testimony admissible. *Id.* at 274, 676 S.E.2d at 689.

A. Computer Experts

CAS concedes that the first two elements under Rule 702 have been met with respect to Dr. Daugherity, Dr. Lively, and Painter, i.e., their testimony would aid the jury and they are qualified. Thus, the only question on appeal is whether their opinions that a software defect caused the alarm to fail are reliable. The bulk of the arguments advanced by the Graves concern whether the court erred in categorizing the testimony as scientific and thus subject to *Council*.[8] They posit that when viewed instead under the proper lens, it is admissible. However, we need not determine whether the court erred in classifying the opinions as scientific because we hold they are unreliable under either standard.[9]

As previously mentioned, we have declined to set a general test for nonscientific testimony due to the multitude of challenges which may arise. Thus, this evidence must be evaluated on an ad hoc basis. Although this is our first opportunity to assess the reliability of an opinion rendered using the reasoning to the best inference methodology, other courts have already done so. In *Westberry v. Gislaved Gummia AB*, 178 F.3d 257 (4th Cir. 1999), the court described the differential diagnosis methodology as a process of identifying a cause by "eliminating the likely causes until the most probable one is isolated." *Id.* at 262. A reliable differential diagnosis eliminates each potential cause until arriving at one that cannot be ruled out or concluding that of those that cannot be ruled out, one is most likely. *Id.* While the strength of an expert's rejection of possible alternative causes usually is an issue for the jury, when an expert cannot offer an explanation for the

[8] It is unclear whether the court found Painter's testimony scientific. We will therefore analyze it as both scientific and nonscientific.

[9] In reaching this conclusion, we assume *arguendo* only that reasoning to the best interference is a valid scientific method.

rejection of a possible alternative cause, the expert's testimony is not sufficiently reliable. *Id.* at 265. Accordingly, we hold an expert relying on differential diagnosis must provide a reasonable, objective explanation for the rejection of possible alternative causes in order for the opinion to be admissible under Rule 702. We believe this objectivity requirement is consistent with the quality control element of *Council*.

In this case, both the monitor's log reflecting that the alarm sounded and the testimony of India's pediatrician implicate complaint error as a potential issue. We therefore focus our attention on whether these experts sufficiently reasonably discounted it based on objective criteria.

Turning first to Dr. Daugherity, his exclusion of complaint error as a cause was premised on the Graves' own testimony that the alarm did not sound. He even went so far as to conclude that there is *no* "evidence that can support a finding that the alarm actually functioned the night of the incident." When presented with the evidence from the machine's internal log that the alarm did go off, Dr. Daugherity therefore dismissed it as unreliable based on the "undisputed testimony that the alarm did not function," i.e., the Graves contention that the alarm failed.[10] Dr. Daugherity simply assumed the alarm did not sound and provided no reason for discounting the evidence to the contrary other than the assertion of the person alleging a failure. Thus, Dr. Daugherity did not objectively discount the evidence of complaint error. *See Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) ("Simply put, an expert does not assist the trier of fact in determining whether a product failed if he starts his analysis based upon the assumption that the product failed (the very question that he was called upon to resolve), and thus, the court's refusal to accept and give credence to [the expert's] opinion was proper.").

[10] Dr. Daugherity references the testimony of Anita Kelly, the EMT who tended to India, as supporting his conclusion that the alarm did not go off. However, Kelly could not state whether she looked at the machine and saw it was even turned on when she was in the house. Her testimony therefore does not support either side of the debate.

Dr. Lively's testimony is even more problematic. The record reveals no attempt on his part to eliminate complaint error as a contributing cause. At best, he simply forgot to consider it; at worst, he blithely dismissed it without comment despite evidence demonstrating it is a distinct possibility. In either case, not only has he failed to provide objective criteria for why this could not have occurred, but no evidence shows he endeavored to eliminate it as a potential cause to begin with.

Painter's testimony presents the same problem. When he learned for the first time during his deposition that the monitor has an independent system to listen for the alarm, he was able to conclude without hesitation or further review of the system that this evidence simply has no effect on his opinion. While he conceded this ordinarily would mean the alarm sounded, he baldly marginalized the evidence in this case simply because the Graves said the alarm did not go off. We therefore believe there is evidence that Painter too did not provide objective criteria for eliminating complaint error as a cause. Underscoring our concerns about the reliability of his opinion, Painter ultimately stated that the monitor "failed in a way that we don't really understand."

We also agree with the circuit court that these experts improperly relied on reports of other failures to bolster their conclusions that software error was to blame. Evidence of similar incidents is admissible "where there is some special relation between the accidents tending to prove or disprove some fact in dispute." *Watson*, 389 S.C. at 453, 699 S.E.2d at 179. A plaintiff bears the burden of demonstrating the other accidents are "substantially similar to the accident at issue" by demonstrating that the products are similar, the alleged defect is similar, the defect caused the other accidents, and there are no other reasonable secondary explanations. *Id.* While the products in the FDA report are similar to the one here, the record contains no evidence suggesting any further connection to or whether a software error was even involved in these other cases. In order to deem these other incidents substantially similar, we would have to automatically equate an alleged failure with a software defect of the kind claimed by the Graves without any evidentiary basis for doing so. This we will not do.

Accordingly, we find evidence to support the circuit court's conclusion that the testimony of these experts is unreliable regardless of whether it is deemed scientific or nonscientific. Complaint error is a real possibility in this case, and there is evidence that none of the experts reasonably and objectively rejected it as a potential cause. Of great concern to us is that each of them began with the assumption that the monitor failed and then discounted evidence to the contrary based on the *ipse dixit* of the plaintiff who hired them, an analysis we find lacking in the indicia of reliability required for reasoning to the best inference. While the Graves may be correct that it is rare to exclude the testimony of three experts in a single case, we find no abuse of discretion based on the record before us.

B. Dr. Wilkins

The circuit court excluded Dr. Wilkins' testimony first on the ground that she was not qualified to render an opinion as to SIDS. This was due in large part to her statement that she would not consider herself a SIDS expert. However, an "expert need not be a specialist in the particular branch of the field." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. The record before us reveals a doctor with over thirty years' experience as a neonatologist who stays current on SIDS literature. It is also clear from her testimony that she routinely encounters SIDS in her practice. We therefore find the circuit court abused its discretion in finding Dr. Wilkins was not qualified to render an opinion in this case.

The court further excluded her testimony on the ground that it was not reliable under the *Council* factors. We recognized in *Whaley*, though, that most doctors do *not* give scientific testimony. 305 S.C. at 142, 406 S.E.2d at 371. Thus, a doctor who merely applies his knowledge to every day experiences does not need to satisfy the additional foundation required by *Council*. *See id.* at 142, 406 S.E.2d at 371–72. All Dr. Wilkins did was apply the knowledge she has gained from her training and experience as a neonatologist to determine whether India would have survived had her parents been alerted to her condition. Accordingly, the circuit court committed an error of law in holding Dr. Wilkins to the *Council* standard for

reliability. However, for the reasons discussed below, CAS is still entitled to summary judgment even if Dr. Wilkins' testimony is taken into account.

II. SUMMARY JUDGMENT

We turn now to whether the Graves have adduced sufficient evidence to withstand summary judgment without the opinions of their computer experts. We hold they have not.

In any products liability action, a plaintiff must establish three things: (1) he was injured by the product; (2) the product was in essentially the same condition at the time of the accident as it was when it left the hands of the defendant, and (3) the injury occurred because the product "was in a defective condition unreasonably dangerous to the user." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). If the plaintiff is pursuing a design defect claim, the only way to meet the third element is by "point[ing] to a design flaw in the product and show[ing] how his alternative design would have prevented the product from being unreasonably dangerous." *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP.

Here, there is no argument that the monitor was not in essentially the same condition as it was when it left CAS's factory. Furthermore, Dr. Wilkins testified it is more likely than not that India could have been revived had the parents been woken up by an alarm. Without the testimony of their experts, however, the Graves have no direct evidence of whether the monitor was unreasonably dangerous because there is no identification of a specific design flaw.[11] Thus, the question is whether the record contains sufficient circumstantial evidence of a defect required to survive summary judgment.

[11] There was evidence introduced as to feasible alternative designs.

We take this opportunity to correct the circuit court's erroneous holding that a plaintiff cannot use circumstantial evidence to prove a design defect claim. "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." *St. Paul Fire & Marine Ins. Co. v. Am. Ins. Co.*, 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968). Thus, the general rule is any fact can be shown through circumstantial evidence, and it is up to the trier of fact to determine whether it alone is worth as much merit as direct evidence. Although CAS argues we foreclosed the use of circumstantial evidence for design defects in *Branham*, we recognized in that very case that other similar incidents can be used to show a design defect, which is classic circumstantial proof. *See* 390 S.C. at 230, 701 S.E.2d at 20. In this case, however, we need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony is nevertheless dispositive of the Graves' claim.

It is well-established that one cannot draw an inference of a defect from the mere fact a product failed. *Sunvillas Homeowners Ass'n v. Square D. Co.*, 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990). Accordingly, the plaintiff must offer some evidence beyond the product's failure itself to prove that it is unreasonably dangerous. Thus, while the Graves do have witnesses who testified that the alarm did not sound, that alone is not sufficient. In some design defect cases, expert testimony is required to make this showing because the claims are too complex to be within the ken of the ordinary lay juror. *Watson*, 389 S.C. at 445, 699 S.E.2d at 175 ("[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge."); *cf. Esturban v. Mass. Bay Transp. Auth.*, 865 N.E.2d 834, 835 (Mass. App. Ct. 2007) ("By its nature, an escalator is a complex, technical piece of machinery, whose design and operational requirements are not straightforward. Accordingly, any determination of the dimensions essential to its safe operation is generally beyond the scope of an average person's knowledge."); *Olshansky v. Rehrig Int'l*, 872 A.2d 282, 287 (R.I. 2005) (affirming grant of summary judgment in defect case involving a shopping cart in the absence of expert testimony because "[a]lthough average

lay persons use shopping carts every day, we conclude that only an expert who understands the mechanics of constructing such a cart could understand and explain the mechanics of the cart and whether a defect proximately caused an injury such as Mr. Olshanky's"); *Burley v. Kytec Innovative Sports Equip., Inc.*, 737 N.W.2d 397, 407 (S.D. 2007) ("[U]nless it is patently obvious that the accident would not have happened in the absence of a defect, a plaintiff cannot rely merely on the fact that an accident occurred. It is not within the common expertise of a jury to deduce merely from an accident and injury that a product was defectively designed."); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006) ("A lay juror's general experience and common knowledge do not extend to whether design defects such as those alleged in this case caused releases of diesel fuel during a rollover accident. Nor would a lay juror's general experience and common knowledge extend to determining which of the fire triangle's fuel sources, diesel from the tractor or crude from the tanker, would have first ignited, or the source for the first ignition."). Whether expert testimony is required is a question of law. *Mack Trucks, Inc.*, 206 S.W.3d at 583.

We have little trouble concluding as a matter of law that the Graves' claim is one such case because it involves complex issues of computer science. Although we use computers in some form or fashion almost every day of our lives, the design and structure of the software they run is beyond the ordinary understanding and experience of laymen. Hence, the Graves must support their allegations with expert testimony, and without it, their claims are subject to dismissal. Because we find the circuit court did not abuse its discretion in excluding the Graves' computer experts, CAS is entitled to summary judgment.

CONCLUSION

In conclusion, we hold the circuit court did not abuse its discretion in excluding the testimony of the Graves' computer experts. While the court did err in excluding Dr. Wilkins' testimony, the Graves are still left with no expert opinions regarding any defects in the monitor. In the absence of this

evidence, CAS is entitled to summary judgment. We accordingly affirm the circuit court as modified.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Tracy B., A Minor Under the Age of Seventeen, Petitioner.

Appellate Case No. 2011-186286

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion No. 27199
Heard October 31, 2012 – Filed December 12, 2012

DISMISSED AS IMPROVIDENTLY GRANTED

Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Scarlett A. Wilson, of Charleston, for the State.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *In re Tracy B.*, 391 S.C. 51, 704 S.E.2d 71 (Ct. App. 2010). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Chad Brian Hatley, Respondent

Appellate Case No. 2012-212668

Opinion No. 27200
Heard October 16, 2012 – Filed December 12, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and William Curtis Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Henrietta U. Golding, McNair Law Firm, of Myrtle Beach, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any suspension greater than one (1) year or disbarment. He requests that any suspension or disbarment be imposed retroactive to September 28, 2011, the date of his interim suspension. *In the Matter of Hatley*, 396 S.C. 216, 721 S.E.2d 767 (2011). In addition, he agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of a sanction and to reimburse the Lawyers Fund for Client Protection (Lawyers Fund) for any and all funds paid on his behalf prior to seeking reinstatement. Finally, respondent agrees to complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to seeking reinstatement. We accept the

Agreement and suspend respondent from the practice of law in this state for two (2) years, retroactive to the date of his interim suspension. Respondent shall not file a Petition for Reinstatement until he has completed the Legal Ethics and Practice Program Ethics School and Trust Account School and fully reimbursed all clients and entities, including the Lawyers Fund, harmed as a result of his misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent admits he incurred three insufficient fund reports on his trust account due, in part, to his failure to maintain and reconcile his trust accounts. Respondent further admits that he failed to ensure that the deposits were properly credited to his trust account prior to disbursements. This error occurred when respondent's primary paralegal was on maternity leave and a temporary paralegal did not timely make the deposits even though the deposit slip had been prepared and packaged for delivery to the bank.

Matter II

As a result of his own internal investigation, respondent discovered that a former paralegal had committed fraud and misappropriation through numerous and creative false entries on closing statements. Although the paralegal did not follow a specific pattern, in one scenario the paralegal listed her landlord and a creditor as service providers on closing statements, causing checks to be written to these two parties on the paralegal's behalf. At other times, the paralegal misappropriated the funds due to the law firm and, instead, allocated those funds to her own creditors. In total, the paralegal misappropriated approximately $21,665.29 from twenty (20) different closings by causing twenty-eight (28) checks in relatively small sums to be issued on her behalf.

Prior to the discovery of her fraud and misappropriation, respondent terminated the paralegal for attempting to proceed with a real estate closing without respondent being present. After discovering the misappropriation by the paralegal, respondent immediately contacted the paralegal's new employer to alert the employer to his

discovery. After a review, the new employer determined the paralegal had also committed fraud at its business. By quickly contacting the new employer, respondent limited the paralegal's misappropriation at the new employer although she had already misappropriated a much larger sum from her new employer than she had at respondent's practice.[1]

Respondent acknowledges that it is his responsibility to supervise the activities of his staff and the failure to timely detect the paralegal's criminal activities was due, in part, to his failure to follow Rule 417, SCACR. Respondent has now conducted a complete audit of his closing files and has repaid the amount misappropriated, $21,665.29, with his personal funds.

Matter III

While conducting an audit of real estate files in conjunction with the prior matter, respondent discovered that another former paralegal had committed fraud and misappropriation in one closing. When the check for taxes was returned because the seller had paid the taxes prior to the sale, the paralegal voided the check and wrote a new reduced check in the amount of $473.02 for taxes. When respondent contacted the county office to question this reduced amount, it was discovered that the check was for property taxes on property personally owned by the paralegal.

Prior to the discovery of this misappropriation, respondent had terminated the paralegal due to poor work habits. After discovery of the misappropriation, respondent contacted the paralegal and she promised to repay the stolen funds. The paralegal repaid $100.00 of the misappropriated funds. Respondent repaid the remaining $373.02 from his personal funds.

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[1] Respondent conducted a background check prior to hiring this paralegal. Even though the paralegal was on probation at the time, the probation did not appear in the background check.

After discovering the misappropriation, respondent initiated criminal charges against this paralegal. Charges were filed against her and she was incarcerated as a result of misappropriation from respondent's law firm and from her new employer.

Upon discovery, respondent self-reported this matter to ODC. Respondent has now conducted a complete audit of his closing files and determined this is the only instance of fraud by this paralegal.[2]

Matter IV

Respondent acknowledges that he failed to ensure procedures were in place that would thwart staff misappropriation and misconduct. Respondent states that, prior to these disciplinary proceedings, he lacked a complete understanding of Rule 1.15, RPC, and Rule 417, SCACR. He represents to ODC that he now has the requisite understanding of the Court's Rules and will institute procedures that are compliant with the rules.

As previously stated, respondent has now conducted a complete audit of his closing files and has repaid the amounts misappropriated by the paralegals with his personal funds. Respondent acknowledges that reliance on the representations of his employees and accountants does not relieve him of the responsibility of meeting the standards for financial recordkeeping and the safeguarding of property as set forth in the Court's Rules.

Matter V

Initially, the complainant in this matter alleged respondent had committed misconduct which is not subject to the Rules of Professional Conduct. Subsequently, the complainant alleged respondent failed to pay the withholding taxes for the complainant's wife during her employment with respondent. Respondent admits he failed to pay the complainant's wife's withholding taxes.

Matter VI

Respondent represented the complainant in a real estate closing. Respondent entered into a business relationship with the complainant without obtaining the requisite written waivers and disclosures required by Rule 1.8, RPC, in that he did not acquire a writing apart from the Agreement establishing he would not represent

[2] Respondent did not initiate criminal charges against this paralegal because she promised to repay the funds, cares for four children, and no longer works in the legal profession.

the complainant in the transaction and that the complainant should consult separate counsel. The Agreement between respondent and the complainant specifically acknowledges that both parties had time to deliberate and consult with their respective attorneys.

Respondent acknowledges that a Rule 1.8 waiver and disclosure were not obtained but states that the complainant is a seasoned real estate developer who has retained a number of lawyers in the Myrtle Beach area on a regular basis and has a son-in-law who is an attorney licensed in South Carolina.

Matter VII

Respondent admits he received an insufficient fund notice on his First Citizens IOLTA account which he had closed. Respondent states that the account was dormant and the funds in that account had been transferred to a new IOLTA account.

Respondent admits that the 2005 check drawn on the closed account was located in a file. Instead of issuing a check on the new account, the 2005 check payable on the closed account was forwarded to the title insurance company. Respondent admits that the delay in transmitting the funds to the title insurance company was solely his responsibility.

Matter VIII

Respondent admits he incurred tax liens from his failure to pay withholding taxes and failure to file and pay income taxes.

Matter IX

Respondent admits he failed to pay the court reporter in a timely manner for her services rendered and invoiced on April 30, 2008. On April 30, 2009, the probate court issued a Summons to Show Cause to respondent to explain why he had not paid the court reporter. Upon receipt of the Summons to Show Cause, respondent immediately paid the court reporter.

Respondent also admits that he had previously been summoned by the Probate Court of Horry County for his failure to produce documents requested by the court. At that hearing, respondent blamed the problem on his staff.

At the hearing regarding the unpaid court reporter bill, respondent advised the court that the bill had been placed in the file by a staff member; however, he advised the court he understood it was ultimately his responsibility and he apologized to the court. At the hearing, the probate court sanctioned respondent in the amount of $500.00 for his failure to timely pay the court reporter.

Respondent admits it was his responsibility for the delicts before the probate court and he accepts that he is responsible for any issues that arise in the practice of law.

Matter X

Respondent was arrested and charged with two counts of Willful Attempt to Evade or Defeat a Tax, two counts of Failure to Pay a Tax, File a Return or Maintain Records, and six counts of Failure to Pay Over or Account for Withholding Taxes. Respondent was attempting to remedy the failure to pay these taxes when he discovered the State Department of Revenue had commenced a criminal investigation. Respondent had paid all known outstanding withholding taxes prior to any criminal charges being filed.

Respondent pled guilty to one count of Failure to Pay a Tax, File a Return or Maintain Records and two counts of Failure to Pay Over or Account for Withholding Taxes. Respondent paid a fine of $5,000.00 and restitution in the amount of $26,867.00 for state income taxes.

Matter XI

On March 15, 2011, respondent was retained by a client to pursue a reduction in alimony. Respondent admits he did nothing in furtherance of the client's case for five months. Respondent further admits he and the client discussed sending a letter regarding the ending of alimony payments, but he did not tell the client that the letter had been sent. In addition, respondent admits he inadvertently filed the pleadings in Georgetown County rather than Horry County and that he did not include a request to terminate alimony as desired by the client.

Respondent acknowledges there was a clerical billing error on the invoice; however, the client was never overcharged.

Matter XII

Respondent admits he failed to recognize that he was obligated to pay $100.00 in court costs by February 17, 2012, when he signed his consent to a Civil Contempt Order of the family court dated January 17, 2012. As a result of respondent's failure to pay the court costs, a bench warrant was issued for respondent's arrest. Prior to being arrested, this matter was brought to respondent's attention and he immediately took steps to rectify his mistake. The court then lifted the bench warrant.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall reasonably consult with client about the means by which client's objectives are to be accomplished and keep client reasonably informed about the status of the matter); Rule 1.8 (lawyer shall not enter into business relationship with client unless client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek advice of independent legal counsel on the transaction and client gives informed consent, in a writing signed by client, to the essential terms of the transaction and lawyer's role in the transaction, including whether lawyer is representing client in the transaction); Rule 1.15 (lawyer shall safe keep client property); Rule 5.3 (lawyer possessing managerial authority in a law firm shall make reasonable efforts to ensure that firm has in effect measures giving reasonable assurance that non-lawyer employee's conduct is compatible with the professional obligations of lawyer); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits he violated provisions of Rule 417, SCACR.

Respondent also admits he has violated the following Rule for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is grounds for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for two (2) years, retroactive to the date of his interim suspension. Respondent shall not file a Petition for Reinstatement until he has completed the Legal Ethics and Practice Program Ethics School and Trust Account School and fully reimbursed all clients and entities, including the Lawyers Fund, harmed as a result of his misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Storm M. H., a minor, by her parent, Gayla S. L. McSwain, and Gayla S. L. McSwain, pro se, Respondents/Appellants,

v.

Charleston County Board of Trustees and Nancy J. McGinley, in her official capacity as Superintendent of Charleston County School District, Appellants/Respondents.

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27201
Heard October 19, 2011 - Filed December 12, 2012

AFFIRMED

Kenneth L. Childs, John M. Reagle, Tyler R. Turner, all of Childs & Halligan, of Columbia, for Appellants-Respondents.

Gayla S. L. McSwain, of Goose Creek, *pro se* Respondents-Appellants.

CHIEF JUSTICE TOAL: In this declaratory judgment action, the parties appeal the circuit court's order authorizing Storm M. H. ("Student"), who resides in Berkeley County, to enroll in the Academic Magnet High School ("AMHS") located in the Charleston County School District ("CCSD") provided she purchase

real property in the CCSD with a tax-assessed value of $300 or more. We affirm the order of the circuit court.

FACTUAL/PROCEDURAL BACKGROUND

AMHS is a countywide, taxpayer-funded school located in the CCSD. It is a "top ten," nationally-recognized magnet high school.[1] In terms of admission requirements, the AMHS brochure/application states that "Students must be residents of Charleston County and complete an AMHS application."

Student resides with her parents in Berkeley County, South Carolina. In January 2010, Student applied for admission to the 9th grade class at the AMHS for the academic year beginning on August 18, 2010. In her application, Student identified her Berkeley County address. Student was accepted by the AMHS on January 20, 2010, and required to confirm her intention to enroll by January 28, 2010. The Confirmation Form requested a "Charleston County Residence Address." After seeing this request, Student's mother, Gayla S. L. McSwain ("Parent"), spoke with someone at the AMHS and explained that Student could not provide a Charleston County address because she did not "live in Charleston County yet." As a result of this conversation, Parent completed the Confirmation Form by indicating that she would "provide [a Charleston County residence address] prior to enrollment."

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[1] The following definition is instructive:

> A Magnet school is part of the public school system. Usually students are zoned into their schools based on location. Students mostly go to the school which they are closest to (this may not always be true since boundaries can seem arbitrary). With Magnet schools, the public school system has created schools that exist outside of zoned school boundaries. The point of them is that they usually have something special to offer over a regular school which makes attending them an attractive choice to many students, thereby increasing the diversity of the student population within them (in theory).

Grace Chen, "What is a Magnet School?" (December 4, 2007), available at http://www.publicschoolreview.com/articles/2.

Beginning in March 2010, Parent exchanged e-mails with John Emerson, the General Counsel for CCSD, regarding CCSD's policies for nonresident students.[2] Specifically, Parent inquired whether these policies required her to relocate the family to Charleston County in order for Student to attend the AMHS.

In his initial response, Emerson emphasized the "clear notification" that the AMHS is for Charleston County residents. However, Emerson appeared to concur in Parent's interpretation that section 59-63-30[3] of the South Carolina Code would

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[2] The primary policy, which is entitled "Policy JFAB Nonresident Students," provides that its purpose is "[t]o establish guidelines for admitting to Charleston County School District schools those students who do not reside in the district." The policy also states, "Non-resident students may not attend magnet schools/programs."

[3] Section 59-63-30 provides:

> Children within the ages prescribed by § 59-63-20 shall be entitled to attend the public schools of any school district, without charge, only if qualified under the following provisions of this section:
>
> (a) Such child resides with its parent or legal guardian;
>
> (b) The parent or legal guardian, with whom the child resides, is a resident of such school district; or
>
> (c) The child owns real estate in the district having an assessed value of three hundred dollars or more; and
>
> (d) The child has maintained a satisfactory scholastic record in accordance with scholastic standards of achievement prescribed by the trustees pursuant to § 59-19-90; and
>
> (e) The child has not been guilty of infraction of the rules of conduct promulgated by the trustees of such school district pursuant to § 59-19-90.

permit Student to attend the AMHS without charge if she purchased property in Charleston County with a tax-assessed value of $300 or greater. Additionally, Emerson acknowledged that section 59-63-490[4] would permit Student to attend the AMHS if she would be better accommodated by the adjoining CCSD; however, he clarified that Student's enrollment at the AMHS would be contingent upon the consent of the BCSD's Board of Trustees and the CCSD's Board of Trustees. Finally, concerning Parent's inquiry as to whether she could "pay the difference in cost per pupil between the two districts" rather than change her family's residence, Emerson simply cited section 59-63-45,[5] which provides a formula for these payments.

In a subsequent e-mail on May 5, 2010, Parent referenced the prior e-mail exchange and questioned whether she was required to sign an affidavit prior to registration attesting that Student was a Charleston County resident. Emerson responded by e-mail, stating, "Once you either buy land in your daughter's name or get consent from both boards, you won't have to sign it. Until then you do not have the requirements to be admitted without the affidavit. One of those things has to happen first."

On May 11, 2010, Parent wrote to Nancy J. McGinley, the Superintendent of CCSD, requesting the CCSD's Board of Directors consent to Student attending the

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S.C. Code Ann. § 59-63-30 (2004).

[4] Section 59-63-490 provides:

> When it shall so happen that any person is so situated as to be better accommodated at the school of an adjoining school district, whether special or otherwise, the board of trustees of the school district in which such person resides may, with the consent of the board of trustees of the school district in which such school is located, transfer such person for education to the school district in which such school is located, and the trustees of the school district in which the school is located shall receive such person into the school as though he resided within the district.

S.C. Code Ann. § 59-63-490 (2004).

[5] S.C. Code Ann. § 59-63-45(A) (2004).

AMHS pursuant to section 59-63-490. According to Parent, McGinley called her two weeks later to inform her that the AMHS is reserved for Charleston County residents.

On June 7, 2010, Emerson wrote to Parent instructing her that Student could not be "admitted to the Academic Magnet unless she actually resides in Charleston County, in compliance with 59-63-30 (a)–(b)."

On June 14, 2010, the CCSD Board of Trustees conducted a meeting in which it discussed numerous agenda items, including an "Academic Magnet Student Appeal." By letter dated June 16, 2010, Emerson informed Parent that the Board "voted unanimously in open session to admit [Student] to the AMHS if [her] family establishes 'residence and domicile' in Charleston County before school starts."

On June 27, 2010, Parent, on behalf of Student, filed a declaratory judgment action[6] against the CCSD Board and McGinley for the circuit court to determine whether Parent had to establish the family's domicile and residence in Charleston County prior to August 18, 2010, the start of the academic year at the AMHS. The next day, Parent filed a Petition to Appeal the CCSD's directive with the Board of Trustees.[7]

In the declaratory judgment Complaint, Parent disputed the residency requirement, arguing that Student was entitled to enroll in the AMHS if any of the following conditions were satisfied: (1) Parent paid tuition to the CCSD; (2) Student purchased real estate in Charleston County valued at $300 or more pursuant to section 59-63-30(c); or (3) Student's education would best be accommodated by the AMHS pursuant to section 59-63-490. Because she believed the Board's directive constituted a final decision, Parent asserted that she did not have to exhaust administrative remedies as any hearing before the CCSD would be "futile."

The Board and McGinley (the "Board") moved to dismiss the declaratory judgment action, arguing Parent did not state a cause of action and the circuit court did not have subject matter jurisdiction as the Board had not entered a final, appealable order. In the alternative, the Board requested the court decline to exercise jurisdiction on the ground Parent failed to exhaust all administrative remedies.

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[6] S.C. Code Ann. § 15-53-20 (2005).

[7] S.C. Code Ann. §§ 59-19-510 to -560 (2004).

After conducting a hearing on July 19 and 22, 2010, the circuit court issued an order on July 28, 2010. Initially, the court found that it had subject matter jurisdiction to declare Parent's rights under section 59-63-30, but not section 59-63-490. In so ruling, the court found that a final order by the Board was not a prerequisite to Parent obtaining a declaratory judgment. Because the Board had never addressed Parent's reliance on section 59-63-30, i.e., whether payment of tuition or purchase of real property in Charleston County was sufficient for Student to enroll in the AMHS, the court explained that the Board "could not have issued a final 'order' regarding 59-63-30."

In addition, the court rejected the Board's contentions that Parent failed to state a cause of action or exhaust her administrative remedies. Specifically, the court found Parent had presented a justiciable controversy that required a "speedy resolution" due to Student's impending enrollment date. Because Parent had not requested a Board decision with respect to the provisions of section 59-63-30, the court concluded that Parent did not have to exhaust administrative remedies in order to obtain a ruling in the circuit court.

Regarding Parent's claim under section 59-63-490, the court found it did not have jurisdiction because Parent had appealed the Board's decision to the circuit court;[8] thus, the court concluded that it "now has appellate jurisdiction only to review that decision and cannot exercise original jurisdiction to declare Plaintiffs' rights under 59-63-490."

With respect to the merits of Parent's claim, the court held that the CCSD's policy of requiring domicile for a child to attend a CCSD magnet school violates section 59-63-30(c) "because domicile by a child and that child's parent or guardian is not required by the statute, only property ownership is required."

Based on this ruling, the court rejected Parent's contention that, because Student had already been admitted to the AMHS, she should be allowed to pay tuition under section 59-63-30 rather than buy the requisite property in the CCSD. Although the court acknowledged that a nonresident child could pay tuition to attend school in a particular attendance zone within the CCSD, the court stated that

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[8] On July 21, 2010, Parent appealed the Board of Trustees' decision denying Student's transfer under section 59-63-490 to the circuit court in its appellate capacity.

the Board is authorized, via section 59-19-90(9), to choose in which school the child may enroll. The court emphasized that "a nonresident child who wants to be statutorily entitled to enroll at a magnet school must meet one of the residency requirements of 59-63-30."

Finally, the court summarily dismissed Parent's claim that the Board's application of its policy requiring domicile as a prerequisite to an eligible nonresident student violated the equal protection clause.

Both parties appealed the circuit court's order to the court of appeals. Subsequently, Student purchased real property in Charleston County and enrolled in the AMHS on August 18, 2010, as the circuit court lifted the automatic stay of its order.[9] The court of appeals denied the Board's petition to revoke the order lifting the automatic stay. This Court certified this appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

LAW/ANALYSIS

A. Exhaustion of Administrative Remedies

As a threshold issue, the Board contends the circuit court erred in ruling on Parent's declaratory judgment action. Specifically, the Board claims the circuit court did not have jurisdiction over the school board action as it arose under a statutory scheme that provides for administrative appellate review. Because the Board of Trustees did not issue a final order regarding Student's enrollment at the AMHS, the Board asserts the circuit court lacked subject matter jurisdiction over Parent's claim for declaratory relief. Even if the circuit court had subject matter jurisdiction, the Board avers the circuit court abused its discretion in exercising jurisdiction given Parent failed to exhaust her administrative remedies prior to instituting the proceedings in circuit court.

Initially, we note that the Board incorrectly characterizes its claim as one involving subject matter jurisdiction. As this Court has explained, "[t]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Ward v. State*, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000) (citations omitted). In contrast, "subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong."

[9] S.C. Code Ann. § 18-9-220 (Supp. 2010); Rule 241, SCACR.

Id. "Thus, the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." *Id.*

"Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994). "The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Id.* at 208, 442 S.E.2d at 583. "A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act." *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010).

Notwithstanding the alleged procedural problems, we have chosen to address the merits of the parties' appeals for several reasons. First, we find that it would have been futile for Parent to exhaust her administrative remedies as the Board's decision was certain to be unfavorable. Secondly, we believe the administrative remedies would have been inadequate given the immediacy of Student's enrollment date and the potential delay of an administrative appeal. Finally, we find the instant case presents issues of important public interest and a resolution would promote judicial economy. *See Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011) (addressing issues in the interest of judicial economy to supply a sufficient analytical framework for future cases); *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001) (recognizing that an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest).

B. Board-Imposed Physical Residency Requirement for Magnet School

The Board asserts the circuit court erred in determining that the Board's policy of requiring residency in Charleston County for admission to the CCSD's magnet schools violates section 59-63-30 of the South Carolina Code. In support of this assertion, the Board claims the court not only misinterpreted section 59-63-30, but also failed to appreciate the Board's authority under section 59-19-90(9), which authorizes a board of trustees to transfer and assign students to a particular school, to determine which particular school a child will attend and to establish the appropriate admission criteria for a particular school. S.C. Code Ann. § 59-19-90(9) (2004).

In her cross-appeal, Parent also challenges the circuit court's construction of sections 59-63-30 and 59-19-90. Parent contends these statutes entitle a child to attend a public school, without charge, if the child either resides or owns real estate within the school district in which the school is located. However, if the child does not meet either of these qualifications, Parent claims the nonresident child may pay tuition so as to be eligible to enroll in a particular school within the school district.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 147–48, 694 S.E.2d 525, 529 (2010) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

Section 59-19-90 provides in relevant part:

> The board of trustees shall also:
> . . . .
>
> (9) Transfer and assign pupils. Transfer any pupil from one school to another so as to promote the best interests of education, and *determine the school within its district in which any pupil shall enroll*.
>
> (10) Prescribe conditions and charges for attendance. Be empowered *to prescribe conditions* and a schedule of charges based on cost per pupil as last determined, for attendance in public schools of the school district for
>
> > . . . .
> >
> > (d) all other children specially situated and not meeting the eligibility requirements of § 59-63-30, but who shall have petitioned the trustees in writing seeking permission to attend the public schools of the school district.

S.C. Code Ann. § 59-19-90(9), (10)(d) (2004) (emphasis added).

In construing the language of this section, we agree with the Board that the General Assembly conferred discretionary authority on a board of trustees to set attendance criteria for particular schools and to determine which school in its district a student may attend. *Cf. Stewart v. Charleston Cnty. Sch. Dist.*, 386 S.C. 373, 688 S.E.2d 579 (Ct. App. 2009) (concluding CCSD had ultimate authority to set attendance guidelines for magnet school). Here, the Board initially determined that Student would be assigned to AMHS. This was the 59-19-90(9) decision.

However, the Board's subsequent attempt to rescind that decision is unavailing because, in making its decision, the Board relied on the unlawful policy purporting to mandate Charleston County residency as a requirement for acceptance at AMHS. This "resident only" criterion runs afoul of section 59-63-30 because any child meeting the threshold established by this provision, either as a resident or a property owner of the subject school district, is entitled to attend that district's schools. Thus, while we agree with the Board that section 59-63-30 does not necessarily confer a child the right to attend a particular school within a school district, CCSD may not utilize this provision to revoke admission to a child qualifying to attend a district's school merely because a child qualifies to attend school in the district by virtue of property ownership rather than residence under the auspices of exercising its section 59-19-90(9) right to transfer and assign children to a particular school.

By its plain terms, section 59-63-30 entitles a child to attend the public schools of any school district if the child: (1) resides with his or her parent or legal guardian, and that parent or legal guardian is a resident of the school district ***or*** the child owns real estate in the district having an assessed value of at least three hundred dollars; and (2) the child has maintained a satisfactory scholastic record and not been guilty of infraction of the rules of conduct.

A school district may impose admissions requirements for its schools, including magnet schools. However, in considering eligible applicants, a school board may not distinguish between a child who qualifies to attend its schools as a resident under section 59-63-30(a) & (b) and a child who qualifies to attend its schools as a property owner under section 59-63-30(c). We disagree with the Board that a judicial determination that Student is entitled to *enroll* at AMHS usurps its authority to *transfer or assign* students under section 59-19-90(9). CCSD employs a merit-based selection process for AMHS, accepting only those children who demonstrate exceptional academic ability. Just as the Board could not ignore the merit-based selection process and transfer or assign a resident child to AMHS, the

Board cannot ignore the merit-based process when revoking a child's admission just because the child qualifies to attend CCSD schools as a property owner.

The Board alternatively argues that its authority to set admissions requirements to its magnet schools includes the authority to create physical residency requirements, citing *Stewart v. Charleston County School District*, 386 S.C. 373, 688 S.E.2d 579 (Ct. App. 2009). That case involved the Buist Academy, an academic magnet school in Charleston County serving intellectually gifted students of primary and elementary school age. *Id.* at 377, 688 S.E.2d at 581. In 1967, the General Assembly passed local legislation consolidating Charleston County's eight school districts under the umbrella of one unified school district, CCSD. *Id.* at 376–77, 688 S.E.2d at 581. The eight individual districts remained in existence as constituent districts of CCSD, and Buist Academy is located in constituent District 20. *Id.* District 20 used a lottery system to select the students who would be tested for a determination of whether they met the academic requirements for admission. *Id.* Available openings were prioritized as follows: one-fourth of open seats were reserved for children residing in District 20, one-fourth for siblings of Buist Academy students, one-fourth for children who would otherwise attend low performing schools, and one-fourth for children county-wide. *Id.* In 2006, District 20 adopted a motion giving priority for all open seats at Buist Academy to qualified children residing in District 20, essentially closing its doors to children residing outside of District 20 but in Charleston County. *Id.* CCSD refused to recognize the motion, and each party claimed it had the authority to set attendance guidelines for the school. *Id.* The court of appeals evaluated the local legislation that created CCSD and found that CCSD possessed the authority to "'provide for intellectually gifted children a program which shall challenge their talents.'" *Id.* at 379, 688 S.E.2d at 582 (quoting Act No. 340, § 5(8), 1967 S.C. Acts 470). In finding that District 20 could not reserve all openings for residents of its district, the court stated, "Placing all emphasis on the physical location of a school such as Buist Academy would permit a constituent school district to monopolize a county-wide magnet school to the exclusion of all other students in the county." *Id.* The court of appeals concluded such a result was contrary to legislative intent. *Id.*

The Board argues that because *Stewart* recognized its authority to prioritize available openings based on a child's physical location, it may establish an attendance requirement for its magnet schools—that children must reside in the county. We disagree that this is the import of *Stewart*. *Stewart* did not implicate non-resident students, and therefore, section 59-63-30 was not at issue. This is not an inconsequential distinction. Section 59-63-30 places a child who owns county property on the same footing as a child who resides in the county. Just as District

20 could not monopolize the county-wide magnet school for its own residents in *Stewart*, CCSD cannot monopolize its magnet schools for county residents when section 59-63-30 recognizes property owners as eligible to attend its schools. The Board can most certainly set admissions requirements for its magnet schools and even set geographic priority for available seats. What it cannot do is exclude an entire segment of students recognized under the statute as qualified to attend its schools.

In light of our view that CCSD's policy of excluding all non-resident children from attendance at its magnet schools is contrary to the plain language of section 59-63-30, Student is entitled to continue attending AMHS. Student qualified for consideration by AMHS as a property owner and she met or exceeded AMHS's admissions requirements. Importantly, AMHS accepted her application for admission with the understanding that she would take up residence or buy property in Charleston County prior to enrollment. We are not unsympathetic to the Board's argument that allowing non-resident children to attend its magnet schools displaces other qualified resident children. However, we are constrained to interpret the unambiguous language of section 59-63-30. Thus, a child who owns real estate in the district having an assessed value of three hundred dollars or more is entitled to attend that district's schools, just as a resident child. If this interpretation is contrary to legislative intent, or if it does not promote the furtherance of education, we leave it to the legislature to amend the statute. As the statute is written, however, the Board does not have the authority to unilaterally exclude children who qualify to attend its schools under section 59-63-30.[10]

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[10] Our holding today is based on a plain reading of section 59-63-30. Therefore, we decline to reach Parent's alternative argument that the resident/ property owner distinction employed by the Board violates the equal protection clause of the South Carolina Constitution. *See Arnold v. Ass'n of Citadel Men*, 337 S.C. 265, 275, 523 S.E.2d 757, 762 (1999) ("This Court will decline to rule on constitutional questions unless the determination is essential to the disposition of a case." (citing *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 126 S.E.2d 15 (1962))); *cf. Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

In view of our interpretation of sections 59-63-30 and 59-19-90, we reject Parent's contention that the mere payment of tuition is sufficient to deem a nonresident child eligible to enroll in a particular school in another district. Instead, the payment of tuition is a secondary requirement that may be imposed after a nonresident child, who is statutorily eligible to attend the public schools of another school district, is granted admission to a particular school. In the event that occurs, the school district may require the nonresident child's parent or legal guardian to reimburse the district for the assessed costs of educating that child to the extent that child's property taxes do not cover such costs. S.C. Code Ann. § 59-63-45(A) ("Notwithstanding the provisions of this chapter, a nonresident child otherwise meeting the enrollment requirements of this chapter may attend a school in a school district which he is otherwise qualified to attend if the person responsible for educating the child pays an amount equal to the prior year's local revenue per child raised by the millage levied for school district operations and debt service reduced by school taxes on real property owned by the child paid to the school district in which he is enrolled. The district may waive all or a portion of the payment required by this section.").[11]

C. Automatic Stay

Finally, the Board contends the circuit court erred in lifting the automatic stay of its order as it authorized Student to attend the AMHS during the pendency of this appeal.

We need not address this issue because, under our construction of the statute, Student may continue her enrollment at the AMHS.

CONCLUSION

Based on the foregoing, we affirm the order of the circuit court granting declaratory judgment in favor of Parent. *See Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995) ("The

[11] Although we are cognizant of the conflict between the "without charge" language in section 59-63-30 and the provisions of section 59-63-45 that require reimbursement for a child attending another school district, we believe section 59-63-45 is controlling as it was enacted in 1996, thirty-four years after section 59-63-30. *See Williams v. Town of Hilton Head*, 311 S.C. 417, 429 S.E.2d 802 (1993) (recognizing that where it is not possible to harmonize two statutes, the later legislation supersedes the earlier enactment).

decision to grant a declaratory judgment is a matter which rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse.").

AFFIRMED.

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

JUSTICE PLEICONES: I respectfully dissent.

I. Exhaustion of Administrative Remedies

Although in my view Parent likely failed to exhaust her administrative remedies, I would not disturb the circuit court's finding on this issue. *See Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994) (whether administrative remedies must be exhausted is a matter within the sound discretion of the trial court). Nevertheless, I address this point because I disagree with the majority's analysis.

For urgency to constitute an exception to the requirement that a party exhaust her administrative remedies, she must show that the injury threatened is irreparable. *See* 2 Am. Jur. 2d *Administrative Law* § 478 (2012). Futility is an exception when the administrative body cannot provide the relief requested or when circumstances guarantee a negative result of appeal. *See Ward v. State*, 373 S.C. 14, 18-19, 538 S.E.2d 245, 247 (2000) ("Allowing ALJs to rule on the constitutionality of the statute would violate the separation of powers doctrine. . . . Requiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statute would be a futile act."); *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) ("Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a hard and fast position that makes an adverse ruling a certainty.") (internal quotation marks and citation omitted).

In this case, Parent made no showing that irreparable harm was likely to result from Student's inability to immediately enroll in the magnet school. Neither does the exception for futility apply here, since the Board had the power to alter or clarify its interpretation of the relevant statutes or to change its school attendance policy. Nor does a single Board articulation of its policy warrant a finding that the Board had taken a hard and fast position that made an adverse ruling a certainty.

Further, waiving the requirement that Parent exhaust her administrative remedies in no way promotes judicial economy in this case, since the only resulting omission is of administrative, not judicial, process. I would also not rely on the notion that an unspecified "important public interest" is at stake in order to waive the exhaustion of administrative remedies requirement. The only case relied on by the majority for this proposition did not involve a question of exhaustion of administrative remedies. *See Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). Moreover, even assuming this rationale is an appropriate basis for excusing failure to exhaust administrative remedies, it must be used with great

judicial restraint and only where a question "of imperative and manifest urgency" truly exists, since any case, construed at the most useful level of generality, could be found to embrace an important public interest.[12] The opportunity for nonresident students *to displace resident students* in county magnet schools contrary to local school board policy can hardly be said to present a question of imperative and manifest urgency. The majority trivializes the doctrine by applying it to these facts.

II. S.C. Code § 59-63-30

On the merits, I agree with the majority that S.C. Code Ann. § 59-63-30 (2004) entitles a nonresident child to attend the schools within a public school district by acquiring property with a tax-assessed value of at least $300 in the district. However, I disagree with the majority that the General Assembly intended anything more than this. The General Assembly clearly contemplated the question of how students would be assigned within a district, and it explicitly conferred full discretionary authority to decide such matters on the board. S.C. Code Ann. § 59-19-90 (2004) provides, in relevant part:

> The board of trustees shall also:
>
> . . .
>
> (9) *Transfer and assign pupils.* Transfer any pupil from one school to another so as to promote the best interests of education, and *determine the school within its district in which any pupil shall enroll*[.]

(Emphasis added.) Thus, under § 59-19-90(9), the board of trustees has authority to determine which school in its district any student will attend.

Section 59-63-30 does no more than establish means by which a child is entitled to attend public school in a particular school district; nothing in its language implies a legislative intent to override the plain language of § 59-19-90. Thus, we must recognize the validity of both. *See Stewart v. Charleston County School Dist.*, 386 S.C. 373, 379, 688 S.E.2d 579, 582 (Ct. App. 2009) ("Statutes dealing with the same subject matter are to be construed together, if possible, to produce a harmonious result.") (citation omitted). Although the majority attempts to reconcile the conflict it creates by distinguishing between a student's enrolling and

[12] *Curtis* dealt with an unconstitutional presumption of criminal intent in a statute creating a felony offense. *Curtis* at 570, 549 S.E.2d at 597-98.

the Board's assigning, the plain language of § 59-19-90(9) confers authority on the Board to "determine the school within its district in which any pupil *shall enroll*" (emphasis added).

As for magnet schools and their admission policies, the General Assembly could not have intended to create an equal treatment mandate for them when it enacted § 59-63-30 in 1962, as magnet schools did not then exist. Section 59-63-30, read together with § 59-19-90(9), requires nothing more or different than that the board admit a qualifying nonresident student to a school of the board's choice within the district based upon policies that promote the best interests of education. This Court has historically deferred to local government control of the operation of public schools. *See Bd. of Trustees of School Dist. of Fairfield County v. State*, 395 S.C. 276, 290, 718 S.E.2d 210, 217 (2011); *United States v. Charleston County School Dist.*, 960 F.2d 1227, 1233 (4th Cir. 1992). We should continue that deference and not read into the statute a restriction on the board's discretion to assign students to particular schools within the district.

The majority simply assumes that if the Board employs a merit-based selection process for admitting students to AMHS, it cannot ignore that process in a particular case. While this proposition is appealing, the majority cites no legal authority for it, just as it cites no authority for the proposition that the Board may not distinguish among students who became eligible to attend district schools by different means. *Stewart* has no application to this case, as it found a constituent district board exceeded its statutory authority when it attempted to dictate the attendance criteria for a county-wide magnet school located within its subdistrict in defiance of the county-wide school district board. *See Stewart v. Charleston County School District*, 386 S.C. 373, 688 S.E.2d 579 (Ct. App. 2009).

Thus, I respectfully dissent.

JUSTICE BEATTY: Respectfully, I dissent as I disagree with the majority's limitation of the statutory authority of the board of trustees. Although I agree with the majority's interpretation that a student may become eligible under section 59-63-30 to enroll in a particular school district via the purchase of property, I believe the board of trustees still retains its authority under section 59-19-90 to set attendance criteria for particular schools and to determine which school in its district a student may attend. Thus, for reasons that will be more fully explained, I would reverse the order of the circuit court.

I.

As the majority concludes, section 59-63-30 entitles a child to attend the public schools of any school district if the child satisfies: (1) one of the three criteria outlined in subsections (a) through (c); and (2) both subsections (d) and (e). In essence, it provides an alternative for a child to attend school in a particular school district without being a resident of that school district.

This, however, does not end the analysis as the question becomes whether a board of trustees is authorized under section 59-19-90 to determine attendance criteria for a particular school and to which particular school in its district a student will attend. I believe the Legislature placed these ultimate decisions within the purview of the board of trustees' authority, which is defined in section 59-19-90. Section 59-19-90 provides in relevant part:

> The board of trustees shall also:
>
> . . . .
>
> (9) Transfer and assign pupils. Transfer any pupil from one school to another so as to promote the best interests of education, and <u>determine the school within its district in which any pupil shall enroll</u>.
>
> (10) Prescribe conditions and charges for attendance. Be empowered <u>to prescribe conditions</u> and a schedule of charges based on cost per pupil as last determined, for attendance in public schools of the school district for
>
> > . . . .
> >
> > (d) all other children specially situated and not meeting the eligibility requirements of § 59-63-30, but who shall have petitioned the trustees in writing seeking permission to attend the public schools of the school district.

S.C. Code Ann. § 59-19-90(9), (10)(d) (2004) (emphasis added).

Based on the plain language of the above-referenced subsections, it is clear the Legislature explicitly conferred full discretionary authority on a board of trustees to set attendance criteria for particular schools and to determine which school in its district a student may attend. *Cf. Stewart v. Charleston County Sch. Dist.*, 386 S.C. 373, 688 S.E.2d 579 (Ct. App. 2009) (concluding CCSD had ultimate authority to set attendance guidelines for magnet school).

Although the majority rejects this interpretation, I discern nothing in section 59-63-30 that reflects a legislative intent to supersede the plain language of section 59-19-90. Thus, even though a student may become eligible under section 59-63-30 to enroll in a particular school district, the board of trustees still retains its authority under section 59-19-90 to set attendance criteria for particular schools and to determine which school in its district a student may attend.

Applying the foregoing to the facts of the instant case, I would find that once Student purchased real property with a tax-assessed value of $300 or greater in the CCSD, she became eligible to attend the public schools within the Charleston County attendance zone, which includes the AMHS. However, pursuant to section 59-19-90, the Board was authorized to assign Student to any appropriate school whether it was the AMHS or some other grade-appropriate school within the district.

II.

In a related argument, Parent contends the CCSD's policy of excluding nonresident children from its magnet schools violates the Equal Protection Clause of the South Carolina Constitution. Parent claims the policy "classifies school children as two groups, nonresident and resident, and takes away a nonresident child's entitlement to attend a magnet school while leaving a resident child's entitlement to attend a magnet school intact." Parent avers that this policy violates a nonresident child's right to equal protection as the CCSD cannot show "how excluding nonresident children from its magnet schools bears a reasonable relationship to the legislative purpose sought to be achieved by 59-63-30 and 59-19-90(10)."

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection "requires that all persons be

treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of South Carolina*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (quoting *Marley v. Kirby*, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978)). "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Id.* "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis." *Id.*

Because the classification at issue does not implicate a suspect class or abridge a fundamental right, the analysis of this issue is governed by the rational basis test. Applying this test, I believe the CCSD's Board of Trustees legitimately imposed a residency requirement in order to effectuate the legislative purpose to reserve attendance at the AMHS, a specialized school with limited capacity for enrollment, for only bona fide residents of the CCSD. Thus, I would hold the Board's JFAB policy for the AMHS does not violate the Equal Protection Clause.

Furthermore, I note that appellate courts have consistently rejected Parent's claim and have held that the imposition of a residency requirement withstands scrutiny under the rational basis test. *See Martinez v. Bynum*, 461 U.S. 321, 328 (1983) ("A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment."); *see also* 78A C.J.S. *Schools and School Districts* § 989 (2011) ("Statutes establishing bona fide residency requirements, appropriately defined and uniformly applied, with respect to attendance at free public schools are constitutional.").

III.

Finally, the Board contends the circuit court erred in lifting the automatic stay of its order as it authorized Student to attend the AMHS during the pendency of this appeal. I decline to address this issue as the Court of Appeals denied the Board's request at the onset of this appeal. Moreover, based on my decision to reverse the order of the circuit court, I would find the Board is authorized to determine whether Student may continue her enrollment at the AMHS.

IV.

In conclusion, I believe that any other construction of the statutory provisions involved in this appeal would be contrary to the legislative intent. Moreover, to adhere to the circuit court's reasoning would effectuate chaos in our state school systems as it would entitle all nonresident children to be eligible to attend magnet schools which, in turn, may displace equally-qualified resident children.[13]

This Court has historically deferred to a local government's control over the operation of public schools.[14] I would continue that deference and decline to restrict the Board's statutorily-granted authority to establish admission criteria for particular schools and to determine which particular school a student will attend. Accordingly, I would reverse the order of the circuit court granting declaratory judgment in favor of Parent. *See Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820-21 (1995) ("The decision to grant a declaratory judgment is a matter which rests in the sound

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[13] In an affidavit, the principal of the AMHS stated the school has "a wait-list of 80 students for the ninth grade, and if a student who is not an actual resident of Charleston County were to enroll in AMHS, he or she would displace another student who would be in fact a resident of Charleston County."

[14] *See United States v. Charleston County Sch. Dist.*, 960 F.2d 1227, 1233 (4th Cir. 1992) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process." (quoting *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974))).

discretion of the trial court and will not be disturbed absent a clear showing of abuse.").

The Supreme Court of South Carolina

In the Matter of
William H. Jordan, Petitioner.

Appellate Case No. 2012-211666

ORDER

On January 5, 2009, the Court placed petitioner on interim suspension after his arrest on drug and other charges. *In the Matter of Jordan*, 381 S.C. 141, 672 S.E.2d 104 (2009). On October 26, 2009, the Court suspended petitioner from the practice of law for nine (9) months. *In the Matter of Jordan*, 385 S.C. 614, 686 S.E.2d 682 (2009).[1] Subsequently, on March 7, 2012, the Court suspended respondent from the practice of law for eighteen (18) months, retroactive to October 26, 2009. *In the Matter of Jordan*, 397 S.C. 1, 723 S.E.2d 586 (2012).[2] The Court further stated:

> [u]pon reinstatement to the practice of law, [petitioner] shall enter a two-year contract with Lawyers Helping Lawyers and file quarterly reports with the Commission on Lawyer Conduct during the contract period and, for these first two years he shall also submit quarterly reports regarding all trust account activity to the Commission.

Id. S.C. at 7, S.E.2d at 589.

Petitioner has filed a Petition for Reinstatement seeking reinstatement from both definite suspensions. The Committee on Character and Fitness (the Committee) issued a Report and Recommendation recommending petitioner's reinstatement subject to the conditions set forth in the Court's March 7, 2012, opinion. Neither

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[1] Petitioner completed Pre-Trial Intervention and the drug charges were expunged. Most of the other charges were dismissed.

[2] The matters addressed in this opinion involved misconduct which occurred prior to petitioner's arrest.

petitioner nor the Office of Disciplinary Counsel filed exceptions to the Committee's Report and Recommendation.

Petitioner is reinstated to the practice of law in this state subject to the following conditions:

1) petitioner shall extend his current monitoring contract with Lawyers Helping Lawyers for a period of two years;

2) during the contract period, petitioner shall file quarterly reports addressing his compliance with the monitoring contract with the Commission on Lawyer Conduct (the Commission); and

3) during the next two years, petitioner shall submit quarterly reports regarding all of his trust account activity to the Commission.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 7, 2012

The Supreme Court of South Carolina

In the Matter of W. Benjamin McClain, Jr., Petitioner.

Appellate Case No. 2012-209906

ORDER

On December 19, 2011, the Court definitely suspended petitioner from the practice of law for two years, retroactive to the date of his interim suspension, March 13, 2007.[1] *In the Matter of McClain*, 395 S.C. 536, 719 S.E.2d 675 (2011). Petitioner has now filed a Petition for Reinstatement.

The Committee on Character and Fitness issued a Report and Recommendation recommending petitioner's reinstatement, subject to certain conditions. Neither petitioner nor the Office of Disciplinary Counsel filed exceptions to the Report and Recommendation.

Petitioner is reinstated to the practice of law subject to the following conditions:

1. for the next two (2) years, petitioner shall file quarterly monitoring reports from his psychiatrist with the Commission on Lawyer Conduct (the Commission);

2. for the next two (2) years, petitioner shall consult with a lawyer-mentor and the lawyer-mentor shall file quarterly monitoring reports with the Commission;[2] and

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[1] *In the Matter of McClain*, 372 S.C. 518, 643 S.E.2d 680 (2007).

[2] Petitioner and the Commission shall agree on the selection of the lawyer-mentor. Petitioner shall consult with the lawyer-mentor on terms specified by the Commission.

3. one (1) year from the date of this order, the Commission shall reassess petitioner's restitution agreement with the Lawyers' Fund for Client Protection.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 7, 2012

The Supreme Court of South Carolina

RE: Amendments to Rule 410 of the South Carolina Appellate Court Rules

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O R D E R

On May 7, 2012, this Court issued an order revising, among other things, Rule 410 of the South Carolina Appellate Court Rules (SCACR). This revised Rule 410 is effective January 1, 2013, and will govern the license fees for lawyers and foreign legal consultants that are due on January 1, 2013.

Pursuant to Article V, § 4, of the South Carolina Constitution, the language of the revised Rule 410 contained in the order of May 7, 2012, is hereby amended as follows:

(1) Rule 410(h)(1)(D)(ii) is amended to read:

> **(ii)** the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit or the Supreme Court of the United States. This shall not include attorneys in a federal public defender organization.

(2) Rule 410(k)(4) is amended to read:

> **(4) Judicial Staff Member.** The additional license fee for a judicial staff member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $20. The additional license fee for all other judicial staff members shall be $50.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 5, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Larry Bradley Brayboy, Appellant.

Appellate Case No. 2009-138127

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5060
Heard September 10, 2012 – Filed December 12, 2012

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christina J. Catoe, all of Columbia, and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

SHORT, J: Larry Bradley Brayboy appeals his convictions of armed robbery, kidnapping, and assault and battery of a high and aggravated nature (ABHAN), arguing the trial court erred in limiting his ability to impeach a witness with evidence of a prior conviction. We affirm.

I. FACTS/PROCEDURAL BACKGROUND

Late in the evening of December 6, 2008, intruders entered the Pizza Hut in Lake City, South Carolina. The men wore stocking caps and dark clothing. One man held a pistol, and another man had a shotgun. The man with the shotgun hit an employee in the head with the gun and ordered him to open the cash register. The man with the pistol hit another employee on the head with the gun. The employees were told to take off their clothes and surrender their wallets, cell phones, and keys. After the intruders could not open the cash register and realized the police were en route, they fled.

Investigator Jerry Gainey of the Lake City police department testified he was at the gas station across the street during the robbery. Two employees, who had been outside smoking when the robbery began, ran to him and told him what was happening. Gainey radioed for backup and circled to the back of the Pizza Hut. Gainey and his fellow officers caught Quennell Brown and Robin Turner, two of the perpetrators. Gainey collected evidence at the scene including a shotgun that was "like a sawed-off . . . shotgun."

Brown and Turner admitted their involvement in the crime, indicated Brayboy was the third participant, and agreed to plead to lesser charges and testify against him. Subsequently, a Florence County grand jury indicted Brayboy for armed robbery, kidnapping, and ABHAN.

Prior to Turner's testimony, the trial court heard arguments concerning the admissibility of Turner's prior convictions, especially his prior conviction for possession of a sawed-off shotgun. Brayboy argued the conviction was more probative than prejudicial, and Turner was merely a witness, not a co-defendant. The State argued the conviction was highly prejudicial. Specifically, the State maintained its admission would tend to inappropriately imply Turner's conformity in this case with his prior conviction rather than impeach him. The State agreed to the admission of the conviction itself to be used for impeachment, but it requested the conviction be referred to as a "weapons" conviction.

The trial court opined:

> The issue that was the more interesting issue and the more questionable issue that I have is . . . that of the conviction for the possession of a sawed-off shotgun. And the reason obviously that [it] is an issue that is of higher concern is because . . . that is a very issue in this case. I have absolutely no question that if it [was] a conviction that Mr. Brayboy had and he was facing this dilemma, it wouldn't be a dilemma. I would not allow you to ask regarding the sawed-off shotgun.
>
> So, whether that protection extends to a witness . . . is questionable . . . . I'm trying to think to . . . [its] logical conclusion and . . . why do we not want the jury to hear that type of impeaching . . . evidence[?] And the reason is . . . because we expect and we want the jury to base [its] decision solely on the facts that are presented during the course of this trial . . . and not on some issue that occurred in a previous conviction.
>
> The purpose of impeachment is simply to determine whether or not someone is believable or not, and it should have nothing to do with ["]they did it once, they must [have] done it again.["]
>
> . . . .
>
> And . . . I feel that allowing Mr. Turner to be questioned that he has a prior conviction for possession of a sawed-off shotgun, with that being a direct issue involved in this case, is highly prejudicial to a jury in determining . . . someone's credibility.

The court permitted further discussion, and the State argued that *State v. Elmore*, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006), although not on point because it involved the admissibility of a prior conviction against a defendant, was

instructive. In *Elmore*, this court discussed the heightened prejudicial effect of the admission of a similar prior crime against the defendant. *Id.* at 238-39, 628 S.E.2d at 275. This court noted:

> One permissible approach, advocated by the United States Fourth Circuit Court of Appeals, is to allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1)[, SCRE] without disclosing to the jury the nature of the prior offense. *See United States v. Boyce*, 611 F.2d 530, 531 n. 1 (4th Cir. 1979). The *Boyce* approach was approvingly referenced by our supreme court in *Green v. State*, 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n. 5 (2000). The *Boyce* approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice occasioned by the similarity of the prior crime to the crime charged is removed.

Id. at 239 n.5, 628 S.E.2d at 276 n.5.

The State argued the prejudicial nature of a similar prior crime "goes not so much for impeachment, but more so to . . . show action and conformity therein." Brayboy argued "Rule 609 makes a distinction between witnesses and the accused . . . . The defendant, when he takes the stand, is a different kind of witness . . . . [T]he higher duty to a defendant, which we also see . . . in Rule 404(b)[, SCRE,] and *Lyle* situations[,] as well about a prior bad act, is different with a witness. . . . [T]he duty is higher when it may implicate the due process rights of a defendant." Brayboy requested that if the trial court "determine[d] that the word sawed-off shotgun should not be used, . . . that the [c]ourt consider using the word firearm rather than just weapon."

After further discussion, the court stated the reference to a sawed-off shotgun would "take[] a jury away from simply [evaluating] the credibility of the witnesses" and ruled the prior conviction could be admitted only as the unlawful possession of a firearm conviction. Turner and Brown testified, implicated Brayboy, and the jury found him guilty as charged. The trial court sentenced Brayboy to concurrent eighteen-year terms of imprisonment for the armed robbery

and kidnapping charges and a concurrent ten-year term for the ABHAN charge. This appeal followed.

II. LAW/ANALYSIS

Brayboy argues the balancing test between probative value and prejudicial effect found in Rule 609(a), SCRE, only applies when the State seeks to impeach the *accused* with a prior conviction. Because Turner was not the defendant in this case, Brayboy argues he should have been permitted to specifically question Turner about the shotgun conviction. Brayboy maintains the trial court erroneously relied on cases that apply only to impeach a defendant. Finally, Brayboy submits he was prejudiced because the only evidence linking him to the crime was the testimony of Turner and Brown. We find no reversible error.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Anderson*, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

> [E]vidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, [SCRE,] if the crime was punishable by death or imprisonment in excess of one year . . . and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . .

Rule 609(a)(1), SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE.

The analysis for the admissibility of impeachment evidence differs depending on whether its admission is sought against a witness or a criminal defendant. Warren Moise describes the difference as follows:

Rule 609(a)(1) addresses a conviction with a potential sentence of greater than one year. In civil trials, and in criminal trials for all witnesses other than the accused, a conviction "shall" be admitted under 609(a)(1) subject to the balancing test under Rule 403. The language of proposed Rule 609 initially did not favor admissibility, providing that a prior criminal conviction "is admissible *but only if* . . . punishable by death or imprisonment in excess of one year . . . or involved dishonesty or false statement regardless of the punishment." The imperative "shall" ["must" in Fed. R. Evid. 409(a)(1)] was added later after extensive debate and reflected a decision by Congress to emphasize admissibility. Because admissibility of criminal convictions under the common law was discretionary with the trial judge, Rule 609(a)(1) represents a subtle but clear change for both the federal and South Carolina courts. Now admissibility is mandatory . . . in the first instance. Discretion may be applied to *exclude* the criminal conviction "subject to Rule 403", and then, in accord with the rules' liberal thrust toward admissibility, only if the probative value of the conviction is *substantially* outweighed by countervailing factors. Thus, criminal convictions of a party or witness, other than the accused in a criminal trial rarely should be excluded under Rule 403.

Special rules for the criminal defendant

When the *accused* is sought to be impeached under Rule 609(a)(1), Rule 403 is not used. Instead, the rule is construed . . . pursuant to *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000) and *Green v. State*, 338 S.C. 428, 527 S.E.2d 98 (2000). Under . . . *Colf* and *Green*, the court neither *per-se* excludes nor always allows a criminal defendant's prior convictions into evidence; instead, a factor-based approach is used in determining whether the prosecution has met its burden in establishing that the probative value of the accused's prior conviction

> outweighs any prejudice, a test set forth in Rule 609(a)(1) itself. Although the burden is on the prosecution to meet the test in Rule 609(a)(1), it is not required to prove that the conviction's prejudicial effect *substantially* outweighs its probative value. If the prosecutor's burden has been met, the conviction shall be admitted.

Warren Moise, *Criminal Convictions,* 14 S.C. Law., March 2003, at 11, 11-12 (internal citation omitted).

Because Turner was a witness rather than the accused, the trial court was required to conduct a Rule 403 balancing test. Rule 403's balancing test is applied when the conviction is offered to impeach a witness who is not the defendant. Rule 609(a)(1), SCRE. To exclude the conviction, the court was required to find the probative value was *substantially* outweighed by the danger of unfair prejudice, not merely outweighed by the danger of prejudice. Rule 403, SCRE. Although the trial court relied on *Elmore* and *Boyce*, and it did not specifically cite the Rule 403 balancing test, the trial court considered these issues in its analysis: (1) "because we . . . want the jury to base their decision solely on the facts that are presented during the course of this trial . . . and not on some issue that occurred in a previous conviction"; (2) "[t]he purpose of impeachment is simply to determine whether or not someone is believable or not, and it should have nothing to do with ["]they did it once, they must [have] done it again.["]; and (3) "allowing Mr. Turner to be questioned that he has a prior conviction for possession of a sawed-off shotgun, with that being a direct issue involved in this case, is highly prejudicial to a jury in determining . . . someone's credibility." We find the court indicated its consideration of whether the probative value of the conviction was substantially outweighed by the danger of unfair prejudice. Accordingly, we find no reversible error. *See State v. King*, 349 S.C. 142, 157, 561 S.E.2d 640, 647 (Ct. App. 2002) (finding no error in the admission of the defendant's prior bad acts despite the trial court's failure to perform the required Rule 403 balancing test on the record when the court's comments on the record indicated it was cognizant of the evidentiary rule); *Hunter v. Staples*, 335 S.C. 93, 102, 515 S.E.2d 261, 266 (Ct. App. 1999) (affirming the trial judge's exclusion of a prior conviction based on its finding that the conviction was not relevant and its prejudicial effect outweighed its probative value despite the trial court's failure to "specifically enunciate the factors involved in reaching his ultimate decision" because it was "evident the judge considered Rule 609(a)(1) in conjunction with the Rule 403 balancing analysis").

In addition, we find if the trial court erred, it was harmless beyond a reasonable doubt. "Whether an error is harmless depends on the circumstances of the particular case." *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Error is deemed harmless if it could not reasonably have affected the result of the trial. *Id.* "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." *Id.*

Turner was impeached with multiple convictions: (1) unlawful possession of a "firearm"; (2) common law robbery; (3) possession of a stolen vehicle; and (4) receiving stolen goods. He was also questioned about his pending charges and plea agreement with the State, the terms of which would result in a ten-year federal sentence and the dismissal of all state charges. Furthermore, the other co-defendant, Brown, also testified Brayboy was the third perpetrator and maintained he was with Brayboy when Brayboy purchased the shotgun. Based on a review of the record as a whole, we find any error was harmless.

CONCLUSION

For the foregoing reasons, Brayboy's convictions are

AFFIRMED.

KONDUROS, J., concurs. LOCKEMY, J., concurring in result only.

LOCKEMY, J.: I concur in result only. I would hold that limiting Brayboy's ability to question Turner, one of only two witnesses testifying against him, about Turner's sawed-off shotgun conviction was a violation of Rule 609(a)(1), SCRE, and was error. Furthermore, I do not agree with the majority's determination that the trial court conducted a Rule 403, SCRE, balancing test. In my view, after a proper Rule 403, SCRE, analysis, Brayboy should have been permitted to introduce Turner's shotgun conviction into evidence. Additionally, I am concerned Brayboy's inability to cross-examine Turner regarding his conviction for possession of a sawed-off shotgun is a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. However, I agree with the majority that any error by the trial court was harmless because Turner was impeached with multiple convictions, and Brown testified Brayboy was the third perpetrator. For these reasons, I respectfully concur in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William and Mary Frances Walde, as assignees of Johnson Construction Company of Aiken, Inc., Respondents,

v.

Association Insurance Company, Appellant.

Appellate Case No. 2010-172706

Appeal From Aiken County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5061
Heard June 20, 2012 – Filed December 12, 2012

REVERSED

R. Michael Ethridge and Jennifer B. McCoy, of Carlock Copeland & Stair LLP, both of Charleston, for Appellant.

Benjamin E. Nicholson, V, of McNair Law Firm P.A., of Columbia, for Respondents.

THOMAS, J.: On cross-motions for summary judgment, Association Insurance Company (AIC) appeals the grant of partial summary judgment, costs, and attorney's fees to William and Mary Frances Walde, as assignees of Johnson Construction Company of Aiken, Inc. (Johnson). AIC argues the trial court erred

in finding AIC had a duty to defend Johnson against the Waldes' arbitration claims. AIC further maintains the trial court erred in holding AIC was liable for costs and attorney's fees due to a breach of that duty because the court failed to find that AIC's refusal to defend was without reasonable cause. Because the provisions of Johnson's insurance policy with AIC are unambiguous, those provisions are the guideposts of our analysis below. We reverse.

FACTS AND PROCEDURAL HISTORY

The Waldes owned residential property in Aiken and planned to build a barn and paddock to accommodate their horses. A special exception from a city ordinance was required to allow the barn because the barn was not for commercial use. A variance from the ordinance was also needed to allow the barn to be built behind their home because the barn would be nearer to the neighbors' houses than permitted by the ordinance. To those ends, the Waldes contracted with Johnson for $500 to represent them before Aiken's Board of Zoning Appeals (the BZA) in obtaining the necessary approval to build the barn and paddock (the Permitting Contract).[1]

Johnson submitted applications for the variance and special exception to the BZA. Before and immediately after Johnson met with the BZA, Johnson's owner, Mike

[1] In the order appealed from, the trial court found Johnson and the Waldes entered two separate contracts: the Permitting Contract and a contract to build a paddock and two-story barn–apartment. Thus, the trial court held Johnson's representation of the Waldes before the BZA was "separate and apart" from its construction of the barn itself. At the summary judgment hearing, AIC argued the parties entered only one contract that included permitting and construction. However, AIC's initial appellant's brief does not include an issue on appeal addressing this contention, does not argue the specific issue, and only briefly refers to this concern in its exclusion arguments without providing any supporting authority. Therefore, we do not address whether the trial court properly found the parties entered separate contracts. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Fassett v. Evans*, 364 S.C. 42, 50 n.5, 610 S.E.2d 841, 846 n.5 (Ct. App. 2005) (holding that even if an argument could be construed as raising a separate issue on appeal, it was abandoned for being conclusory and failing to cite any supporting authority).

Johnson, affirmed to the Waldes that the variance and special exception being applied for would be sufficient for the desired barn, including an upstairs accessory apartment, to comply with Aiken's ordinances. The BZA approved the variance and special exception, but those approvals were not sufficient to build the barn the Waldes desired.

The Waldes subsequently contracted with Johnson for the construction of a paddock and barn that included the upstairs apartment (the Construction Contract). Johnson had completed 80% of the barn by June 2008. That month, Aiken's building inspector notified Johnson the barn did not comply with the variance or special exception. The barn was not built in the location permitted by the special exception. Nor had the BZA approved the apartment, which caused the barn to contravene the height and size standards of Aiken's ordinances.

Johnson sought another variance and special exception with the BZA. The BZA denied the applications and directed the barn to be torn down. The Waldes consequently terminated the Construction Contract with Johnson. Without Johnson's help, they sought a variance and special exception for a third time, requesting that the barn remain if the apartment was removed. The BZA granted this request, and Johnson tore down the apartment to lower the barn's roof to remedy the problem.

In September 2008, the Waldes filed an arbitration demand with the American Arbitration Association. Johnson was insured by AIC under a comprehensive general liability policy (the Policy). Johnson notified AIC of the arbitration demand, and AIC denied any duty to defend or indemnify pursuant to the Policy. Johnson thereafter hired its own counsel to defend against the Waldes' allegations.

The Waldes also filed a brief with the arbitrator. Taken together,[2] the arbitration demand and arbitration brief specify claims for breach of contract, negligent

[2] The trial court considered both the arbitration demand and the Waldes' arbitration brief. The record does not indicate whether AIC objected to the consideration of the arbitration brief before the trial court ruled or in a subsequent Rule 59(e) motion. Thus, whether the trial court should have considered the arbitration brief is not properly before us, and we consider both the arbitration demand and the arbitration brief in deciding the issues. *See Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) (when an appellant neither raises an issue at trial nor

misrepresentation, breach of fiduciary duty, and unjust enrichment. They include a quote from Mike Johnson at the second BZA meeting that he "had no inkling, no intent," and "no idea" that the construction plans violated the size or height requirements of the variance and special exception. The gravamen of the Waldes' negligence, negligent misrepresentation, and breach of fiduciary duty claims alleged the same conduct by Johnson: negligent representation of them pursuant to the Permitting Contract to obtain the necessary approval of the desired barn, which included performing work before the BZA and advising them that the variance and special exception would permit the barn's height with the apartment. The Waldes' arbitration claims sought prejudgment interest; arbitration costs and fees; damages for the difference between the value of the barn they contracted for and the value of the barn they received; damages for the cost of paying additional professionals to supervise, plan, and survey construction of the property due to Johnson's negligence; travel costs; and punitive damages.

Johnson and the Waldes settled their dispute prior to arbitration. Part of the settlement agreement assigned to the Waldes any rights Johnson had to insurance proceeds under the Policy.

The Waldes thereafter filed a complaint against AIC, alleging AIC breached its duty to defend and indemnify Johnson. The complaint also attached the Policy, the arbitration demand, and the arbitration brief.

The Waldes moved for partial summary judgment that (1) AIC breached its duty to defend Johnson and (2) AIC was therefore liable to them under section 38-59-40(1) of the South Carolina Code (2002) for their costs and attorney's fees in suing AIC as well as Johnson's costs and attorney's fees in the prior arbitration.[3] AIC filed a cross-motion for summary judgment in response. AIC maintained the Waldes' arbitration claims did not involve an "occurrence" giving rise to "property damage" and were precluded by "insured contract," "your work," "intentional

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through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review).

[3] The Waldes' motion did not seek a finding on the amount of costs or fees recoverable; it sought a finding on AIC's liability for those items.

acts," and "products-completed operations hazard" (PCOH) exclusions.[4] Even if AIC breached a duty to defend, moreover, AIC argued the Waldes were not entitled to costs or fees because they did not present any evidence AIC's refusal was without reasonable cause.

The trial court granted the Waldes' motion for partial summary judgment. It held AIC was obligated to defend Johnson in the arbitration because (1) the Waldes suffered "property damage" caused by an "occurrence" and (2) the alleged policy exclusions did not apply. The trial court lastly held that, because AIC failed to defend Johnson, AIC was liable for the fees and costs sought by the Waldes. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in finding AIC had a duty to defend Johnson?

2. Did the trial court err in finding AIC liable for fees and costs under section 38-59-40?

STANDARD OF REVIEW

"Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law." *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 576, 666 S.E.2d 897, 899 (2008). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 577, 666 S.E.2d at 899.

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[4] We note the parties refer to exclusion A.2(j)(6) as the "Your Work exclusion" and exclusion A.2(l) as the "PCOH exclusion." While this practice may be helpful to the reader, we discuss the exclusions by referring to their particular subdivisions. We do this to emphasize that legal analysis addressing contractual provisions should focus on the language of the contract. In this case, the Policy frames the meaning of "occurrence," "property damage," "your work," and "PCOH" by using different, specific definitions. Those definitions only gain legal meaning through the insuring clause and exclusions of the Policy.

ANALYSIS

I. Duty to Defend

AIC asserts the trial court erred in finding AIC had a duty to defend Johnson against the Waldes' claims for multiple reasons. We address them below.

"Insurance policies are subject to the general rules of contract construction." *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). "The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions. Each exclusion in the policy must be read and applied independently of every other exclusion." *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 547 (2009). We "interpret insurance policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer." *M & M Corp.*, 390 S.C. at 259, 701 S.E.2d at 35.

Here, the provisions of the Policy, and the manner in which they apply under the allegations at issue,[5] are unambiguous. Thus, those provisions are the guideposts of our analysis below.

"Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the third party's complaint." *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994), *aff'd* 321 S.C. 310, 468 S.E.2d 304 (1996). In examining these allegations, the "court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against

[5] The Waldes contend the trial court found as alternative holdings that exclusion A.2.(j)(6) does not apply because it is "ambiguous as applied to these facts" and thus must be construed against AIC, the insurer. They contend AIC has not appealed these findings and they accordingly are the law of the case. However, AIC's entire appeal is clearly based upon an argument that the Policy unambiguously excludes coverage for the Waldes' claims. Therefore, the finding that this exclusion is "ambiguous as applied" is not the law of the case.

the insurer." *Collins Holding Corp.*, 379 S.C. at 577, 666 S.E.2d at 899. If these alleged acts create "a possibility of coverage under an insurance policy, the insurer is obligated to defend." *Isle of Palms Pest Control Co.*, 319 S.C. at 15, 459 S.E.2d at 319.

A. "Property Damage" Caused by an "Occurrence"

The Policy's insuring clause provides the following:

> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.
>
> . . . .
>
> **b.** This insurance applies to . . . "property damage" only if:
>
> **(1)** The . . . "property damage" is caused by an "occurrence" . . . .

Thus, AIC argues it did not have a duty to defend Johnson because the Waldes' claims failed to raise the possibility of "property damage" caused by an "occurrence."[6]

[6] In defense of this argument, the Waldes contend the trial court's finding that AIC had a duty to defend Johnson is the law of the case. They first maintain the trial court made an unappealed finding in a footnote that AIC had a duty to defend based upon Johnson's breach of a fiduciary duty. However, the footnote is attached to the court's finding that an "occurrence" existed by virtue of Johnson's negligent statements to the Waldes pursuant to the Permitting Contract that the plans complied with the variance and special exception. We do not interpret the footnote to constitute an alternative finding to support a blanket grant of summary judgment on the duty to defend, including any consideration of whether "property damage" was alleged or any exclusions apply. In the footnote, the trial court held the

1. *Property Damage*

AIC contends the trial court erred in finding the Waldes alleged "property damage" because their allegations do not establish "physical injury" or "loss of use." AIC argues the claims in fact allege economic loss resulting from faulty workmanship. We find the Waldes alleged "property damage" under the terms of the Policy.

The Policy defines "property damage" as the following:

> **a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> **b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

In granting partial summary judgment, the trial court found the Waldes raised the possibility of more than mere economic loss because they claimed both (1) "physical injury" when the barn was partially torn down and (2) if no physical injury, "loss of use" of the barn when the BZA determined it failed to comply with Aiken's regulations. We hold the Waldes alleged loss of use without physical injury.

The Waldes' arbitration claims clearly allege economic loss that does not by itself trigger coverage under the Policy.[7] However, this does not preclude AIC from

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allegations underlying the breach of fiduciary duty claim established an "occurrence."

[7] The Waldes' arbitration allegations raise several items that are economic loss, including prejudgment interest; arbitration costs and fees; damages for the difference between the value of the barn contracted-for and received; damages for the costs of travel and construction supervision, planning, and surveying of their property.

having a duty to defend Johnson against the Waldes' claims. The Policy's insuring clause says AIC has a "duty to defend [Johnson] against any 'suit' seeking those damages" Johnson "becomes legally obligated to pay . . . because of . . . 'property damage' to which this insurance applies." Thus, AIC must defend Johnson in a suit for damages so long as the Waldes' allegations raise the possibility that Johnson is obligated to pay those damages because of "property damage" caused by an "occurrence" that is not excluded by the Policy.

The seminal case in South Carolina addressing whether a party has alleged mere economic loss is *Auto-Owners Insurance Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003). In that case, third party homeowners sued multiple insureds on a number of theories for the failure to disclose the known presence of hazardous materials in the construction and sale of their homes. *Id.* at 159, 588 S.E.2d at 113. The homeowners alleged the insureds' failure to disclose the presence of the hazardous materials caused the homeowners to suffer lower property values and other economic damages. *Id.* The court held the insurer did not have a duty to defend the insureds because the homeowners' claims did not allege any "physical injury" that meets the definition of "property damage." *Id.* at 162-63, 588 S.E.2d at 115. The court reasoned the allegations of mere diminution in property value and other economic damages are purely economic loss. *Id.* at 163, 588 S.E.2d at 115.

Unlike the third parties in *Carl Brazell Builders, Inc.*, the Waldes have gone beyond alleging mere economic loss. They have raised the possibility of "property damage."

The Waldes' allegation that the barn had to be partially torn down to make it comply with Aiken's regulations does not raise the possibility of "physical injury to tangible property." "Physical injury" is not defined by the Policy, but an "injury" is generally considered the violation of another's legal right. *See Black's Law Dictionary* 856 (9th ed. 2009) (providing that an injury is "the violation of another's legal right, for which the law provides a remedy"). Under this definition, Johnson's partial tearing down of the barn's second story does not constitute an injury. This removal of the second story was a remedial measure Johnson performed to fix the injury he caused to the Waldes when the construction put them in violation of Aiken's ordinances.

Nonetheless, the Waldes' allegations do raise the possibility of "loss of use of tangible property" that has not been physically injured. The Waldes could not fully use the property after the BZA informed them of the barn's noncompliance. Thus, they have alleged property damage as defined under the Policy. Whether that claim of "property damage" is covered by the Policy is determined by whether it was caused by an "occurrence," and whether an exclusion applies.

We disagree with AIC's argument that the Waldes failed to allege "property damage" because the physical injury to the barn resulted from faulty or defective workmanship. Under the plain language of the Policy, whether "property damage" was caused by faulty workmanship is relevant in the Policy's exclusions and not the definition of "property damage." Further, the three cases raised by AIC in support of its argument are inapplicable to the property damage issue. *See Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 50, 717 S.E.2d 589, 592, 594 (2011) (stating that the question before the court was whether the party's claims involved an "occurrence"; the parties stipulated the claims involved property damage and the parties would not argue any policy exclusions); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 122-25, 621 S.E.2d 33, 36-37 (2005) (addressing whether a party's claims involved an "occurrence"); *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 563-65, 561 S.E.2d 355, 357-58 (2003) (stating that the parties stipulated the claims involved property damage and addressing whether a claim for cost of repair was excluded by a faulty workmanship exclusion), *overruled on other grounds by Crossmann Cmtys. of N.C., Inc.*, 395 S.C. at 50, 717 S.E.2d at 594.

2. *Occurrence*[8]

The Waldes have consistently maintained an "occurrence" existed under the Policy due to Johnson's negligent representation of them before the BZA pursuant to the Permitting Contract. The trial court agreed with this assertion, finding three occurrences arising out of the Permitting Contract: (1) Johnson's incorrect advice to the Waldes before and immediately after the BZA meeting that their desired barn would comply with the ordinances, variance, and special exception; (2)

[8] Our supreme court has held the definition of "occurrence" is ambiguous in the progressive property damage context. *Crossmann Cmtys. of N.C., Inc.*, 395 S.C. at 49, 717 S.E.2d at 594.

Johnson's failure to obtain the necessary approvals from the BZA to build the desired barn; and (3) Johnson's failure to design the barn within the height and location requirements established by the BZA and Aiken ordinances.

On appeal, AIC maintains the Waldes' claims do not arise from an "occurrence" because the Waldes' arbitration demand asserted Johnson's advice was "wrongful." According to AIC, this allegation indicates the Waldes' claims are not based upon an "accident" that would give rise to an "occurrence." We disagree.

In the Policy, an "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." When left undefined in a CGL policy, "accident," means "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *Newman*, 385 S.C. at 192, 684 S.E.2d at 543 (alteration in opinion) (internal quotation marks omitted).

Here, the Waldes' allegations establish the possibility of an "occurrence." The Waldes' allegation that Johnson "wrongly" said their plans complied with the BZA's variance and exception could be construed as alleging Johnson was mistaken or acting "without due care." *See Black's Law Dictionary* 856 (9th ed. 2009) (defining a "wrong" as a "breach of one's legal duty"); *id.* (defining "wrongful" as "1. Characterized by unfairness or injustice . . . 2. Contrary to law; unlawful"); *id.* (defining "wrongful conduct" as "[a]n act taken in violation of a legal duty; an act that unjustifiably infringes on another's rights"); *Webster's New World College Dictionary* 1653 (4th ed. 2008) (defining "wrongly" as "in a wrong manner; . . . incorrectly; amiss"). Thus, regardless of whether a claim is made for "negligence," "negligent misrepresentation," or "breach of fiduciary duty," the Waldes sufficiently allege Johnson's erroneous representation of them before the BZA and provision of information was unintentional. *Compare Collins Holding Corp.*, 379 S.C. at 577-78, 666 S.E.2d at 899-900 (holding the trial court erred in finding a negligent misrepresentation claim created the possibility of an occurrence because the allegations underlying the claim could not be construed as accidental since they incorporated assertions the insured's conduct "systematic[ally]," "intentional[ly]," and "deliberate[ly]" violated the law and therefore could not possibly be construed as negligent in nature). Therefore, it could be an accident within the terms of the Policy. That accident caused loss of use, and the Waldes have sufficiently alleged "property damage" caused by an "occurrence."

B. Exclusion A.2(j)(6)

If the Waldes sufficiently alleged "property damage" caused by an "occurrence," AIC argues the trial court erred in finding AIC had a duty to defend Johnson because the Waldes' claims fall within exclusion A.2(J)(6). We agree.

Exclusion A.2(j)(6) provides the following:

> **2. Exclusions**
>
> This insurance does not apply to:
> . . . .
>
> **j. Damage to Property**
>
> "Property damage" to:
> . . . .
>
> **(6)** That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.
> . . . .
>
> Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."
> . . . .

"Your work" includes "[w]ork or operations performed by you or on your behalf" as well as "[w]arranties and representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work.'" PCOH includes all "property damage" (1) "occurring away from premises you own or rent" and (2) arising out of "your work" except:

> **(2)** Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

> **(a)** When all of the work called for in your contract has been completed.
>
> **(b)** When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> **(c)** When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair, or replacement, but which is otherwise complete, will be treated as completed.

The Waldes have alleged property damage not included in the PCOH. Regardless of whether the Permitting Contract was complete when the Waldes in fact lost use of the property, the Policy deems all loss of use unaccompanied by physical injury to have occurred at the time of the occurrence. In this case, the Waldes claim loss of use of the property arising out of Johnson's incorrectly performed obligations to advise them and obtain the necessary approval from the BZA to build the desired barn on the property under the Permitting Contract. The loss of use is deemed to have happened at the time of those incorrect performances. Therefore, the alleged loss of use happened before Johnson's work pursuant to the Permitting Contract was complete.[9]

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[9] If this court were able to consider whether Johnson and the Waldes in fact entered two contracts, we may have been inclined to find that they did not. As a result, Johnson and the Waldes' contract would involve both the agreement to obtain the necessary approval from the BZA and the construction of the barn. In such a case, however, the Waldes' allegations would still allege property damage within the PCOH. Because the Waldes are deemed to have lost use of the barn during Johnson's representation of the Waldes before the BZA, the loss of use would have happened before all of the work in that contract—including the construction—was complete.

Because the Waldes have alleged "property damage" not included in PCOH, the Policy indicates the Waldes' claims would be excluded from coverage under A.2(j)(6) if they claimed "property damage" to "that particular part of property that must be . . . replaced because 'your work' was incorrectly performed on it." In this case, A.2(j)(6) precludes coverage. The Waldes have alleged that they lost use of the barn while they were required to tear down and place a new roof on its structure to comply with Aiken's height regulations because of Johnson's defective work. In other words, the Waldes have alleged property damage to that particular part of property that must be replaced because Johnson's permitting work was incorrectly performed on it.

The Waldes contend their claims are not excluded because the defective work occurred before the BZA rather than in the construction of the barn, i.e. they claim Johnson negligently performed the permitting work and did not negligently build the barn. However, this argument that their claims involve a permitting defect and not a construction defect cannot escape the exclusion mandated by A.2(j)(6). *Cf. Century Indem. Co.*, 348 S.C. at 565-67,561 S.E.2d at 358-59 (providing an identical provision excluded coverage not only for (1) "property damage" to defective work caused by that defective work but also (2) "property damage" to non-defective work caused by the defective work), *overruled on other grounds by Crossmann Cmtys. of N.C., Inc.*, 395 S.C. at 50, 717 S.E.2d at 594. As a result, the trial court erred in finding AIC had a duty to defend Johnson against the Waldes' allegations.

CONCLUSION

Because we find AIC had no duty to defend Johnson, we need not address AIC's remaining arguments and issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). We reverse the trial court's grant of summary judgment to the Waldes. We find the Waldes successfully raised the possibility of "property damage" caused by an "occurrence" under the terms of the Policy. However, we hold the Waldes' allegations have not raised the possibility of coverage because they are unambiguously excluded. Thus, we hold AIC had no duty to defend Johnson

against the Waldes' claims, and AIC is not liable for the fees and costs sought by the Waldes.

REVERSED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Energy Carolinas, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, South Carolina Attorney General, American Rivers, and The South Carolina Coastal Conservation League, Defendants, Of whom South Carolina Department of Health and Environmental Control and American Rivers and The South Carolina Coastal Conservation League are, Appellants.

Appellate Case No. 2010-166486

Appeal From Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Published Opinion No. 5062
Heard May 23, 2012 – Filed December 12, 2012

REVERSED AND REMANDED

Stephen P. Hightower, of Columbia, for Appellant South Carolina Department of Environmental Control.
Christopher K. DeScherer, J. Blanding Homan, IV, and Frank S. Holleman, III, all of the Southern Environmental Law Center, of Charleston, for Appellants American Rivers and South Carolina Coastal Conservation League.

James Wm. Potter, W. Thomas Lavender, Jr., Joan W. Hartley, all of Nexsen Pruet, LLC, of Columbia, for Respondent.

LOCKEMY, J.: In this administrative action, South Carolina Department of Health and Environmental Control (DHEC) appeals the administrative law court's (ALC) decision, arguing that the ALC erred in finding: (1) DHEC's review of Duke Energy Carolinas, LLC's (Duke) water quality certification application was not timely and (2) DHEC waived its right to issue a water quality certification to Duke. American Rivers and South Carolina Coastal Conservation League (Coastal Conservation) (collectively Conservation Groups) also appeal the ALC's decision and contend the ALC erred in: (1) refusing to give effect to Regulation 61-30; (2) finding DHEC's decision untimely; (3) misconstruing Regulation 61-101; (4) ignoring facts that showed Duke was estopped from arguing DHEC's decision was untimely; and (5) failing to find that Duke waived any challenge to DHEC's certification decision and the State's certification authority.[1] We reverse and remand.

FACTS

We first review the relevant statutory framework for these facts. Section 401 of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2010), "requires States to provide a water quality certification [WQC] before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994); *see* 33 U.S.C. § 1341 (2010). States "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1). Further, section 401 of the CWA provides:

> If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be

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[1] DHEC and the Conservation Groups will be collectively referred to as Appellants.

> waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

Id.

"The Pollution Control Act [PCA] empowers DHEC to 'take all action necessary or appropriate to secure to this [s]tate the benefits of the Federal [CWA].'" S.C. Code Ann. § 48-1-50(17) (Rev. 2008). Section 48-1-30 of the South Carolina Code (Rev. 2008) authorizes generally that DHEC shall promulgate regulations guiding the procedures for permits under the PCA. Regulation 61-101was then promulgated pursuant to section 48-1-30 to establish procedures and policies for implementing the WQC requirements of Section 401 of the CWA. S.C. Code Ann. Regs. 61-101 (Supp. 2011); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010).

Regulation 61-101 requires that any applicant for a federal license or permit, including those issued by Federal Energy Regulatory Commission (FERC), to conduct any activity which during construction or operation may result in any discharge in navigable waters, must obtain a water quality certification from DHEC. S.C. Code Ann. Regs. 61-101(A)(2). Further, it establishes a time frame for review of the applications, stating

> [DHEC] is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If the Federal permitting or licensing agency suspends processing of the application on request of the applicant or [DHEC] or of its own volition, suspension of processing of application for certification will also occur, unless specified otherwise in writing by [DHEC]. Unless otherwise suspended or specified in this regulation, [DHEC] shall issue a proposed decision on all applications within 180 days of acceptance or an application.

S.C. Code Ann. Regs. 61-101(A)(6). Review can begin when an applicant has presented DHEC with a complete application in the manner specified by Regulation 61-101. S.C. Code Ann. Regs. 61-101(C)(1). An application must contain the names and addresses of adjacent property owners. S.C. Code Ann. Regs. 61-101(C)(1)(f).

Regulation 61-101(C)(2) states

> [i]f [DHEC] does not request additional information within ten (10) days of receipt of the application or joint public notice, the application will be deemed complete for processing; however, additional information may still be requested of the applicant within sixty (60) days of receipt of the application.

Moreover, Regulation 61-101(C)(4) provides

> [w]hen [DHEC] requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by [DHEC]. Any subsequent resubmittal will be considered a new application.

The Environmental Protection Fund Act (Fund Act), sections 48-2-10 to 48-2-90 of the South Carolina Code (Rev. 2008 & Supp. 2011), was enacted for the purpose of creating a fund whose "monies must be used for improved performance in permitting, certification, licensing, monitoring, investigating, enforcing, and administering [DHEC's] functions." S.C. Code Ann. § 48-2-40 (Rev. 2008). The Fund Act applies to the processing of all environmental permits, licenses, certificates, and registrations authorized by the PCA, Clean Air Act, Safe Drinking Water Act, Hazardous Waste Management Act, Atomic Energy Act, and the Oil and Gas Act. S.C. Code Ann. § 48-2-30(B) (Rev. 2008 & Supp. 2011). WQCs are also covered by the Fund Act. S.C. Code Ann. § 48-2-50(H)(1)(b) (Supp. 2011).

The Fund Act contains a provision entitled, "Processing of permit application; maximum time for review," which mandates that DHEC promulgate regulations governing the timeliness, thoroughness, and completeness of DHEC's processing of application subject to the Fund Act. S.C. Code Ann. § 48-2-70 (Rev. 2008). Section 48-2-70 states

> [u]nder each program for which a permit processing fee is established pursuant to this article, the promulgating authority also shall establish by regulation a schedule for timely action by [DHEC] on permit applications under that program. These schedules shall contain criteria for determining in a timely manner when an application is complete and the maximum length of time necessary and appropriate for a thorough and prompt review of each category of permit applications and shall take into account the nature and complexity of permit application review required by the act under which the permit is sought. If the department fails to grant or deny the permit within the time frame established by regulation, the department shall refund the permit processing fee to the permit applicant.

§ 48-2-70. DHEC promulgated the Environmental Protection Fees, S.C. Code Ann. Regs. 61-30 (2011), in accordance with the Fund Act. Its purpose and scope is described as follows:

> This regulation prescribes those fees applicable to applicants and holders of permits, licenses, certificates, certifications, and registrations (hereinafter, "permits") and establishes schedules for timely action on permit applications. This regulation also establishes procedures for the payment of fees, provides for the assessment of penalties for nonpayment, and establishes an appeal process to contest the calculation or applicability.

S.C. Code Ann. Regs. 61-30(A). Regulation 61-30 also provides in pertinent part that "[a]pplication fees shall be due when the application is submitted. The

Department will not process an application until the application fee is received." S.C. Code Ann. Regs. 61-30(C)(1)(b). Further, the regulation maintains that

> [t]he schedule shall be tolled when the Department makes a written request for additional information and shall resume when the Department receives the requested information from the applicant. If an applicant fails to respond to such a request within 180 days, the Department will consider the application withdrawn and the application fee will be forfeited. The Department shall notify the applicant no later than 10 days prior to expiration of the 180-day period.

S.C. Code Ann. Regs. 61-30(H)(1)(c).

On June 5, 2008, Duke filed an application with DHEC to obtain a WQC for a FERC license authorizing Duke's continued operation of the Catawba-Wateree Hydroelectric Project in South Carolina. The application was submitted without the required names and addresses of the adjacent property owners. Additionally, Duke did not provide the regulatory application fee.

On June 27, 2008, Duke supplied DHEC with several lists that contained the names of interested citizens and stakeholders who had contacted Duke and requested notification of matters regarding Duke's FERC application. However, the lists still did not contain all the names and addresses of the adjacent property owners. On July 29, 2008, Duke provided DHEC with a list of the names and addresses of all the adjacent property owners. In response to Duke's fulfillment of that requirement, DHEC notified Duke by email that it was placing Duke's application on public notice. However, DHEC also specified it still required an affidavit of publication and the required application fee from Duke before its review would commence and the 180 day clock would start. DHEC placed Duke's application on public notice on August 8, 2008.

DHEC also sent a letter to Duke dated August 19, 2008 (Letter 1), requesting additional information regarding the draft Quality Assurance Program Plan (QAPP) that Duke had submitted with their application. Letter 1 further requested that Duke submit the information to DHEC by October 19, 2008, and notified Duke that pursuant to Regulation 61-30, DHEC had 180 days to issue a decision

once the application was complete. Letter 1 also stated Duke's application would not be complete for processing until the application fee and affidavit of publication requested previously was received, and that "the clock stops when information is requested and [DHEC] is waiting on a response."

DHEC received the affidavit and application fee on August 25, 2008. DHEC then sent two more letters to Duke requesting additional information needed to process Duke's application. One letter (Letter 2) was sent to Duke on October 8, 2008, requesting the additional information by November 8, 2008. On November 10, 2008, DHEC received the information requested in the October 8 letter. Another letter (Letter 3) was sent to Duke on October 21, 2008, requesting information to be sent to DHEC by November 21, 2008. DHEC received a partial response on the due date for the information. The remainder of the information was received by DHEC on December 12, 2008.

On May 15, 2009, DHEC issued its Notice of Department Decision (Notice), granting Duke's WQC. The Conservation Groups appealed the Notice on May 15, 2009, challenging DHEC's proposed WQC on the grounds that it would permit Duke to operate its project in violation of water quality standards. The South Carolina Board of Health and Environmental Concern (Board) granted the Conservation Groups' request for a final review conference, which was held on July 9, 2009. On August 6, 2009, the Board issued a final agency decision, overturning DHEC's issuance of Duke's WQC.

Duke appealed the Board's decision by filing a request for a contested case proceeding in the ALC on September 5, 2009. By an order dated November 9, 2009, the ALC admitted the Conservation Groups and the South Carolina Attorney General as respondent-intervenors.[2] On January 21, 2010, Duke filed two motions with the ALC, one for summary judgment and the second for declaratory judgment. Duke based its argument for summary judgment on two grounds: (1) pursuant to regulation 61-101(A)(6) of the South Carolina Code (Supp. 2011), DHEC was required to issue a proposed decision on Duke's application for a WQC within 180 days of receiving the application on June 5, 2008, and (2) by operation

[2] The ALC limited the participation of the South Carolina Attorney General to issues impacting the State's law suit against the State of North Carolina seeking a ruling from the United States Supreme Court on the proper apportionment of water from the Catawba River.

of law, the State waived its right to issue certification when DHEC failed to either issue or deny the WQC on or before December 2, 2008.

DHEC filed a response on February 12, 2010 in which it argued for denial of Duke's motions. A hearing was held on May 6, 2010, and on June 10, 2010, the ALC granted Duke's motion for summary judgment, but failed to rule on Duke's motion for declaratory judgment. DHEC and the Conservation Groups filed a joint motion for reconsideration, which the ALC denied. Both DHEC and the Conservation Groups filed timely appeals from the ALC's decision to grant summary judgment to Duke and its denial of their joint motion for reconsideration, which this court has consolidated under this caption.

STANDARD OF REVIEW

"Appeals from the ALC are governed by the Administrative Procedures Act (APA)." *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct. App. 2011). "Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.* (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2010)).

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (citing *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Media Gen. Commc'ns, Inc. v. S.C. Dept. of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 527 (2010) (citing Rule 56(c), SCRCP); *see also* ALC Rule 68 (stating the South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules). In

determining whether a genuine issue of material fact exists, "the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

LAW/ANALYSIS

Application of Regulation 61-30 to Regulation 61-101

"Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health and Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012); *see S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). "'When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation.'" *Murphy*, 396 S.C. at 639-40, 723 S.E.2d at 195 (quoting *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002). "Furthermore, we give deference to the interpretation of a regulation by the agency charged with it [sic] enforcement." *Id.* at 640, 723 S.E.2d at 195; *see Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.").

"The primary rule of statutory construction is to ascertain and give effect to the intent of the [legislature]." *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (citing *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). "This [c]ourt has held that a statute shall not be construed by concentrating on an isolated phrase." *Id.* (citing *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("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*, 370 S.C. at 468, 636 S.E.2d at 606-07 ("A statute as a whole must receive practical,

reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "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." *Beaufort Cnty.*, 395 S.C. at 371, 718 S.E.2d at 435.

First, we briefly address Appellants' argument that the ALC erred in finding *Responsible Economic Development, et al. v. South Carolina Department of Health and Environmental Control and Wal-Mart Stores East, LP*, 371 S.C. 547, 641 S.E.2d 425 (2007) applied to the instant case. *Responsible Economic* held that regulations from different enabling acts could not be applied to each other when the regulations did not reference each other and there is an absence of statutory authorization to apply the two acts and their corresponding regulations to each other. We agree with the Conservation Groups' contention that the present case is distinguishable from *Responsible*.

Section 48-2-70, under which Regulation 61-30 is promulgated, explicitly states DHEC must establish by regulation a schedule for timely action on permit applications for a WQC. S.C. Code Ann. § 48-2-70 (Rev. 2008). It further states the schedule must have criteria for determining in a timely manner when an application is complete along with the maximum length of time necessary and appropriate for a thorough and prompt review required by the act under which the permit is sought. *Id.* The statute's plain language indicates the time schedule provided in Regulation 61-30, as well as any corresponding explanation of how to count the days in that time schedule, would be applicable to any previous regulation under which the permit is authorized.

Regulation 61-30 "prescribes those fees applicable to applicants and holders of permits, licenses, certificates, certifications, and registrations (hereinafter, "permits") *and establishes schedules for timely action on permit applications*." S.C. Code Ann. Regs. 61-30(A) (emphasis added). The regulation defines "time schedule" as follows:

> In accordance with S.C. Code Sections 48-2-70 and 48-39-150, a "schedule of timely review" for purposes of this regulation shall begin when the applicant is notified that the application is administratively complete or within ten days of receipt of the application, whichever comes

> first; and end when a final decision is rendered. *It will include required technical review, required public notice, and end with a final decision by the Department to issue or deny the permit.* The time schedule may be tolled or extended in accordance with the conditions stipulated in Section H(1) of this regulation.

S.C. Code Ann. Regs. 61-30(B)(22) (emphasis added). Section H(2)(a)(vii) lists the time schedules for environmental permits for water pollution control and allows 180 days for a WQC permit to be processed; this time schedule mirrors Regulation 61-101's time schedule for permit review. Regulation 61-30 also states an application is not to be processed until the required processing fee is received. Duke argues that the 61-30 solely governs the time schedule by which a fee must be returned due to untimely action, and has no bearing upon the time schedule of the actual substantive decision of whether a permit will be granted. We have difficulty understanding how the processing of a permit hinges upon receipt of the fee, but then once that fee is received, there is a separate time schedule applied to each. There are multiple references to the substantive permit review process in Regulation 61-30, and many portions of Regulation 61-30's requirements and procedures regarding the application procedure mirror the requirements in Regulation 61-101. Reading the statutory mandates and regulatory requirements in their plain and ordinary sense indicates that Regulation 61-30 and 61-101 were to be read together to provide DHEC more flexibility in the processing of permits.[3] Both of the regulations can exist without one negating the other, as Regulation 61-30 clarifies how Regulation 61-101's 180-day time period of review will be counted.

Section H(1) of Regulation 61-30 sets the procedure for counting the days in a given time schedule, and allows for tolling as well as suspension of the time schedule. S.C. Code Ann. Regs. 61-30(H)(1)(c)-(d). Because we find Regulation 61-101 and Regulation 61-30 are applicable to each other, we believe that the

[3] We are not encouraging untimely action by state agencies. Further, we make no determinations in the present case as to the reasonableness of DHEC's requests for information, as that is not an issue on appeal. Simply put, we believe that these regulations recognize the need for some flexibility in making these complex permitting decisions, such as under these facts, where the applicant is untimely with their responses to DHEC's requests.

tolling provisions of 61-30 are also applicable to Regulation 61-101. Additionally, DHEC explained its interpretation of the time schedule to Duke Energy in their letter dated October 19, 2008, as well as in other documents. It cited Regulation 61-30, and stated that while DHEC had 180 days to complete its action on the application, only the days on which DHEC was actively reviewing the application would be counted. DHEC maintained the clock stopped when information was requested and DHEC was awaiting a response. We give DHEC's interpretation deference because we believe it complies with the regulations' plain language.

We find the language of section 48-2-70 provides that the regulations promulgated under its authority are to enhance DHEC's review process for any permits which require a processing fee, including a WQC. S.C. Code Ann. § 48-2-70 (Rev. 2008). Accordingly, we hold the ALC erred in finding, as a matter of law, that Regulation 61-30 had no application to Regulation 61-101. Thus, we reverse the ALC.

Estoppel

The Conservation Groups argue that because Duke had full knowledge that DHEC was operating by the full time period provided by reading Regulation 61-101 and Regulation 61-30 in conjunction, Duke is now estopped from maintaining that Regulation 61-30 is not applicable to Regulation 61-101. We decline to make a ruling on this issue, as it is moot in light of our above holding. *See Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (noting an issue becomes moot when a decision, if rendered, will have no practical legal effect upon the existing controversy).

Waiver of Water Quality Certification

Because we reverse and remand the ALC's grant of summary judgment based upon our finding that Regulation 61-30 does apply to Regulation 61-101, it is unnecessary for us to determine DHEC's arguments and additional sustaining grounds regarding waiver. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

For the foregoing reasons, we reverse and remand the ALC's decision to grant summary judgment.

REVERSED AND REMANDED.

WILLIAMS, J., concurs.

THOMAS, J., dissenting: I respectfully dissent and would affirm the order of the ALC.

As the majority has stated, Regulation 61-101 was promulgated pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 through -350. (2008 & Supp. 2011). Moreover, this regulation, which is entitled "Water Quality Certification," "establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341." 25A S.C. Code Ann. Regs. 61-101.A.1 (Supp. 2011).

Regulation 61-101.A.6 references the requirement in the Clean Water Act quoted by the majority that the State must act on a request for water quality certification within a reasonable period of time. Under the Federal Clean Water Act, this period is not to exceed one year after receipt of a certification request unless processing of the application is suspended. If the deadline is not met, "the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1) (2000). Regulation 61-101.A.6 references the one-year deadline in the Clean Water Act for a state to act on a request for water quality certification, but imposes a shorter time limit of one hundred eighty days for DHEC to act on such a request. This regulation further provides that "[u]nless otherwise suspended or specified *in this regulation*, [DHEC] shall issue a proposed decision on all applications within 180 days of acceptance or [sic] an application." (emphasis added).

The circumstances under which Regulation 61-101 allows DHEC to suspend processing of application for water quality certification or to delay a decision past one hundred eighty days after it is received by DHEC are explained in paragraphs

(2) through (4) of subsection (C) of the regulation.[4] Under paragraph (2), DHEC may request additional information within sixty days after receiving an application even if the application has already been deemed complete for processing. Paragraph (3) specifies the type of information that DHEC can request, such as water quality monitoring data, water quality modeling results, or other environmental assessments. Central to this appeal is paragraph (4), which provides as follows:

> When [DHEC] requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended *upon notification to the applicant* by [DHEC]. Any subsequent resubmittal will be considered a new application.

25A S.C. Code Ann. Regs. 61-101.C.4 (2011) (emphasis added). Under Regulation 61-101.C.4, the processing of an application for water quality certification is suspended only after the applicant has failed to meet the given deadline for submitting additional requested information and DHEC has notified the applicant about the suspension. Significantly, Regulation 61-101 does not authorize DHEC to suspend processing during the interval between the time it requests more information and the deadline that it gives the applicant when it makes the request.

On August 19, 2008, DHEC sent a letter to Duke requesting additional information about the draft Quality Assurance Program Plan that Duke submitted with its application. In the letter, DHEC instructed Duke to submit the information by October 19, 2008. DHEC sent two more letters requesting more information, one on October 8, 2008, with a deadline of November 8, 2008, and another on October 21, 2008, with a deadline of November 21, 2008. The ALC found that these

[4] Regulation 61-101.A.6 also provides that the suspension of the application process can occur "if the Federal permitting or licensing agency suspends processing of the application on request by the applicant or [DHEC] of its own volition"; however, none of these circumstances are present here.

requests were ineffective to suspend the processing of Duke's application. I agree with this finding. Even assuming the information that DHEC requested was both necessary to process Duke's application and not provided by the stated deadlines, DHEC never, as required by Regulation 61-101.C.4, provided Duke with a notice of suspension after any of the specified due dates. Moreover, as I have explained in the preceding paragraph, DHEC was not authorized under Regulation 61-101 to suspend its processing of Duke's application during the interval between the date of its request and the date by which Duke was to produce the required information.

The majority quotes Regulation 61-101.C.4 and does not appear to question its relevance to the processing of applications for water quality certification. However, instead of applying the unambiguous provisions of this paragraph to determine when the processing of an application is suspended, it looks to Regulation 61-30, which provides in pertinent part:

> The time schedule shall be tolled when [DHEC] makes a written request for additional information and shall resume when [DHEC] receives the requested information from the applicant. If an applicant fails to respond to such a request within 180 days, [DHEC] will consider the application withdrawn and the application fee will be forfeited. [DHEC] shall notify the applicant no later than 10 days prior to expiration of the 180-day period.

4 S.C. Code Ann. Regs. 61-30.H.1.c (2011). The tolling provisions in this regulation are inconsistent with those in Regulation 61-101.C.4. Under Regulation 61-101.C.4, the processing of an application continues after DHEC requests additional information from an applicant. The processing is suspended only when the applicant misses the deadline to comply with the request *and* DHEC informs the applicant that a suspension is to take place. In contrast, under Regulation 61-30.H.1.c, the time schedule to process an application is tolled at the time DHEC makes a written request for more information and remains tolled until the applicant satisfies the request. Furthermore, Regulation 61-30.H.1.c does not require DHEC to impose any deadline on such a request. DHEC itself has acknowledged these two regulations are inconsistent with each other with regard to the method of determining whether it has acted timely on an application.

The ALC held that the issue of whether the processing of Duke's application had been suspended should be analyzed under Regulation 61-101.C.4 and DHEC could not invoke Regulation 61-30.H.1.c to support its claim that it issued a timely decision. I would affirm these holdings. First, although both regulations purport to address the issue of when DHEC can suspend processing of an application for water quality certification, Regulation 61-101 specifically covers water quality certification and was expressly promulgated to fulfill requirements of the Federal Clean Water Act. These requirements include prompt action by state agencies on requests for water quality certification, an objective important enough to warrant a legislative mandate in the Clean Water Act that unreasonable delay by a state agency in acting on such a request for water quality certification would be tantamount to a waiver by the State of its right to deny certification and thus delay the applicant's pursuit of any federal license or permit for which state water quality certification is a prerequisite. *See South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010) (stating Regulation 61-101 "establishes procedures and policies for implementing water quality certification requirements of Section 401 of the Clean Water Act"). In contrast, although Regulation 61-30, which is entitled "Environmental Protection Fees," covers permitting decisions for all environmental programs administered by DHEC pursuant to federal and state law and regulation. Although this regulation "establishes schedules for timely action on permit applications," the issue of timeliness is presented in the context of determining when an application fee is deemed to be forfeited by the applicant. Nowhere does Regulation 61-30 reference the Clean Water Act.

DHEC has argued in its brief, that Regulation 61-30.H.1.c controls here because it was enacted later than Regulation 61-101.C.4 and has been amended as late as 2004. Although its provisions apply to requests for water quality certification, Regulation 61-30, does not further the mandates of the Clean Water Act or the policy favoring prompt action by the states on requests for water quality certification. Therefore, I would hold that the ALC correctly followed Regulation 61-101(C)(4) in concluding that DHEC waived its right to deny certification to Duke. *Cf. City of Rock Hill v. South Carolina Dep't of Health & Envt'l Control*, 302 S.C. 161, 167-68, 394 S.E.2d 327, 331 (1990) ("[T]he general rule is that statutes of a specific nature . . . are not to be considered as repealed in whole or in part by later general statutes . . . , unless there is a direct reference to the former statute or the intent of the legislature to repeal is explicitly implied therein.").

Furthermore, as Duke has noted, DHEC issued requests for information on October 8, 2008, and November 8, 2008, while it was awaiting additional information it had requested on August 19, 2008. DHEC's own actions, then, show it did not suspend the processing of Duke's application according to Regulation 61-30.H.1.c; rather, it continued to review it actively after it requested supplemental information.

I would further reject Appellants' arguments that the doctrines of estoppel and waiver preclude Duke from raising the issue of timeliness of DHEC's action on its application. DHEC, as the party claiming estoppel, must prove not only reliance on Duke's conduct, but also that "lack of knowledge and of the means of [obtaining] knowledge of the truth as to the facts in question." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000). Here, DHEC cannot reasonably claim it lacked knowledge and the means of obtaining knowledge about its own regulations.

As to Appellants' contention that Duke could not raise the issue of timeliness during proceedings before the ALC because it did not raise this issue to the DHEC staff or board, I note the appealed order resulted from a contested case hearing, not a judicial review proceeding. The governing statute does not limit the parties to asserting only those issues that had been litigated before the administrative agency. *See* S.C. Code Ann. § 44-1-60(G) (Supp. 2011) (setting forth procedures for contested case proceedings).

For the foregoing reasons, I would hold that DHEC's processing of Duke's application for water quality certification was never suspended pursuant to Regulation 61-101.C.4. When DHEC issued its staff decision on May 15, 2009, it had already waived its right to act on the requirement for the state water quality certification that Duke was required to satisfy in order to obtain a FERC license to continue operating the Catawba-Wateree Hydroelectric Project. I would therefore affirm the ALC's decision.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

T. Patrick Broyhill, Respondent/Appellant,

v.

Resolution Management Consultants, Inc., Gerard P. O'Keefe, Jeffrey B. Kozek, and Thomas Cummings, Defendants,

Of whom Resolution Management Consultants, Inc. is Appellant/Respondent,

And Gerard P. O'Keefe and Jeffrey B. Kozek are Respondents.

Appellate Case No. 2010-154106

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

Opinion No. 5063
Heard May 22, 2012 – Filed December 12, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Stanley E. Barnett, Smith, Bundy, Bybee, & Barnett, PC, of Mount Pleasant, for Respondent/Appellant.

John J. Pringle, Jr., Ellis, Lawhorne & Sims, PA, of Columbia, and John T. Lay, Jr., Gallivan, White & Boyd, PA, of Columbia, for Appellant/Respondent and Respondent Jeffery B. Kozek.

Julius H. Hines, Womble Carlyle Sandridge & Rice, LLP, of Charleston, for Respondent Gerard P. O'Keefe.

FEW, C.J.: This cross-appeal arises out of a trial in which a jury returned a verdict in favor of Patrick Broyhill against Resolution Management Consultants, Inc. (RMC) for malicious prosecution. RMC argues the trial court gave an erroneous jury instruction and erred in only partially granting its motion for directed verdict. Broyhill argues the trial court erred in directing a verdict in favor of RMC's corporate officers on his claim for malicious prosecution, and in directing a verdict for all defendants on his civil conspiracy claim. We affirm on all issues except RMC's claim that the trial court erred in charging the jury. We reverse the judgment against RMC and remand for a new trial.

I. Facts and Procedural History

RMC provides various consulting services, including project management, dispute resolution, and litigation support. Gerard O'Keefe, Jeffrey Kozek, and Thomas Cummings were officers of RMC during the time relevant to this appeal. Broyhill worked for RMC from 1999 until 2002. During that time, Broyhill acted as project manager on all work RMC performed for ENSCO International, Inc. Among other things, he prepared RMC's cost proposals for ENSCO projects.

Broyhill's employment contract provided that for a period of one year after Broyhill left RMC, he would not "solicit or accept any business . . . relating to existing [RMC] projects, or . . . relating to potential work from existing or prospective clients." If Broyhill violated that clause, the contract required him to pay RMC 25% of the fees invoiced to the client.

In 2002, RMC closed the office Broyhill managed due to insufficient profits. After that, Broyhill worked for RMC out of his home. According to Broyhill, Cummings told him that RMC was taking him off of the company's profit-sharing plan and demoting him to senior consultant.

Broyhill resigned in December 2002. Before his last day, he reformatted his company computer and reinstalled its software, thereby erasing all the data on its hard drive. Broyhill testified he did this as a courtesy to RMC and the next user of the computer.

The following February, he joined a competing company called JMI Solutions. Around that time, JMI submitted proposals to ENSCO on two projects on which RMC had also bid. ENSCO awarded one of the projects to JMI and the other to RMC. RMC soon learned Broyhill was working for JMI on its ENSCO project. According to RMC, its officers believed this violated the employment contract and Broyhill was obligated to pay RMC 25% of the fees that JMI invoiced to ENSCO. According to Broyhill, however, Cummings told him back in 2002 that his demotion voided the contract.

RMC also discovered that while Broyhill was still an RMC employee, he used his personal email account to send a document containing financial information about RMC to the personal email account of another RMC employee. According to RMC, neither Broyhill nor the other employee was authorized to have that information. However, Broyhill testified he created the document using information Cummings provided to him, and the information concerned the financial performance of the office Broyhill managed.

Finally, RMC contends that after it reviewed its ENSCO files, it believed that Broyhill had taken other documents relating to ENSCO, such as seminar materials and rate sheets. Broyhill disputes that RMC had any evidentiary basis for that belief, pointing out that O'Keefe testified RMC "didn't know what [Broyhill] kept back . . . . We never saw them."

After talking with each other and counsel, O'Keefe, Kozek, and Cummings decided RMC should sue Broyhill. RMC filed an action for conversion, civil conspiracy, intentional interference with prospective contractual relations, and breach of his employment contract. In the discovery phase, RMC did not attempt to contact ENSCO or JMI to obtain proof that Broyhill had done the things RMC alleged. Additionally, RMC did not produce any projections of damages relating to its claims for conversion, civil conspiracy, or interference with prospective contractual relations. Later, O'Keefe testified "our damages have always been under [Broyhill's employment] agreement." RMC never identified any of the reference materials or project files that it alleged Broyhill took from the company.

Broyhill filed a motion for summary judgment in RMC's case against him. At the summary judgment hearing, RMC voluntarily dismissed all of its causes of action except for breach of contract. The circuit court denied Broyhill's motion for summary judgment on the breach of contract claim. The case was later tried non-jury before a master-in-equity, who found for Broyhill.

Broyhill then filed this action for malicious prosecution and civil conspiracy. At trial, the defendants moved for a directed verdict. The trial court directed a verdict for all four defendants on the civil conspiracy claim. As to the malicious prosecution claim, the court directed a verdict for O'Keefe, Kozek, and Cummings, but not for RMC. The jury returned a verdict against RMC and awarded Broyhill $291,000.00 in damages.

II. RMC's Appeal

A. Denial of Motion for Directed Verdict

RMC argues the trial court should have directed a verdict in its favor on Broyhill's malicious prosecution cause of action. We must affirm a trial court's denial of a motion for directed verdict unless we determine that the jury could not reasonably find in favor of the party opposing the motion. "When reviewing the trial court's ruling on a motion for a directed verdict . . . , this Court must apply the same standard as the trial court . . . ." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). Viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, "[t]he trial court must deny a motion for a directed verdict . . . if the evidence yields more than one reasonable inference." 399 S.C. at 331-32, 732 S.E.2d at 171; *see also Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006) ("If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury."). On appeal from an order denying a motion for directed verdict, therefore, "we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Goodwin v. Kennedy*, 347 S.C. 30, 38, 552 S.E.2d 319, 323 (Ct. App. 2001) (citation omitted); *see also Martasin v. Hilton Head Health Sys., L.P.*, 364 S.C. 430, 440, 613 S.E.2d 795, 801 (Ct. App. 2005) (reversing directed verdict for two defendants where a jury could reasonably have found for the plaintiff against them); 364 S.C. at 437, 442, 613 S.E.2d at 799, 802 (affirming directed verdict for another defendant where there was not sufficient evidence upon which a jury could reasonably "conclude the alleged negligent acts or omissions . . . proximately caused Mr. Martisan's death"). In other words, if there is sufficient evidence upon which the jury could reasonably find for Broyhill on his claim for malicious prosecution against RMC, we must affirm the trial court's decision to deny RMC's motion for directed verdict.

To recover in a malicious prosecution action, the plaintiff must prove the following elements: (1) the institution or continuation of original judicial proceedings; (2) by

or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Ruff v. Eckerds Drugs, Inc.*, 265 S.C. 563, 566, 220 S.E.2d 649, 651 (1975). RMC argues Broyhill failed to produce any evidence of lack of probable cause or malice. We disagree. The record contains evidence which, if believed by the jury, would reasonably support a verdict that RMC lacked probable cause for each of its causes of action against Broyhill. Further, because malice may be inferred from evidence of lack of probable cause, *Parrot v. Plowden Motor Co.*, 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965), there was evidence from which the jury could draw an inference of malice.

RMC also claims the fact that summary judgment was denied on its breach of contract claim against Broyhill establishes the existence of probable cause of a breach of contract as a matter of law. On these facts, we disagree. RMC's evidence that Broyhill worked on an ENSCO project after joining JMI and received fees for that work created a question of fact as to whether Broyhill breached the employment contract and owed RMC 25% of the fees. In the malicious prosecution trial, however, Broyhill presented evidence that Cummings told him the contract was voided by Broyhill's demotion. Therefore, even though evidence regarding Broyhill's work for JMI on the ENSCO project required the denial of summary judgment in RMC's action, evidence that RMC believed the contract was void created a question of fact in Broyhill's action as to whether RMC actually had probable cause, and whether it acted maliciously in suing Broyhill.

Finally, RMC argues Broyhill could not establish lack of probable cause because its officers obtained advice of counsel before suing him. "Good faith reliance upon advice of fully informed counsel may establish probable cause." *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 615 (Ct. App. 1984). Evidence of a fair, full, and truthful disclosure of all the facts to counsel is necessary to show good faith. *Id.* Although RMC's officers spoke with counsel about what RMC should do with regard to Broyhill, it is not clear what they told their attorneys, or what the attorneys told them. Under these circumstances, the question of whether RMC established the good faith defense was for the jury to answer. We affirm the trial court's decision denying a directed verdict.

B. Jury Charge

RMC argues the trial court erred in charging the jury on the element of lack of probable cause in a malicious prosecution claim. We agree.

Broyhill could prevail on his malicious prosecution claim only if he established that RMC lacked probable cause as to each of the causes of action it asserted against Broyhill. *See Ruff*, 265 S.C. at 567, 220 S.E.2d at 651 (finding an action for malicious prosecution was not available where the two charges asserted against the plaintiff arose out of the same set of circumstances and the defendant's employee had probable cause to bring one of the charges); *Jackson v. City of Abbeville*, 366 S.C. 662, 669-70, 623 S.E.2d 656, 660-61 (Ct. App. 2005) (affirming summary judgment for city in malicious prosecution action where police officer had probable cause to arrest plaintiff for offense with which the plaintiff was never formally charged). In a charge conference, counsel for RMC stated, "I think what I want the jury to know is that we don't have to establish probable cause as to every single cause of action. Probable cause as to any one cause of action is sufficient to defeat a claim for malicious prosecution." Under *Ruff* and *Jackson*, what RMC requested is a correct statement of law.

The trial court replied it was going to use its standard jury charge on probable cause. It charged the jury as follows:

> [T]he plaintiff must prove that the defendant lacked probable cause in instituting or continuing the action. In determining whether probable cause existed, you should focus on whether the defendant had reasonable cause to believe that the plaintiff committed the acts about which the complaint was made, and not whether the plaintiff was actually guilty or innocent. . . . If the facts and circumstances will lead a person of ordinary intelligence, caution and prudence, acting conscientiously, fairly and without prejudice to believe that the plaintiff was guilty, that would be probable cause.

This instruction failed to explain that Broyhill was required to prove RMC lacked probable cause for each of its causes of action, and that a jury finding of probable cause to support any one of RMC's causes of action required a verdict for RMC on Broyhill's malicious prosecution claim. Therefore, the trial court erred in rejecting RMC's requested instruction. *See Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge."). Moreover, the phrase "the acts about which the complaint was made" suggests that RMC had to have probable cause as to *all* of its causes of action, which would

mean Broyhill could prevail by showing only that RMC lacked probable cause for any one cause of action. In that respect, the court erred by making an incorrect statement of the law. *See id.* (stating "the trial court is required to charge only the current and correct law of South Carolina.").

Broyhill argues that, when considered in context, the jury charge conveyed the point RMC asked the court to make. Broyhill undercuts that argument in his brief, however, by ascribing to the jury charge the very meaning it could not permissibly have. Broyhill states in his brief: "The jury was charged to consider whether there was probable cause for *all* of the acts about which the complaint was made." (emphasis added)

We find the erroneous jury charge prejudiced RMC. The charge permitted the jury to award damages based on a lack of probable cause for any one of the claims RMC asserted against Broyhill, while the law forbids recovery unless Broyhill proved a lack of probable cause for all of them. RMC contended that probable cause existed for all of its claims, but its strongest argument as to probable cause was on the breach of contract claim. The trial court's refusal to give the requested charge therefore prevented RMC from making its strongest probable cause argument. *See State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998) (to determine whether error regarding jury charge was prejudicial, "our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered"). We reverse and remand for new trial.[1]

III. Broyhill's Appeal

Broyhill appeals the trial court's decisions to direct a verdict for O'Keefe, Kozek, and Cummings on his claim for malicious prosecution, and for all defendants on his civil conspiracy claim.

We find no evidence that would support a verdict for malicious prosecution against O'Keefe, Kozek, or Cummings. All of their actions were taken only in their corporate capacities to recover damages that belonged exclusively to the corporation. In other words, there is no evidence that any of the individual

[1] We do not address the other issues RMC raises on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

defendants instituted or continued judicial proceedings. *See Ruff*, 265 S.C. at 566, 220 S.E.2d at 651. RMC is the only party that sued Broyhill.

As to the civil conspiracy claim, "a corporation cannot conspire with itself." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 887 (2006). Because Broyhill presented no evidence that O'Keefe, Kozek, or Cummings acted outside their official capacities as officers of RMC, neither they nor RMC can be liable for civil conspiracy. *See* 367 S.C. at 565, 626 S.E.2d at 887 (2006) ("A civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, conspiring with the corporation."). Therefore, we affirm.

IV. Conclusion

The decisions of the trial court are **AFFIRMED IN PART AND REVERSED IN PART.** We **REMAND** for a new trial only as to Broyhill's malicious prosecution claim against RMC.

HUFF, J., concurs.

SHORT, J., concurring in part and dissenting in part: I respectfully dissent because I interpret the learned trial court's jury charge differently than the majority.

The trial court need only charge the current and correct law of South Carolina. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 362, 725 S.E.2d 112, 120 (Ct. App. 2012). "In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the [trial] court's decision absent an abuse of discretion." *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). In our review, this court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. *Hennes*, 397 S.C. at 402, 725 S.E.2d at 507. "A trial court's refusal to give a properly requested charge is reversible error only

when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

I disagree with the majority's finding that the trial court's language in its charge, "the acts about which the complaint was made," suggests Broyhill could prevail on his malicious prosecution claim by showing that RMC lacked probable cause for any one cause of action. I find the charge required the jury to consider *all* the four causes of action RMC brought against Broyhill to determine if RMC had probable cause to believe that Broyhill committed any of the acts about which the complaint was made.[2] Furthermore, I find there is no evidence the court's refusal to grant RMC's requested charge resulted in any prejudice to RMC. Like the majority, I agree RMC's strongest argument as to the existence of probable cause was on the breach of contract claim, but there was ample evidence in the record to support a finding of a lack of probable cause. Therefore, I find there was no abuse of discretion resulting in any prejudice to RMC, and I would affirm as to all issues.

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[2] RMC's complaint alleged the following causes of action against Broyhill: (1) conversion of trade secrets; (2) conspiracy to injure RMC; (3) interference with RMC's prospective contractual relations; and (4) violation of the non-compete agreement.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Raymond Eugene King, Jr., Appellant,

v.

Patricia Ann Lowe King, Respondent.

Appellate Case No. 2010-176387

Appeal From Spartanburg County
Letitia H. Verdin, Family Court Judge

Opinion No. 5064
Heard October 31, 2012 – Filed December 12, 2012

AFFIRMED

Jack W. Lawrence, Lawrence & Rudasill, PA, of Spartanburg, for Appellant.

N. Douglas Brannon, Turnipseed & Brannon Law Firm, of Spartanburg, and John S. Nichols, Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Respondent.

FEW, C.J.: Ray King appeals the family court's order denying a modification of alimony. He argues the court erred by: (1) finding his income had increased, (2) imputing income to him from a LLC without requiring his ex-wife to pierce the corporate veil, and (3) not making specific findings of fact as to alimony factors Ray did not raise as a basis for his claim of change in circumstances. We affirm.

I. Facts and Procedural History

Ray and Patricia King married in 1976 and had three children. In 1999, Patricia filed for divorce on the grounds of adultery. Ray admitted the adultery and agreed to permanent periodic alimony payments in the amount of $6,500 per month. The alimony was set based on Ray's yearly base salary of $300,000 as chief operating officer of a textile company called Mastercraft Fabrics. Patricia had no income at the time.

In May 2004, Ray lost his job at Mastercraft. Two months later, he filed an action seeking a reduction of alimony based on a change in employment. By the fall of the same year, he was employed as a commissioned sales representative of Hans Vlessing International Textile Agencies, Inc., also known as HV. Although Ray was a salesman for HV, he independently represented other companies as well, so he created Alpha Sales, an unincorporated business Ray referred to as merely a "checking account" through which other companies and HV paid him commissions.

The family court heard Ray's action for reduction of alimony in April 2005. He presented a financial declaration showing a monthly income of $1,200 and monthly expenses of $11,000. Patricia was employed with a school district making $2,040 per month. In May 2005, Judge A. Eugene Morehead issued an order finding Ray, "at a minimum, ha[d] the capability of earning approximately $100,000 annually." Due to the decrease in his income, the court lowered his alimony payment to $4,167 per month.

Ray continued to work for HV until March 2007, when he became the president of United Mills Group, a company formed by his previous boss at HV, Hans Vlessing. In his capacity as president of United Mills, Ray traveled to China and established business contacts with textile mills located there. From Ray's contacts, United Mills was able to buy directly from the Chinese suppliers and resell the goods in the United States.

In 2008, the Chinese suppliers of United Mills complained Vlessing owed them money, so Ray flew to China in September to try to salvage the business. Ray called his new wife Melinda from China "to see what she could do about setting up a company that could filter this stuff through." As a result, Melinda formed Gold Medal Fabrics, LLC. Ray claims Melinda served as CEO of the company. Gold

Medal Fabrics had one checking account, on which Ray and Melinda were signatories.

During this time, Patricia's health declined significantly. She developed a condition known as dystonia, a movement disorder that causes muscles to contract and spasm involuntarily.[1] In Patricia's case, dystonia restricts her ability to speak, so that she has not worked full-time as a teacher since the end of the 2006-2007 school year. Her family practitioner, Dr. Scott Coley, testified Patricia's condition is "debilitating," and she is not capable of working a full-time job.

In June 2009, Ray brought another action for a reduction of alimony. He filed a financial declaration, estimating his income to be $2,240 a month. Patricia was not then employed. On August 28, Judge Roger E. Henderson entered a temporary order finding that, "for the purpose of this temporary hearing only, there has been a sufficient showing to reduce the alimony payments until a final hearing can be had," and temporarily reducing Ray's alimony to $2,000 per month.

Judge Letitia H. Verdin conducted the final hearing over four dates: April 8, April 30, May 7, and August 9, 2010. Ray's factual presentation at the hearing contained numerous inconsistencies and exposed several misrepresentations he made in his financial declaration and in his deposition and hearing testimony. For example, when cross-examined about the financial declaration, he admitted it was not correct and that he actually made $5,000 per month in 2009. He attempted to explain that much of his income came later in the year and that the declaration was his "best guess at the time," but the family court found the declaration "was false." The family court found Ray's income "now exceeds $100,000 per year," an implicit finding that Ray's testimony that he made only $5,000 per month was also false.

Ray hired accountant Dewayne Davidson to determine the amount of income Ray earned in 2009. Based on the information Ray provided to him, Davidson estimated Ray's income for 2009 was around $72,000, with $35,540 coming from Gold Medal Fabrics and $37,500 from Alpha Sales. However, Patricia's accounting expert, Marcus Hodge, compared Ray's financial records with his testimony and found inconsistencies between the two. For example, in his May

[1] Dystonia is defined as: "Prolonged involuntary muscular contractions that may cause twisting (torsion) of body parts, repetitive movements, and increased muscular tone." *Taber's Cyclopedia Medical Dictionary* 654 (Donald Venes ed., 20th ed. 2005).

2009 deposition, Ray contended he had only two bank accounts—his personal checking account at Wachovia Bank and the Alpha Sales account. Hodge located the checking account for Gold Medal Fabrics, which Ray had not mentioned in his deposition. Ray claimed the account was not his even though he had signatory authority over it and was paid commissions from the account.

Hodge located another account at Fifth Third Bank. When questioned as to why he did not identify this account in his deposition, Ray claimed he did not know Melinda had set up the account. However, Ray admitted during cross-examination he signed numerous checks on the account. In addition, Hodge testified he could directly correlate checks Ray wrote on the Gold Medal Fabrics account with deposits made the same day into the Fifth Third account. It is not possible that Ray was unaware Melinda set up the Fifth Third account.

Ray also claimed Melinda was the true owner of Gold Medal Fabrics. However, the evidence supports the family court's finding that this claim "is not credible." Ray sold the goods and made all decisions regarding development of the product, while Melinda did "the financial, did the invoicing and chasing the containers and that kind of thing." Further, Ray was unable to document that any of Melinda's $53,000 to $54,000 earnings in 2009 came from Gold Medal Fabrics since she also had a full-time job as a customer service representative at Sencera International Corporation. Finally, the corporate documents Ray produced for Gold Medal Fabrics do not show any indication that Melinda was CEO.

The family court entered an order on September 8, 2010, finding Ray did not meet his burden of establishing a change in circumstances. The court did not make a specific finding as to Ray's income in 2009 but did find his income had increased from the $100,000 per year that was used as a basis for setting his initial reduction of alimony in 2005. In making this finding, the family court imputed to Ray the earnings of Gold Medal Fabrics and found he had submitted a false financial declaration in the temporary hearing. The court also found Patricia was unable to work due to her declining health. Accordingly, the court ordered Ray to pay Patricia $4,167 each month in permanent periodic alimony and to pay $26,004 in back alimony for the period of time his alimony was temporarily reduced.

II. Applicable Law

Pursuant to South Carolina Code section 20-3-130(B)(1) (Supp. 2011), permanent periodic alimony is "modifiable based upon changed circumstances occurring in the future." The party seeking modification of alimony bears the burden of

demonstrating a substantial unforeseen change in circumstances. *Butler v. Butler*, 385 S.C. 328, 336, 684 S.E.2d 191, 195 (Ct. App. 2009); *see also Miles v. Miles*, 393 S.C. 111, 120, 711 S.E.2d 880, 885 (2011) ("A party is entitled to . . . a modification if he can show an unanticipated substantial change in circumstances."). Our standard of review is set forth in *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011).

III. Ray Did Not Prove a Substantial Change of Circumstances

We agree with the family court's finding that Ray did not prove a substantial change of circumstances that would justify a reduction of his alimony.

A. Ray's Income Has Increased Since 2005

First, we find Ray's current income exceeds the $100,000 per year Judge Morehead determined he was earning in his 2005 order. Hodge testified Ray's 2009 income was $193,888. Ray's own expert Davidson testified Ray earned over $72,000, before considering income from Gold Medal Fabrics. We agree with the family court that Gold Medal Fabrics' net income for 2009 in the amount of $52,746 should be imputed to Ray.[2] Considering Davidson's income figure together with the imputed income from Gold Medal Fabrics, Ray's income for 2009 was more than $124,000. The family court correctly found it was unnecessary to determine the exact amount of Ray's income since, under any scenario, it exceeded the income Judge Morehead found he earned in 2005.

B. Interpretation of the 2005 Order

Ray contends that even if the family court correctly found his 2009 income exceeded $100,000, the court erred in not finding a substantial change in circumstances. His argument is based on the statement in Judge Morehead's order that "one-half of [Ray's] earning capability should go to [Patricia] until he gets back to his former level of income." Ray argues that based on that statement the 2005 order reduced his alimony to $4,167 in anticipation of Ray returning to his former income of $300,000. Therefore, Ray argues the "change" he must prove is from the court's anticipation that his income would return to $300,000. Ray argues

[2] Davidson explained that Gold Medal Fabrics' 2009 net income was calculated after deducting "contract labor" for Ray in the amount of $35,540, the figure Davidson used to calculate Ray's income at over $72,000.

that because he continues to make less than $300,000, it was error for the family court not to grant a modification of alimony.

Ray's argument mischaracterizes the 2005 order. The court reduced Ray's alimony to $4,167 because it determined his income had decreased, but not below $100,000. The order states, "While it is certainly understandable that he may not be able to move immediately back . . . [to] earning $300,000 to $400,000 annually, as he did in the past, the Court finds that he, at a minimum, has a capability of earning approximately $100,000 annually." The "one-half of [Ray's] earning capacity" refers to half of the $100,000, which is $4,167 per month. In using the language "until he gets back to his former level of income," the court intended that when he did so, his alimony obligation could return to the agreed-upon level of $6,500. This intent is made clear in another statement in the 2005 order: "[B]y April 15th of each year, [Ray] will furnish [Patricia] a copy of his tax return . . . so she can make a determination when this issue should be readdressed by the Court to [reinstate] her previously awarded alimony." Thus, the order did not anticipate that Ray's alimony would be further reduced if his income did not increase after 2005. Rather, the order anticipated that if his income did increase, the alimony could return to its original amount. The family court correctly interpreted the 2005 order to base the alimony award on Ray's income capability of $100,000. Likewise, the court correctly denied a modification of alimony because Ray's income has increased since 2005.

C. Imputing the Earnings of Gold Medal Fabrics to Ray—Findings of Fact

Ray argues the earnings of Gold Medal Fabrics were improperly imputed to him for determining his income. Ray argues Melinda, who he claims is the CEO of Gold Medal Fabrics, was the legal owner of the company, and therefore the company's income belongs to her and should not be imputed to him. However, Ray's own explanation for why Melinda was designated CEO defeats his argument. He testified there were two reasons Melinda was named CEO. First, it allowed Ray to tell potential customers that he "represented" Gold Medal Fabrics and deny he ran the company:

> [I]t was much easier for me to be able to say that I represent Gold Medal [Fabrics]. I represent these people. . . . [I]f I say I am president of Gold Medal [Fabrics], somebody thinks I can make a decision. And it is much better for me to be able to say, "Okay, you know what? I

> cannot make them knock this price off. I have got to go back and speak to the owner."

Second, Ray testified he previously lost a job opportunity because of his ownership of Alpha Sales. Because he "didn't want to have anything associated with [his] name at all that had any type of ownership in case another job [came] along," he made Melinda CEO of Gold Medal Fabrics.

Essentially, Ray's explanation is that he made Melinda CEO in order to deceive his customers and potential employers as to who owned the company. His explanation supports the family court's conclusion that his claim Melinda was the owner of Gold Medal Fabrics "is not credible" and supports this court's agreement with the family court that Gold Medal Fabrics' income should be imputed to Ray.

Moreover, there are other facts the family court found to be inconsistent with Ray's claim that Melinda was CEO: (1) Gold Medal Fabrics grew out of relationships Ray had with Chinese suppliers while he worked for United Mills, and Melinda had no relationship with the Chinese suppliers and had never even traveled to China; (2) Ray directed the creation of Gold Medal Fabrics and testified that had he not directed Melinda to set up the company, she would not have done it on her own; (3) Ray made almost all of the important decisions associated with the business of Gold Medal Fabrics; (4) there was no evidence that Melinda was assigned or claimed any income from Gold Medal Fabrics; and (5) Gold Medal Fabrics' corporate documents do not support Ray's claim—none list Melinda as CEO, or even a member of the LLC—and the Articles of Organization describe Gold Medal Fabrics as a "Member-managed LLC," where "all members . . . shall be managers." As a factual matter, therefore, we believe the court correctly determined the income of Gold Medal Fabrics should be imputed to Ray.

D. Imputing the Earnings of Gold Medal Fabrics to Ray—Legal Conclusion

Ray also argues the family court erred as a matter of law in imputing to him income from Gold Medal Fabrics. He claims the court should have required Patricia to meet the burden of proving the elements to pierce the corporate veil. *See Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) ("The party seeking to have the corporate identity disregarded has the burden of proving that the doctrine should be applied."). We disagree.

While a piercing the corporate veil analysis might be relevant to alimony modification in other circumstances, it is not needed here to impute the income of Gold Medal Fabrics to Ray. The doctrine of "[p]iercing the corporate veil is the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." 18 C.J.S. *Corporations* § 14 (2007) (internal quotation marks omitted). When a party successfully pierces the corporate veil, the liabilities of the corporation may be imposed on and collected from officers, directors, or shareholders. *See id*. In this case, the family court did something completely different. By imputing Gold Medal Fabrics' income to Ray, the court did not determine that Ray was liable for Gold Medal Fabric's debts. Rather, the court determined who would have access to and ownership of Gold Medal Fabrics' profits after they are distributed from the LLC. Therefore, the question in this case is not whether the family court could reach inside the corporate form of Gold Medal Fabrics, but who owned the money when Gold Medal Fabrics paid it out. Because the court determined as a factual matter that Ray owned the money when Gold Medal Fabrics distributed it, the court did not need to disregard the corporate form.

Ray argues this court's decision in *Woodside v. Woodside*, 290 S.C. 366, 350 S.E.2d 407 (Ct. App. 1986) requires a family court to go through the piercing the corporate veil analysis before it can impute earnings of a company for purposes of calculating alimony. We disagree. First, *Woodside* is an appeal from an initial determination of alimony. 290 S.C. at 369, 350 S.E.2d at 409. This case, on the other hand, is an action for modification of alimony in which Ray had the burden of proving a substantial change in circumstances. Ray cannot shift that burden to Patricia by channeling his income through a company.

Second, the facts of *Woodside* are different. In *Woodside*, the husband operated a consulting firm through a corporation, of which he owned a ten percent stock interest. 290 S.C. at 370, 350 S.E.2d at 410. The wife claimed the corporation's income should be constructively allocated to him for purposes of calculating alimony. *Id.* Unlike here, there was no evidence in *Woodside* that the corporation was created to conceal the true owner of the business. Also unlike here, the *Woodside* opinion reveals no evidence the husband was actually using the corporation's net income.[3] In fact, the *Woodside* opinion does not reflect that the

[3] The court noted the wife claimed the husband used the corporation's assets personally, but the opinion does not indicate any facts to support this claim. *See* 290 S.C. at 370, 350 S.E.2d at 410 ("The wife's attorney argued during oral argument that the husband also used some of the corporation's assets personally.").

corporation even had any net income. There also is no evidence in *Woodside* that the husband was the beneficial owner of any corporate profits after they were paid out to the shareholders. The other shareholders in *Woodside* were the parties' children. *Id*. Two of the children were minors, and there was no evidence the emancipated child received any corporate funds. 290 S.C. at 369, 350 S.E.2d at 409. In this case, on the other hand, the person Ray claims is the owner of Gold Medal Fabrics is his current wife, whom the evidence shows shares the burden of Ray's living expenses. This contrast in facts demonstrates the *Woodside* court may have had to reach inside the corporate form to access the corporation's money. From the evidence in this case, however, the family court correctly recognized Ray was the beneficiary of Gold Medal Fabrics' net income, even if the money was actually paid to Melinda.

Finally, the law simply does not support Ray's position that the family court must pierce the corporate veil before it may impute the income of a company to one spouse for purposes of calculating alimony. There is no other published decision on alimony that mentions piercing the corporate veil, and *Woodside* cannot be read to require it. In *Woodside*, this court merely affirmed the family court's decision not to allocate the corporation's income to the husband. In doing so, we stated, "We have reviewed the record and are unable to find a sufficient basis for disregarding the corporate structure and constructively allocating its income to the husband." 290 S.C. at 370, 350 S.E.2d at 410. We did not intend to require a family court to pierce the corporate veil in future cases.

E. The Family Court Did Not Need to Consider All the Statutory Factors in Section 20-3-130

Ray's final argument is the family court erred by not making specific factual findings as to each of the factors listed in section 20-3-130 of the South Carolina Code when it denied modification of alimony. Ray is correct that the factors listed in that section may be relevant to a request that alimony be modified.[4] *See Fuller*

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[4] Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax

v. Fuller, 397 S.C. 155, 163, 723 S.E.2d 235, 239 (Ct. App. 2012) ("Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context . . . ." (citation and quotation marks omitted)). However, in the modification context, the party seeking the modification has the burden of proof, and therefore must argue which factors are important and demonstrate why.

In this case, Ray claimed there was a change in circumstances because (1) his income had decreased, (2) Patricia's income had increased, and (3) his expenses were large. The family court made specific findings as to the first two. As to the claim that his expenses were large, we find Ray did not meet his burden of proof. There was little testimony as to his personal expenses, the nature of those expenses, and why they would warrant a change of alimony. Because Ray did not plead and argue any other changes in circumstances, it was unnecessary for the court to make specific findings as to the other factors in section 20-3-130.

IV. Conclusion

We affirm the family court's ruling that Ray did not prove a substantial change in circumstances justifying a reduction of alimony.

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

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consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant. *See* S.C. Code Ann. § 20-3-130(C) (Supp. 2011).