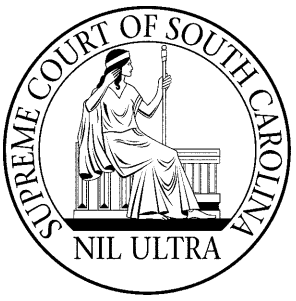

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46
October 30, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Wesley Smith, Petitioner.

Appellate Case No. 2011-188646

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27328
Heard September 17, 2013 – Filed October 30, 2013

REVERSED AND REMANDED

Assistant Appellate Defender Kathrine H. Hudgins, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina J. Catoe, all of Columbia, and Solicitor John G. Hembree, of North Myrtle Beach, for the State.

JUSTICE KITTREDGE: We granted a petition for writ of certiorari to review the court of appeals' affirmance of Petitioner's conviction for aiding and abetting homicide by child abuse. *State v. Smith*, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011). Petitioner contends that the court of appeals erred by applying common law principles of accomplice liability to affirm his conviction for a statutory offense for which he was not indicted. We reverse the court of appeals and remand for a new trial.

I.

Petitioner was the father of the minor child (Victim) who died as a result of child abuse on February 14, 2004. Victim lived only 130 days. Petitioner and the Victim's mother, Charlene Dandridge, were Victim's caretakers. The two contributing causes of death were blunt-force trauma to the chest and pseudoephedrine toxicity. An autopsy revealed seventeen rib fractures, some of which occurred several weeks prior to death and some that occurred in the forty-eight hours immediately prior to death. The autopsy also revealed that, on the day she died, Victim had been given approximately four times the adult dosage of pseudoephedrine.[1]

Petitioner was indicted for homicide by child abuse limited to section 16-3-85(A)(1),[2] as follows:

> That WESLEY SMITH did in Horry County, on or about February 14, 2004, cause the death of [Victim], a four (4) month old child, while committing child abuse or neglect, and the child's death occurred under circumstances manifesting an extreme indifference to human life, in violation of Section 16-3-85(A)(1), S.C. Code of Laws, 1976, as amended.

The trial court, on its own initiative, instructed the jury on both South Carolina Code section 16-3-85(A)(1) (section (A)(1)), homicide by child abuse as a principal, and South Carolina Code section 16-3-85(A)(2) (section (A)(2)),

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[1] Petitioner admitted to giving the Victim "cough medicine" on the day of her death.

[2] Conversely, Dandridge was not indicted pursuant to section 16-3-85(A)(1); she pled guilty to unlawful conduct towards a child.

homicide by child abuse by aiding and abetting. The trial court indicated that it believed that section (A)(2) was a lesser-included offense of section (A)(1), or alternatively, that section (A)(2) was merely another means to convict a criminal defendant of the same underlying crime of homicide by child abuse but would lead to a lesser sentence.[3] Petitioner's trial counsel objected to the jury instruction on section (A)(2) because he was not put on notice of the section (A)(2) offense.[4] The jury subsequently found Petitioner guilty of violating the unindicted section (A)(2) offense without reaching the indicted section (A)(1) charge.[5]

II.

The court of appeals declined to address the grounds relied on by the trial court but affirmed Petitioner's conviction on what it believed was an alternative sustaining ground, stating:

> It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with

---

[3] A defendant convicted of violating section (A)(1) may be imprisoned for twenty years to life, while a defendant convicted of violating section (A)(2) must be imprisoned for between ten and twenty years. S.C. Code § 16-3-85(C) (2003).

[4] It was the State's theory that Petitioner was the sole caretaker of Victim during the relevant time period, and hence the indictment was limited to section (A)(1). After Petitioner's counsel objected to the trial court's consideration of a jury charge on the section (A)(2) offense, the trial court inquired of the State: "[W]hat says the State on that issue? The indictment specifically says (A)(1)." The assistant solicitor responded with his own question, "my question to the Court is . . . there any evidence, any evidence that would tend to give the jury the ability to convict [Petitioner] of the lesser-included offense[?]" On certiorari to this Court, the State only haltingly defends section (A)(2) as a lesser-included offense of section (A)(1), referring to section (A)(2) as "a sort of 'lesser offense' of (A)(1) because it provides for a lesser penalty." (Resp't's Br. 10).

[5] The verdict form contained four possible verdicts: Guilty as to the section (A)(1) charge; Not Guilty as to the section (A)(1) charge; Guilty as to the section (A)(2) charge; and Not Guilty as to the section (A)(2) charge. The jury found Petitioner guilty of the section (A)(2) charge but made no finding on the charge under section (A)(1).

> the principal offense. Thus, the indictment charging [Petitioner] with homicide by child abuse as a principal was effective to put him on notice that the State may request to proceed on aiding and abetting homicide by child abuse as well.

Smith, 391 S.C. at 365, 705 S.E.2d at 497–98 (quoting *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000)) (internal citations and quotations omitted). This was error.

The common law principles of accomplice liability, as applied by the court of appeals, do not apply in the context of the homicide by child abuse statute. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

> (A) A person is guilty of homicide by child abuse if the person:
>
> (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
>
> (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

S.C. Code § 16-3-85(A) (2003).

We find the language of section 16-3-85 unambiguously signals the General Assembly's intent to codify two distinct crimes—homicide by child abuse as a principal pursuant to section (A)(1) and homicide by child abuse by aiding and abetting pursuant to section (A)(2), each with distinct elements and sentencing ranges.[6] Because the section (A)(2) offense is not a lesser-included offense of

[6] An indicted offense necessarily includes all lesser-included offenses, which may properly (if supported by the evidence) be presented to the jury. *See State v.*

section (A)(1), an indictment expressly charging only a section (A)(1) offense does not provide notice of a section (A)(2) charge. *See State v. Cody*, 180 S.C. 417, 423, 186 S.E.165, 167 (1936) ("[I]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.").

III.

In sum, Petitioner was indicted only for homicide by child abuse pursuant to section (A)(1). The court of appeals erred in affirming Petitioner's conviction under section (A)(2)—an unindicted charge that was not a lesser-included offense of the indicted offense. Accordingly, we reverse the decision of the court of appeals and remand this case to the trial court for a new trial on the indicted offense of homicide by child abuse pursuant to section (A)(1).[7]

Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) ("A trial judge is required to charge the jury on a lesser included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed."). Section (A)(2), however, is not a lesser-included offense of section (A)(1). Where, as here, the General Assembly provides separate offenses in the same statutory scheme, only the indicted offense should be submitted to the jury. The unindicted section (A)(2) charge to the jury was error and constituted a material variance from the indicted crime. *See, e.g.*, *Bailey v. State*, 392 S.C. 422, 431, 709 S.E.2d 671, 676 (2011) (granting PCR where counsel was ineffective for failing to object to erroneous supplemental jury instructions, which permitted a jury "to convict [defendant] for 'an act alternative to the one specified with particularity in the indictment'"). The State, of course, could have indicted Petitioner for the offenses of section (A)(1) *and* section (A)(2), but it did not do so.

[7] We understand the inherent difficulties in the prosecution of homicide by child abuse cases. As Chief Justice Toal astutely observed:

> Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to

REVERSED AND REMANDED.

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

> defend themselves, and often too young to alert anyone to their horrendous plight or ask for help.

State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484–85 (2008) (Toal, C.J. dissenting). In this case, there are means upon which the State, if it desires, may on retrial bring the section (A)(2) charge against Petitioner which comport with requirements of notice and due process.

The Supreme Court of South Carolina

In the Matter of Benjamin Jackson Baldwin, Respondent.

Appellate Case No. 2013-002286

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Gretchen B. Gleason, pursuant to Rule 31, RLDE.

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Ms. Gleason is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Ms. Gleason shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Gleason may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Ms. Gleason's requests for information and/or documentation and shall fully cooperate with Ms. Gleason in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Gretchen B. Gleason has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Gretchen B. Gleason, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Gleason's office.

Ms. Gleason's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.

Columbia, South Carolina

October 28, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Michael J. Hilton, Respondent.

Appellate Case No. 2012-211546

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

Opinion No. 5178
Heard September 10, 2013 – Filed October 30, 2013

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Appellant.

Richard A. Harpootlian, M. David Scott, and Graham L. Newman, all of Richard A. Harpootlian, PA, of Columbia, for Respondent.

CURETON, A.J.: This appeal arises from Michael Hilton's indictment for one count of felony driving under the influence resulting in a death and one count of felony driving under the influence resulting in great bodily injury. Prior to trial, the circuit court suppressed the results of a breathalyzer test. On appeal, the State argues the circuit court erred by (1) retroactively applying a statutory change to the

implied consent statute and excluding the results of Hilton's breath alcohol test and (2) finding either Hilton's breath test was not conducted within the two-hour time limit or Hilton was not provided with a complete written report. We reverse and remand.

FACTS

On May 10, 2008, Hilton's vehicle collided with a motorcycle on Highway 17 in Myrtle Beach. The driver of the motorcycle was killed as a result of the collision, and a passenger on the motorcycle was seriously injured. Trooper Peter Schmidt arrested Hilton and transported him to the Myrtle Beach Police Department, where Hilton provided a breath sample for testing by a DataMaster machine. The exact time of Hilton's arrest is disputed, but it occurred between 10:15 p.m. and 10:47 p.m. Trooper Schmidt provided Hilton a Breath Alcohol Analysis Test Report (BA report), which indicated Hilton was arrested at 10:15 p.m., was breath-tested at 12:32 a.m., and had a blood alcohol level of .15%. Subsequently, Hilton was charged with felony driving under the influence involving death and felony driving under the influence involving serious bodily injury.

On September 23, 2011, Hilton filed a motion to suppress the results of the breath test, claiming the breath test was not administered within two hours of his arrest. The parties agreed that at the time of Hilton's arrest, section 56-5-2950 of the South Carolina Code (2006) did not require a breath test to be completed within two hours of a person's arrest. However, Hilton argued the 2008 amendment to section 56-5-2950 requiring a person's breath test to be completed within two hours of arrest was retroactive because it involved procedures for administering breath tests. Accordingly, Hilton asserted the amendment was an exception to the general rule that statutes are applied prospectively. At the end of the suppression hearing, the circuit court gave each party fourteen days to submit written memoranda. In its memorandum, the State argued the amendment to the statute was prospective and the savings clause precluded retroactive application of the amendment.

The circuit court found as a matter of law that the amendment to section 56-5-2950 was retroactive because it was procedural in nature. Based upon the BA report, the circuit court concluded Hilton was arrested at 10:15 p.m. and his breath test was taken at 12:32 a.m. Applying the requirement that a person's breath test must be performed within two hours of arrest, the circuit court suppressed the results of Hilton's breath test. Alternatively, the circuit court found that even if the breath

test had been administered within two hours of Hilton's arrest, the State failed to provide Hilton with a correct written report that included Hilton's time of arrest, time of testing, and test results pursuant to subsection 56-5-2950(I). This appeal followed.

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the [circuit] court's factual findings unless they are clearly erroneous." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which [appellate courts] are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

LAW/ANALYSIS

Initially, Hilton argues the State failed to preserve for appellate review its argument concerning the savings clause, because the circuit court did not rule on that argument. We disagree.

At oral argument on appeal, Hilton cited to *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007). In *Suchenski*, our supreme court found unpreserved the City's argument that subsection (B) of the applicable statute excused noncompliance, because the circuit court's ruling applied subsection (A) but was silent as to subsection (B). *Id.* at 15, 646 S.E.2d at 880. *Suchenski* is distinguishable from the instant case. Following the hearing on Hilton's motion to exclude evidence, the circuit court permitted the parties to submit memoranda. In its memorandum, the State argued the savings clause prevented retroactive application of the amendment. Although the circuit court did not specifically refer to the savings clause in its order, it acknowledged considering the parties' memoranda. We find the State raised its savings clause argument to the circuit court, and in applying the amendment retroactively, the circuit court ruled on that argument. Thus, it is properly before this court.

On the merits, the State contends the circuit court erred by retroactively applying a statutory amendment to section 56-5-2950 that requires all breath test samples to be collected within two hours of arrest. We agree.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

"[L]egislative intent is paramount in determining whether a statute will have prospective or retroactive application." *State v. Bolin*, 381 S.C. 557, 561, 673 S.E.2d 885, 887 (Ct. App. 2009). When the legislative intent is not clear, courts "adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application." *Id*. at 561, 673 S.E.2d at 886-87. "[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." *Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). "A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability. When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only." *Id*. "[A] 'procedural' law sets out a mode of procedure for a court to follow, or 'prescribes a method of enforcing rights.'" *Id*. at 580, 720 S.E.2d at 466 (quoting *Black's Law Dictionary* 1083 (1979)).

Our supreme court recently discussed the retroactive application of statutes and the inclusion of savings clauses:

> A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. The statute must contain express words evincing intent that it be retroactive or words necessarily implying such intent. The only exception to this rule is a statutory enactment that effects a change in remedy or procedure. A savings clause is a restriction in a repealing act, intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted [re]peal. Generally, the repeal of a statute without the inclusion of a savings clause operates

> retroactively to expunge pending claims, but the inclusion of a proper savings clause will have the effect of preserving a pending suit.

State v. Brown, 402 S.C. 119, 127, 740 S.E.2d 493, 496-97 (2013) (internal citations and quotation marks omitted). In *Brown*, our supreme court addressed whether an amendment to section 16-13-30 of the South Carolina Code through the enactment of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 was retroactive. 402 S.C. at 125-26, 740 S.E.2d at 495-96. In finding the amendment was not retroactive, the court relied on the savings clause as clear intent for the amendment to be prospective:

> The General Assembly's inclusion of a savings clause demonstrates clear legislative intent to avoid disrupting pending or ongoing criminal prosecutions. To read the savings clause in any other way would result in a prohibited alteration of the statute's operation. Moreover, section 16-13-30's savings clause provides that the amendment to section 16-13-30 does not affect liability incurred under the prior version of the statute.

Id. at 127-28, 740 S.E.2d at 497 (footnote omitted).

We find the General Assembly clearly evinced its intent that the application of amended subsection 56-5-2950(A) be prospective. The cases discussed above outline our analysis. Generally, statutes are applied prospectively. *Brown*, 402 S.C. at 127, 740 S.E.2d at 496; *Edwards*, 395 S.C. at 579, 720 S.E.2d at 466; *Bolin*, 381 S.C. at 561, 673 S.E.2d at 886-87. However, they may be applied retroactively if (1) a specific provision or clear legislative intent requires retroactive application or (2) no clear expression of legislative intent is present but the statute is remedial or procedural in nature. *Brown*, 402 S.C. at 127, 740 S.E.2d at 496-97; *Edwards*, 395 S.C. at 579, 720 S.E.2d at 466. Neither of these conditions is present in this case.

When Hilton was arrested in May 2008, the only time limit affecting the administration of a breath test was the requirement in subsection 56-5-2953(A)(2)(a) that the videotaping of the breath test be completed within three hours of the person's arrest. On February 10, 2009, nine months after Hilton's

arrest, an amendment to subsection 56-5-2950(A) became effective. Act No. 201, 2008 S.C. Acts 1644, 1693 (the Act). The Act included the following clause:

> The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Id. at 1693. In substance, the amendment eliminated the three-hour videotaping requirement of subsection 56-5-2953(A)(2)(a) and inserted into subsection 56-5-2950(A) a requirement that "[a] breath sample taken for testing must be collected within two hours of the arrest." *Id.* at 1673-74, 1683-84. Consequently, the Act repealed or amended the existing law by eliminating an existing requirement for law enforcement officials in establishing an arrestee's blood-alcohol content and, in its place, instituting a new and different requirement.

We find the statement that "[t]he repeal or amendment by this act of any law . . . does not affect pending actions . . . or extinguish any . . . liability incurred under the repealed or amended law . . ." clearly expresses the General Assembly's legislative intent. *See id.* at 1693. Instead of satisfying the first condition permitting retroactive application of a statute, this savings clause confirms the General Assembly's intent that the amendment be applied prospectively, only. *See Brown*, 402 S.C. at 127, 740 S.E.2d at 496-97; *Edwards*, 395 S.C. at 579, 720 S.E.2d at 466. This clear expression of legislative intent obviates the need for us to

determine whether the amendment was substantive or procedural.[1] *See Brown*, 402 S.C. at 127-28, 740 S.E.2d at 497 ("The General Assembly's inclusion of a savings clause demonstrates clear legislative intent to avoid disrupting pending or ongoing criminal prosecutions. To read the savings clause in any other way would result in a prohibited alteration of the statute's operation."); *Bolin*, 381 S.C. at 562, 673 S.E.2d at 887 ("By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective."). Consequently, the circuit court erred by applying the amendment to subsection 56-5-2950(A) retroactively.

Inasmuch as we have decided the amendment to the breathalyzer statute is not retroactive and Hilton does not claim the videotaping was improper, we need not address the remaining issue raised by the State. *See Earthscapes Unltd., Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) (recognizing when the disposition of a prior issue is dispositive of an appeal, analysis of the remaining issues is unnecessary).

CONCLUSION

We find the General Assembly's 2008 amendment to subsection 56-5-2950(A), deleting the three-hour videotaping requirement for blood alcohol testing and replacing it with a two-hour requirement for completing blood alcohol testing, repealed or amended an existing law. We further find the General Assembly clearly expressed its intent through the savings clause that this amendment be applied prospectively. Consequently, the circuit court erred in applying subsection 56-5-2950(A) retroactively. Accordingly, the decision of the circuit court is

[1] The savings clause here is identical to the savings clauses in *Brown* and *Bolin*, in which the courts found the General Assembly clearly and unambiguously specified the amendments were prospective. It is also the same clause we examined in *State v. Bryant*, 382 S.C. 505, 509, 675 S.E.2d 816, 818 (Ct. App. 2009). However, in that case, we determined the amendment did not "repeal[] or amend[] any previously existing law as contemplated by the savings clause." *Id.* at 510, 675 S.E.2d at 819. Because the amendment "was an addition to the statutory scheme," we held the savings clause did not prevent its retroactive application. *Id.*

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Matthew Ward, Respondent,

v.

Katherine Washington, Appellant.

Appellate Case No. 2012-212378

Appeal From Charleston County
Dana A. Morris, Family Court Judge

Opinion No. 5179
Submitted October 9, 2013 – Filed October 30, 2013

REVERSED IN PART AND REMANDED

Shannon Phillips Jones, of Shannon Jones, Attorney at Law, LLC, of Charleston, for Appellant.

Douglas Alan Barker, of Charleston, for Respondent.

LOCKEMY, J.: Katherine Washington (Mother) appeals a contempt order, arguing the family court erred in (1) finding she willfully violated the family court's 2009 order, (2) imposing criminal sanctions without a finding of willful violation beyond a reasonable doubt, and (3) awarding Matthew Ward (Father) attorney's fees. We reverse in part and remand to the family court.[1]

[1] Pursuant to an agreement by the parties, this case was decided on the briefs and record.

FACTS/PROCEDURAL BACKGROUND

On March 27, 2007, Mother and Father were divorced. The parties have two minor children. Mother and the children live in Charlotte, North Carolina and Father lives in Charleston, South Carolina. In 2009, the parties entered into a settlement agreement regarding visitation and custody of the children. Pursuant to the agreement, the parties retained joint custody of the children with Mother designated as the primary custodial parent and Father designated as secondary custodial parent. The settlement agreement allowed Father to select visitation with the children as follows:

> In lieu of his every-other-weekend visitation, Easter, Memorial Day and Labor Day visitation during the school year, Father shall be allowed to select one weekend in August and December, two weekends in September, October, January, February and May, three weekends total in March and April in odd numbered years and four weekends total in March and April in even numbered years, two weekends in November in even numbered years and one weekend in November in odd numbered years. Father shall select these weekends in writing by the 15th of the previous month, and shall not be allowed to select weekends that conflict with Mother's Spring Break, Thanksgiving or Christmas visitation. Father shall not select Mother's day weekend for his May visitation. Mother shall provide Father the children's school schedule as soon as she receives it. Father shall then select the weekends he wants.

The agreement further provided Mother and Father would have the children on alternating Christmas, Thanksgiving, Spring Break, and Easter holidays. On November 3, 2009, the family court approved the settlement agreement and incorporated it into a final order.

On September 19, 2011, Father filed a petition for a rule to show cause alleging Mother willfully violated the 2009 order. Specifically, Father alleged Mother refused to allow him to visit the children on Labor Day 2011 weekend. Father stated Mother's interference with his visitation was an ongoing issue and noted

Mother had previously been held in contempt for similar behavior.[2] Father requested the family court find Mother in civil and criminal contempt and asked that she be required to pay his attorney's fees and costs. In her return to Father's petition for rule to show cause, Mother denied Father's allegation that she was in willful contempt of the 2009 order. Mother asserted Father was not entitled to Labor Day visitation pursuant to the clear language of the 2009 order. Mother also requested attorney's fees and costs.

A hearing was held before the family court on January 30 and February 22, 2012. At the hearing, Mother admitted she denied Father's request for Labor Day 2011 visitation, however she denied she willfully violated the 2009 order. Mother claimed Father, by agreeing to the terms "[i]n lieu of his . . . Labor Day visitation," forfeited his right to Labor Day visitation with the children. Father testified the children had spent the 2010 Labor Day holiday with him in Charleston without objection from Mother.

The family court found Mother willfully violated the 2009 order by denying Father's Labor Day visitation request and held her in contempt. The court fined Mother $1,500, suspended upon the condition that she not be held in future contempt for further interference with Father's visitation. Additionally, the family court ordered Mother to pay Father's attorney's fees in the amount of $2,500.[3] Mother subsequently filed a motion to reconsider. The family court denied Mother's motion, noting the parties opted out of traditional visitation and "[n]othing in the [2009] Order specifically prohibits [Father] from selecting Memorial Day or Labor Day as part of his weekend visitations." The family court noted that while it understood Mother's interpretation of the 2009 order, it read the order more broadly and looked at the totality of the circumstances. The family court found it "troubling" that Mother "cited a variety of different reasons" in emails to Father as to why Father should not have Labor Day visitation, but indicated in her testimony that the real reason she wanted the children that weekend was that she had planned a birthday party for several family members. Mother appealed.

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[2] The 2009 order states: "Mother acknowledges that she is in civil contempt for denying Father his visitation in September, 2009. The parties agree that further visitation interference can be treated as criminal contempt."

[3] Father requested $4,785 in attorney's fees.

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings." *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55. However, this broad standard of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court is in the better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of demonstrating error in the family court's findings of fact. *Id.* at 387-88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the family court unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court. *See Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55.

LAW/ANALYSIS

I. Contempt

Mother argues the family court erred in finding her in contempt of the 2009 order for denying Father Labor Day visitation. We agree.

"A party may be found in contempt for the willful violation of a lawful court order." *Hawkins v. Mullins*, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004). "A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." *Ex parte Lipscomb*, 398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct. App. 2012*)* (quoting *Ex parte Cannon*, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009)). "A good faith attempt to comply with the court's order, even if unsuccessful, does not warrant a finding of contempt." *Lipscomb*, 398 S.C. at 470, 730 S.E.2d at 324.

First, although the visitation schedule in the 2009 order is non-traditional and the language of the order is somewhat vague, we find the order did not prohibit Father from selecting Labor Day visitation with the children. We read the "in lieu of" language in the order as stating that instead of Father having a traditional visitation

schedule of every other weekend, Easter, Memorial Day and Labor Day, he is allowed to choose his weekends within the limits provided in the order. The order outlines specific instructions regarding all of the major holidays, but does not address Labor Day outside of the "in lieu of" language. We agree with the family court's finding that nothing in the 2009 order prevents Father from selecting Labor Day weekend as one of his two September visitation weekends. Therefore, the family court did not err in finding Father properly selected Labor Day 2011 as one of his allotted September visitation weekends in accordance with the 2009 order.

However, we find the family court did err in finding Mother in contempt for violating the 2009 order. The evidence in the record does not support a finding that Mother willfully violated the order. Mother testified she believed the order clearly prohibited Father from selecting Labor Day visitation and she was in compliance with the order in denying Father's Labor Day request. She also testified she relied on the advice of her counsel who agreed with her view of the language of the order. Furthermore, the family court's statement that it "understands [Mother]'s interpretation of the Order" is evidence that Mother could have reasonably misinterpreted the order and her actions were not willful. Accordingly, we reverse the family court's determination that Mother willfully violated the 2009 order.

II. Sanctions

Mother argues the family court erred in imposing criminal sanctions without finding, beyond a reasonable doubt, that she willfully violated the 2009 order. Based upon our reversal of the family court's contempt finding, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of prior issue is dispositive).

III. Attorney's Fees

Mother argues the family court erred in awarding Father attorney's fees. We reverse and remand to the family court.

Section 20-3-130(H) of the South Carolina Code (Supp. 2012) authorizes the family court to order payment of litigation expenses, including attorney's fees, to either party in a divorce action. "The decision to award attorney's fees is within the family court's sound discretion, and although appellate review of such an award is de novo, the appellant still has the burden of showing error in the family court's

findings of fact." *Lewis v. Lewis*, 400 S.C. 354, 372, 734 S.E.2d 322, 331 (Ct. App. 2012). In determining whether to award attorney's fees, the following factors should be considered: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). If an award of attorney's fees is appropriate, the reasonableness of the fees should be determined according to: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In adjudicating Father's claim for attorney's fees, the family court held ". . . the award of [Father]'s attorney's fees is appropriate, and considering the factors enunciated in *Feldman v. Feldman*, 380 S.C. 538, 670 S.E.2d 669 (Ct. App. 2008) I order [Mother] to reimburse [Father] his attorney's fees in the amount of $2,500.00, payable directly to [Father]'s attorney at a rate of $400.00 per month." In *Feldman*, this court outlined the *E.D.M.* and *Glasscock* factors listed above.

Based upon our reversal of the family court's contempt determination, we reverse the award of attorney's fees and remand the issue of attorney's fees to the family court for consideration of the effects of this appeal. *See Sexton v. Sexton*, 310 S.C. 501, 503-04, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney's fees for reconsideration when the substantive results achieved by counsel were reversed on appeal). On remand, the family court should set forth its specific findings of fact as to each of the *E.D.M* factors in determining whether to award attorney's fees to either party.

CONCLUSION

We reverse the family court's contempt and attorney's fees findings and remand for a reconsideration of attorney's fees.

REVERSED IN PART AND REMANDED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Delta Apparel, Incorporated, Respondent,

v.

Daniel G. Farina, Appellant.

Appellate Case No. 2012-205467

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5180
Heard September 12, 2013 – Filed October 30, 2013

REVERSED

Candy M. Kern-Fuller and Nicole Lynne Thornton, of Upstate Law Group, LLC, of Easley, for Appellant.

Samuel W. Outten and Catherine Runion Atwood, of Womble Carlyle Sandridge & Rice, LLP, of Greenville for Respondent.

LOCKEMY, J.: Daniel G. Farina appeals the trial court's denial of his Rule 60(b), SCRCP motion for relief from judgment. He argues the trial court did not have personal jurisdiction to award a judgment against him and that he was not served with proper notice of the initial claim of Delta Apparel, Incorporated (Delta). We reverse.

FACTS

Farina was hired by Delta, a corporation with corporate offices in Greenville, South Carolina, as the general manager of its Ceiba Textiles plant (Ceiba) in Villanueva, Honduras. In April of 2007, the State of California Franchise Tax Board (California Tax Board) requested that Delta begin withholding certain amounts from Farina's pay. In July of 2008, Delta terminated Farina's employment and entered into a severance settlement agreement with him. As part of the severance settlement, Farina accepted $41,022.92 as full severance payment corresponding to days of labor from October 16, 2007, up to July 10, 2008. On August 15, 2008, pursuant to the California Tax Board's mandate, Delta withheld 25%, which equaled $9,673.63, from Farina's severance payment.

In October of 2008, Farina filed a suit in Honduras against Ceiba claiming he was an employee of Ceiba, he was wrongfully terminated, and he was owed $57,984.14 in unpaid severance. On September 1, 2009, the Honduran court ruled in Farina's favor, ordering Ceiba to pay Farina $230,039.78.[1] Delta, on behalf of Ceiba, appealed the judgment to the Honduran court of appeals, which affirmed the judgment and awarded punitive damages. Delta appealed the appellate decision to the Supreme Court of Honduras, which affirmed in favor of Farina with the exception of the punitive damages award. Delta then paid the Honduran judgment to Farina.

On May 4, 2010, Delta filed a motion for a restraining order in South Carolina to enjoin Farina from disposing of the funds from the Honduran judgment. A hearing was scheduled in July of 2010 in which the trial court denied Delta's motion. Farina was not present at the hearing; however, he had contacted an attorney about the matter. The attorney was never retained, but he did have two conversations about the case with Delta's counsel. Also on May 4, 2010, Delta filed a summons and complaint claiming Farina fraudulently misrepresented his employment to the Honduran court. Further, Delta alleged Farina breached the employment agreement entered into by the parties. The time within which responsive pleadings

[1] Farina was awarded $57,984.14 in unpaid severance salaries prior to his termination, and then he was awarded $172,055.64 in damages and losses for unpaid salaries for a total of thirteen months and twenty days as a result of his wrongful termination.

could be filed expired without an answer from Farina, and, as a result, Delta filed a motion for default judgment on July 5, 2010. It also filed an affidavit of default on July 22, 2010.

Farina filed a motion to dismiss the case on July 26, 2011, and he attached an affidavit in support of his motion. The day after receiving Farina's motion to dismiss, Delta sent Farina notice of its motion for default judgment with a hearing scheduled for September 1, 2011. Delta explained that because it received notice of Farina's motion to dismiss, it sent the notice of the default judgment hearing to Farina's last known address in California as well as to the Arizona address provided on his recent correspondence.

Farina did not appear at the default judgment hearing. At the hearing, Delta alleged it served Farina with notice of its initial claim in three different ways: (1) it mailed notice to his last known address; (2) it sent notice by certified mail with receipt, which was signed and returned; and (3) it sent notice by FedEx to his address, which required a signature. Further, Delta alleged Farina had actual notice because he contacted an attorney to represent him in the action and then decided not to retain the attorney. Delta also stated it employed Farina and that Farina was an employee for Delta at all times even though he worked for its Honduran facilities. Delta filed an affidavit from its employee, Deborah Merrill, supporting Delta's request for an award of $96,484.14 in damages, as well as alleging that Farina had regular contact with Delta's corporate offices in Greenville, South Carolina. The trial court ruled in Delta's favor.

A hearing for Farina's motion to dismiss was scheduled for November 7, 2011.[2] In his motion, Farina argued there were five issues with Delta's claim.

> Plaintiff's [sic] cannot be awarded a Default Judgment in a case that he cannot show proper proof of service
>
> I [Farina] have not had any relationship that could result in a monetary judgment award from a Family Court Division of South Carolina in favor of plaintiff

[2] Farina's motion was captioned as a motion to dismiss, but he argued Rule 60(b), SCRCP, entitled him to relief from the judgment. Thus, the trial court addressed the motion as a Rule 60(b), SCRCP motion.

> I was employed as General Manager in plaintiff's Honduran subsidiary, Ceiba Textiles SRL, from October 2006 until my termination on June 2008
>
> Any labor matter from that relationship is under the jurisdiction of the labor law of a foreign country, Honduras
>
> Plaintiff is using South Carolina legal system to harass me, knowing well that I cannot afford legal representation and/or a personal appearance without losing a significant amount of income, jeopardizing my employment in these uncertain economic times, plus incurring in non-planned expenses.

Farina was present at the hearing, and he asserted he was a resident of Arizona, was working in northern Mexico, and had not been a resident of California since April of 2010. He claimed the first notice he received was in July of 2011 regarding Delta's motion for a default judgment scheduled to be heard on September 1, 2011. Delta denied all his claims and also maintained that while Farina labeled his motion as one pursuant to Rule 60(b), SCRCP, he did not allege any permissible grounds for relief under Rule 60(b), SCRCP. Farina responded that while he received notice of the motion for a restraining order, he thought the matter had been dropped and was not aware there was any other claim. He maintained the restraining order involved his judgment in Honduras, which was a matter not properly before the South Carolina court system. The trial court issued a Form 4 order denying Farina's Rule 60(b), SCRCP motion.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005) (citing *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989)). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* (citing *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988)). "'An abuse of discretion in setting aside a default judgment

occurs when the [trial court] issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.'" *Id.* (quoting *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)).

LAW/ANALYSIS

Rule 60, SCRCP

Despite captioning his motion as one to dismiss, Farina presented his arguments pursuant to Rule 60, SCRCP, which is a motion to relieve the party from a judgment or order. The relevant portion of Rule 60, SCRCP, provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b), SCRCP. We will now address his arguments on appeal.

Improper Service

Farina first argues the default judgment is void pursuant to Rule 60(b)(4), SCRCP, because he did not receive proper service of the summons and complaint. He contends the trial court therefore erred in denying his request to relieve him of the judgment. We disagree.

Rule 4, SCRCP, pertaining to proper service, "assures the defendant of reasonable notice of the action." *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). To effect service on an individual such as Farina, Rule 4(a)(d)(1), SCRCP, provides service may be made by delivering a copy of the summons and complaint to him "personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process."

Effective service of process can also be made upon an individual "by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt." Rule 4(d)(8), SCRCP. Finally, service can be made upon an individual "by a commercial delivery service which meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2)." Rule 4(d)(9), SCRCP. "Service is effective upon the date of delivery as shown in the delivery record of the commercial delivery service." *Id.* If service is by certified mail or commercial delivery service, it cannot be the basis for the entry of a default or a judgment by default unless the record contains a delivery record or return receipt showing acceptance by the defendant. Rule 4(d)(8)-(9), SCRCP. "Any such default or judgment by default shall be set aside pursuant to . . . Rule 60(b) if the defendant demonstrates to the court that the delivery receipt [or return receipt] was signed by an unauthorized person." Rule 4(d)(8)-(9), SCRCP.

The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief. *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). "We have never required exacting compliance with the rules to effect service of process." *Roche v. Young Bros., Inc. of Florence*, 318

S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995). "Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* at 210, 456 S.E.2d at 899. "Further, an [officer's] return of process creates the legal presumption of proper service that cannot be 'impeached by the mere denial of service by the defendant.'" *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App. 2005) (quoting *Richardson Constr. Co. v. Meek Eng'g and Constr., Inc.*, 274 S.C. 307, 311, 262 S.E.2d 913, 916 (1980)).

Here, Delta presented an affidavit of service to the trial court. It stated the officer substituted service upon Pablo Farina at 9341 Parrot Avenue, Downey, California, and listed Pablo as a co-occupant residing with Farina at the home. The affidavit also indicated that Delta effected service by first class mail to the same residence in California. Delta included notice regarding the hearing for its motion for a restraining order with the summons and complaint. Farina admitted receiving notice of Delta's motion for a restraining order and further admits contacting an attorney regarding it. However, he maintained he thought the motion was a separate and distinct action, and he was not aware of the summons and complaint.

Delta complied with the rule for personal delivery and presented an affidavit of service to the trial court, and, thus, proper service is presumed. Farina admitted having notice of the motion for a restraining order, which was in the same delivery as the summons and complaint. Despite his claim that he was never served with the summons and complaint for this action, the officer's return of process cannot be impeached by Farina's mere denial of service. The address in California was his last known address, a fact which was supported by the tax notices Delta received from the California Tax Board. To prove he no longer resided in California, Farina only submitted an affidavit that was attached to his motion to dismiss, and it contained a mere denial that Delta effected proper service. Farina stated he enclosed a copy of his Arizona voter registration with his affidavit, but the voter registration was not in the record on appeal.

Delta claims it also served notice to Farina in two other ways, first class mail with return receipt requested and FedEx with a return signature requested, but we do not address any deficiencies in those methods of service because we find service was proper based upon the personal delivery to an authorized person at Farina's last known address. Accordingly, we find the trial court did not abuse its discretion in denying Farina's motion for relief from judgment based on service of process.

Personal Jurisdiction

Farina contends the trial court erred in finding personal jurisdiction over him. Specifically, he argues Delta did not prove he had sufficient contacts with South Carolina such that a state court would have personal jurisdiction over him, and thus, he should be relieved from the judgment. *See Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (2002) ("The definition of void under [Rule 60(b), SCRCP] . . . encompasses judgments from courts which . . . lacked subject matter jurisdiction or personal jurisdiction."). We agree.

We first address Delta's contention that Farina did not preserve this argument for appellate review. *See Bakala v. Bakala*, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) ("Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised."); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating the "losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). Here, Farina represented himself *pro se* and listed five arguments in his Rule 60, SCRCP motion. We believe the three arguments below are pertinent to the issue of personal jurisdiction.

> I [Farina] have not had any relationship that could result in a monetary judgment award from a Family Court Division of South Carolina in favor of plaintiff
>
> I was employed as General Manager in plaintiff's Honduran subsidiary, Ceiba Textiles SRL, from October 2006 until my termination on June 2008
>
> Any labor matter from that relationship is under the jurisdiction of the labor law of a foreign country, Honduras

While Farina did not invoke the exact name of the legal doctrine of personal jurisdiction, we find the pertinent portions of his argument were sufficiently clear for the trial court to decide the issue. Thus, Farina preserved this issue for appellate review. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640,

642 (2012) (stating that while a party is not required to use the exact name of a legal doctrine in order to preserve the issue, the issue must be "sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge").

"Personal jurisdiction is exercised as 'general jurisdiction' or 'specific jurisdiction.'" *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). In this case, both parties' briefs analyze personal jurisdiction based upon specific jurisdiction rather than general jurisdiction; thus, our analysis will focus on specific jurisdiction. "Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum; specific jurisdiction is determined under [section 36-2-803 of the South Carolina Code (2003)]." *Id.* (citing *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005)).

"'The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis.'" *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2011) (quoting *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 505, 402 S.E.2d 177, 179 (1991)). "The trial court must (1) determine whether the South Carolina long-arm statute applies and (2) whether the nonresident's contacts in South Carolina are sufficient to satisfy due process." *Id.* (citing *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008)).

"Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). "Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there." *Id.* at 491-92, 611 S.E.2d at 508 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Atlantic Soft Drink Co. of Columbia, Inc. v. S.C. Nat'l Bank*, 287 S.C. 228, 231-32, 336 S.E.2d 876, 878-79 (1985)). "Without minimum contacts, the court does not have the 'power' to adjudicate the action." *Id.* at 492, 611 S.E.2d at 508 (citing *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131(1992)). "'The court must also find that the exercise of jurisdiction is reasonable or fair.'" *Id.* (quoting *S. Plastics Co.*, 310 S.C. at 260, 423 S.E.2d at 131).

We begin by determining whether our long-arm statute applies in this case. Farina signed a contract with Delta, whose corporate offices are located in Greenville, South Carolina, implicating section 36-2-803(A)(7) of the South Carolina Code (Supp. 2012), which states "a court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's . . . entry into a contract to be performed in whole or in part by either party in this State."

However, "[o]ur courts have held entering into a contract or mere negotiations inside South Carolina without more is not enough to establish minimum contacts." *Cribb v. Spatholt*, 382 S.C. 490, 501, 676 S.E.2d 714, 720 (Ct. App. 2009); *see Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping & Garden Ctr., Inc.*, 315 S.C. 88, 92, 431 S.E.2d 632, 635 (Ct. App. 1993) ("[A]n individual's contract with an out-of-state party cannot alone establish sufficient minimum contact's in the other party's home forum."). "The parties' prior negotiations, the consequences of their actions as contemplated by the parties, the terms of the contract, and the parties' actual course of dealings must be considered in evaluating whether a defendant purposefully established minimum contacts within the forum." *Loyd*, 315 S.C. at 92, 431 S.E.2d at 635.

Delta alleged in its complaint that the trial court had personal jurisdiction over Farina because Farina entered into an employment relationship with Delta, a corporation doing business in the state of South Carolina. Further, Delta claimed Farina engaged in an ongoing business relationship with Delta; however, Delta only offered Merrill's supplemental affidavit in support of its claims. In her affidavit, Merrill explained Delta's chief executive officer (CEO) and the vice president's offices are located in Greenville, and she asserted both had interviewed Farina and discussed the requirements of the position with him. She stated Farina inquired of Delta's CEO about his job responsibilities at the Ceiba plant and also held conversations with the vice president regarding his employee benefits, termination, and severance settlement. Finally, Merrill stated Farina was aware that Delta's corporate offices were in Greenville and that he had contact with individuals in the corporate offices on a regular basis.

Despite Delta's assertion that Farina had sufficient contacts with South Carolina to support a finding of personal jurisdiction, the California Tax Board sent its requests to withhold money from Farina's pay checks to offices in Duluth, Georgia.

Further, Farina's severance settlement with Delta was executed in Duluth and filed in DeKalb County, Georgia. Despite Merrill's assertions within her affidavit, she never stated where the interview and conversations between Farina and Delta's corporate officers occurred, and Delta admitted in oral argument that Farina's interview occurred in North Carolina. Finally, Merrill never asserted that Farina came to Greenville for any of the other activities listed in the affidavit.

In light of these facts, we believe Farina established he did not have the minimum contacts required for the trial court to have personal jurisdiction over him. The California Tax Board's notices went to offices located in Duluth, Farina signed his severance settlement in Duluth, and Farina worked in Honduras during his employment. While Farina may have spoken with officers that worked in the Greenville corporate office, there was no evidence to show Farina ever traveled to South Carolina for those conversations. Thus, Farina's contacts do not establish that he would have reasonably expected to be haled in to court in South Carolina, nor were the contacts sufficient for this State to fairly exercise personal jurisdiction over him. Accordingly, we reverse the trial court because South Carolina did not have personal jurisdiction over Farina.

Res Judicata and Collateral Estoppel

Farina argues that this action cannot be affirmed because it should have been barred from the trial court pursuant to the legal doctrines of res judicata and collateral estoppel. Because he raises these issues for the first time on appeal, we find the issues are not preserved for appellate review. *See Dawkins v. Mozie*, 399 S.C. 290, 294-95, 731 S.E.2d 342, 345 (Ct. App. 2012) ("Res judicata is an affirmative defense that must be pled at trial to be pursued on appeal. An affirmative defense is waived if not pled." (citing *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004))); *see also Duckett v. Goforth*, 374 S.C. 446, 465, 649 S.E.2d 72, 82 (Ct. App. 2007) (stating a party cannot raise the affirmative defense of collateral estoppel for the first time on appeal); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (finding that for an issue to be preserved for appellate review, it must have been: "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity").

CONCLUSION

For the foregoing reasons, the trial court is

REVERSED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henry W. Frampton, III, Respondent,

v.

South Carolina Department of Transportation, Appellant.

Appellate Case No. 2012-209046

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5181
Heard September 12, 2013 – Filed October 30, 2013

AFFIRMED

Beacham O. Brooker, Jr., of Columbia, for Appellant.

Richard D. Bybee and Michael Brent McDonald, both of Smith Bundy Bybee & Barnett, PC, of Mount Pleasant, for Respondent.

LOCKEMY, J.: In this inverse condemnation case, the South Carolina Department of Transportation (DOT) appeals the judgment in favor of Henry W. Frampton, III. DOT first argues the trial court's decision to seat the jury during the takings phase of the trial was unduly prejudicial and deprived it of a mode of trial to which it was entitled. Additionally, DOT argues (1) Frampton did not prove any facts that would constitute a taking of property; (2) the trial court did not apply the appropriate law in its finding of a taking; (3) the compensation verdict exceeded

any credible evidence of Frampton's loss; and (4) Frampton was not entitled to attorney's fees and costs under the governing statute. We find certain arguments are not preserved for our review, and we affirm the remaining issues.

FACTS

In 2005, DOT began planning for a bridge improvement project located at Ellis Creek on James Island. The bridge spanned over the property at issue, 699 Folly Road (699 Folly). 699 Folly was located on the north side of and immediately adjacent to Ellis Creek, and it contained a small rental home. Frampton and his wife lived at 693 Folly Road (693 Folly), which was immediately adjacent to 699 Folly, and the Framptons also owned the property at 685 Folly Road (685 Folly). During DOT's initial planning, 699 Folly and 693 Folly existed as one tract of land. The rental home on 699 Folly had always contained a separate driveway and been used as a separate income producing property. During DOT's project, Frampton partitioned the tract of land, creating two separate properties.

Robert Larry Phinney operated as DOT's right-of-way agent[1] during the bridge improvement project, and he testified the original construction plans included a permanent guardrail extending from the bridge and continuing to 693 Folly's driveway. As a result of Frampton's division of his tract of land, the guardrail denied all access between 699 Folly and Folly Road. After Phinney discussed the access issues with DOT's engineers, the engineers explained the length of the guardrail could not be avoided.

To address the access issues, DOT wanted to create a "T" drive, where access to 699 Folly would require entering Frampton's driveway at 693 Folly and then turning ninety degrees into 699 Folly. DOT believed this would provide adequate access. However, Frampton exercised his rights as the landowner and refused to grant DOT any driveway permission to allow access from 693 Folly's driveway to 699 Folly. DOT then refused to exercise its option of condemning Frampton's access rights.

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[1] A right-of-way agent uses approved plans to conduct the acquisition process for DOT. The acquisition process includes completing title work of the involved properties, initiating contact with the property owners, and obtaining any necessary permissions.

DOT granted Cape Romain Contractors the contract for the project, and construction started in 2007 on the southern side of Ellis Creek at Folly Road. In October of 2008, construction began on the northern side of Ellis Creek immediately adjacent to 699 Folly. A median was ultimately placed in the center of Folly Road though it was not present in the initial plans.

Frampton alleged there were many actions that blocked access from 699 Folly to Folly Road, including the placement of orange construction fencing, silt fencing, and concrete barriers in November of 2008. The concrete driveway that provided access to 699 Folly as well as the adjacent curb and gutter were removed in November and December of 2008. New sewer pipe trenches were excavated and new sewer pipes installed across the former driveway for 699 Folly. DOT constructed a new sidewalk, curb, and gutter in January of 2009 in front of 699 Folly along its boundary line with Folly Road, and Frampton alleged it also blocked all access from Folly Road to 699 Folly. Further, the area in front of 699 Folly and its driveway was used as a "lay down area" for equipment throughout the construction project, which further blocked any access.

Around June of 2009, DOT agreed to shorten the guardrail from the initial length and create a turnaround area for 699 Folly to allow access to Folly Road. However, because concrete for a sidewalk and curb had already been poured in front of 699 Folly's existing driveway, the concrete had to be torn out in order to reestablish access from 699 Folly to Folly Road. DOT finally restored access to 699 Folly in January of 2010 after a series of grading, drainage, and pothole problems were addressed pursuant to state law. *See* S.C. Code Ann. § 57-5-1140 (2006) (setting forth the requirements for installing residential rights-of-way entrances and aprons to state highways).

As a result of the construction activities and access issues, the tenant occupying 699 Folly vacated the premises in October of 2008 before his lease ended. Frampton asserted that DOT's construction and blockage of access to 699 Folly prevented him from renting the home after the tenant vacated the property. Once access was restored, Frampton rented 699 Folly in March of 2010 after a short marketing period. The tenant who vacated 699 Folly during DOT's construction paid Frampton $950 a month in rent. Frampton confirmed that some deferred maintenance was performed on the rental home at 699 Folly during the

construction. After the construction was completed, Frampton's tenant paid $1150 a month starting in March of 2010.

Frampton filed his initial summons and complaint on September, 29, 2009, claiming inverse condemnation and constitutional torts, and DOT filed its initial answer on November 3, 2009. On June 17, 2011, DOT filed a motion to transfer the case to the non-jury docket. The trial court denied the motion in a Form 4 order dated September 28, 2011. Frampton amended his complaint on December 14, 2011, and DOT responded by filing an amended answer on February 3, 2012.

At the beginning of the trial, DOT asked the trial court to postpone seating a jury until the trial court decided whether, as a matter of law, a taking had occurred. Until that determination was made, DOT argued a jury trial was improper. The trial court viewed the motion as one to bifurcate the trial into a separate taking and compensation phase and denied the motion.[2] *See Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) (explaining that in an inverse condemnation case, the trial court will first determine whether a claim has been established, and then, the issue of compensation may be submitted to a jury at either party's request). The trial court stated it would later determine what issues, if any, would be submitted to the jury.

After both parties' presentation of testimony relating to the alleged taking, the trial court removed the jury from the court room to announce its ruling. Frampton contended as part of the physical taking of his property, he was allowed to argue to the jury that he suffered damages from the median as an incidental part of the whole construction. The trial court rejected his argument and found the median in and of itself was not a taking. Moreover, the trial court stated it did not believe Frampton "could piggyback" the issue of the median with the blocking of 699 Folly's access.[3] The trial court then found by a preponderance of the evidence that "the drive to 699 [Folly], the access to 699 [Folly], was blocked by the actions of DOT for sixteen months," from November of 2008 through February 2010. The only issue submitted to the jury was "how much [Frampton] lost as a result of the taking" during the sixteen months.

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[2] A different judge from the one presiding at trial entered the first denial.

[3] Frampton did not appeal the trial court's ruling on the median.

The trial court proceeded with the compensation phase of the trial and requested the jury be seated again. Frampton qualified a real estate appraiser, Thomas Hartnett, as an expert in real estate and banking, to estimate the damages Frampton incurred from the taking. Harnett acknowledged Frampton leased 699 Folly for only $950 a month prior to the taking and then $1150 a month after the taking, but he testified that contract rent and market rent are two separate calculations and can be different. Harnett testified the market value of 699 Folly was $250,000. Further, he stated eight percent was a fair investment return on 699 Folly, which equaled $20,000 a year, or $1,666.67 a month. He explained that a person would expect an increased return from a rental property versus money deposited in a bank because there are additional costs and risks involved with maintaining a rental property. Harnett estimated Frampton's total loss equaled $26,666.67 for the sixteen months that the access of easement was taken at 699 Folly. Then, Harnett calculated the present value of the total loss using the statutory interest rate of eight percent and stated the loss at present value equaled $31,104. Next, Harnett calculated the present value with a statutory interest rate of eight percent for the invoices reflecting Frampton's costs in relocating and restoring 699 Folly's driveway as well as Frampton's utility bills for the time 699 Folly was vacant, and the damages totaled $4,473.44.

The jury awarded $36,527 in favor of Frampton. DOT filed a 59(e), SCRCP motion arguing the trial court erred in (1) failing to separate the proceedings into a non-jury takings phase and jury compensation phase, (2) failing to apply the correct case law from *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), and (3) finding the taking endured for sixteen months. The trial court denied the motion, and this appeal followed.

STANDARD OF REVIEW

"An action brought by a property owner against a [governmental entity] for the taking of the owner's property without just compensation is an action at law." *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App. 1999) *aff'd sub nom. Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001) (citing *S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 537 (1986); *Poole v. Combined Util. Sys.*, 269 S.C. 271, 273-74, 237 S.E.2d 82, 83 (1977)).

On appeal from an action at law tried with or without a jury, the appellate court's standard of review extends only to the correction of errors of law. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976). The factual findings of the jury or the trial judge will not be disturbed "unless a review of the record discloses that there is no evidence which reasonably supports [its] findings." *Id.*

LAW/ANALYSIS

Seating of the Jury

DOT contends the trial court erred in seating the jury during the takings phase. DOT maintains this error was unduly prejudicial and deprived it of a mode of trial to which it was entitled. We disagree.

In an inverse condemnation case, the trial court will first determine whether a claim has been established. *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005). Then, the issue of compensation may be submitted to a jury at either party's request. *Id.*

As a threshold matter, we will address Frampton's assertion that DOT did not preserve this issue for our review. Orders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), "and must, therefore, be appealed immediately." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *e.g.*, *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."). "Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (citing *Foggie*, 313 S.C. at 103, 431 S.E.2d at 590).

DOT filed a motion to transfer the case to the non-jury docket on June 17, 2011. The trial court denied the motion in a Form 4 order dated September 28, 2011. DOT never appealed the trial court's order. DOT raised this issue again at trial, and the trial court again denied its request. The question before us is whether the trial court's initial order denying DOT's motion was immediately appealable.

In the case before us, DOT asserted a right to a non-jury trial for the takings phase of the inverse condemnation case. The trial court's order denied DOT's request for a non-jury trial during the takings phase and required it to go forth with a jury trial. This ruling could not be overturned by the trial judge who eventually tried the case. *See Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) (one circuit judge does not have the power to reverse an order of another circuit judge regarding the proper mode of trial); *see also Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005) ("If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review."). We find DOT did not preserve this issue for our review because it did not immediately appeal the trial court's order affecting the mode of trial, which is a substantial right.

Correct Application of Relevant Case Law

DOT argues the trial court incorrectly applied *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005), and asserts the trial court should have evaluated the facts pursuant to *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) and found Frampton was not entitled to damages. We disagree.

"The South Carolina Constitution provides, '[e]xcept as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property.'" *Hilton Head Auto., LLC v. S.C. Dep't of Transp.*, 394 S.C. 27, 30, 714 S.E.2d 308, 310 (2011) (quoting S.C. Const. art. I, § 13(A)). "In an inverse condemnation action, a private property owner seeks to establish that a government entity has taken his or her property." *Id.* "The governmental conduct at issue generally takes one of two forms: (1) the entity has physically appropriated private property or (2) the entity has imposed restrictions on the use of the property that deprive the owner of the property's 'economically viable use.'" *Id.*; *see, e.g., Byrd*, 365 S.C. at 656-58, 620 S.E.2d at 79-80.

> Although no set formula exists for determining whether property has been 'taken' by the government, the relevant jurisprudence does provide significant guideposts. Determining whether government action effects a taking requires a court to examine the character of the government's action and the extent to which this action

> interferes with the owner's rights in the property as a whole.

Hardin v. S.C. Dep't of Transp., 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007) (citing *Penn Central*, 438 U.S at 130-31). "Stated more specifically, these 'ad hoc, factual inquiries' involve examining the character of the government's action, the economic impact of the action, and the degree to which the action interferes with the owner's investment-backed expectations." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)). "Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves." *Id.* "Additionally, the enforcement of a government regulation will usually effect a taking when the regulation denies all economically beneficial or productive use of land." *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-016 (1992)). Whether physical or regulatory, permanency is not required to find a taking has occurred because "the government must compensate for even a temporary taking." *Byrd*, 365 S.C. at 657, 620 S.E.2d at 79.

DOT first claims Frampton asserted a regulatory taking. *See Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 15, 675 S.E.2d 439, 442 (2009) (stating that under a claim for regulatory inverse condemnation, *Penn Central* requires the court to look at "(1) the economic impact on the claimant, especially the extent to which the governmental entity has interfered with the claimant's investment-backed expectations, and (2) the character of the governmental action"). However, DOT does not cite any regulation or government-imposed limitation that would give rise to what it alleges is a regulatory takings claim. We disagree with any portion of DOT's argument that contends a regulatory taking analysis applies to this case. The record and Frampton's complaint reflect that Frampton premised his claim on DOT's physical appropriation of private property and not a regulatory taking. Thus, we continue our analysis using a physical taking framework.

The law is clear that following *Hardin*, "a proper analysis of an inverse condemnation claim premised on an alleged physical taking must begin with a determination of the scope of the property rights at issue." *Hilton Head Auto., LLC v. S.C. Dep't of Transp.*, 394 S.C. 27, 30, 714 S.E.2d 308, 310 (2011). When analyzing what property interests exist with reference to the public road system and a property owner's access thereto, our supreme court stated the focus is on how any road re-configuration affects a property owner's easements. *Hardin*, 371 S.C.

at 609, 641 S.E.2d at 443. As an abutting property owner, Frampton had an "easement for access" to Folly Road.[4] *See Hilton Head Auto.*, 394 S.C. at 30-31, 714 S.E.2d at 310. If governmental action materially injured this easement, such that Frampton no longer enjoyed the reasonable means of access to which he was entitled, a physical taking has occurred. *Id.* at 31, 714 S.E.2d at 310; *see S.C. State Highway Dep't v. Allison*, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965) ("[A]n obstruction that materially injures or deprives the abutting property owner of ingress or egress to and from his property is a 'taking' of the property, for which recovery may be had."); *Sease v. City of Spartanburg*, 242 S.C. 520, 524-25, 131 S.E.2d 683, 685 (1963) ("The protection of [the South Carolina takings clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street."); *Brown v. Hendricks*, 211 S.C. 395, 403, 45 S.E.2d 603, 606 (1947) ("'The accessibility of one's property may in some instances constitute a great part of its value, and to permit a material impairment of his access would result in the destruction of a great part of the value . . . and his property is therefore as effectually taken as if a physical invasion was made thereon and a physical injury done thereto.'" (quoting with approval *Foster Lumber Co. v. Ark. Valley & Western Ry. Co.*, 95 P. 224, 228 (Okla. 1908))).

We find the trial court correctly applied the law as stated in *Hardin* and *Hilton Head Auto, LLC.* Accordingly, we affirm the trial court's application of the law to these facts.

Proof of Taking

DOT contends that Frampton did not present sufficient evidence to support a finding of a taking of property, temporary or otherwise. We disagree.

DOT first argues the elements of eminent domain and inverse condemnation are not applicable here because DOT was exercising its separate and distinct police power. It maintains it was rerouting and diverting traffic, and Frampton is not entitled to any compensation for restrictions or damage placed upon his property by the exercise of that police power. To support its position, DOT quotes the following:

[4] DOT concedes that Frampton, as a landowner, was entitled to an easement for access between 699 Folly and Folly Road.

> This court has previously recognized that there is a distinction between the exercise of the police power and the exercise of the power of eminent domain; that just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power.

S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 365, 175 S.E.2d 391, 394 (1970) (citing *Richards v. City of Columbia*, 227 S.C. 538, 547-48, 88 S.E.2d 683, 687 (1955); *Edens v. City of Columbia*, 228 S.C. 563, 571, 91 S.E.2d 280, 282-83 (1956)). We disagree with DOT's position. Frampton never contended the redirecting or rerouting of traffic caused his damage or constituted a taking. The record reflects that Frampton argued and continues to argue that DOT's construction and related activities blocked his easement for access to 699 Folly such that it constituted a physical taking. Because we do not believe DOT was asserting its police power under these facts, we will analyze the law regarding takings in South Carolina.

DOT maintains that even if *Hardin* applies, Frampton's claim centers around the silt fence placed during construction and argues there are at least two reasons this claim is not supported by the evidence. First, it contends the real issue "is not that the fence was placed, but that it was not removed during the construction period," and thus, there is no affirmative governmental action to constitute a taking. It then contends the equitable defense of laches is applicable. We disagree with its first argument and find its second argument was not preserved for our review.

DOT attempts to avoid liability by stating while the initial placement of the silt fence may have been an affirmative action, Frampton's complaint is about the passive event of not taking down the silt fence. However, we do not believe that is an accurate representation of Frampton's claim. Frampton complains there was no access to 699 Folly during DOT's construction from various actions of DOT and its contractors, including the placement of the silt fence. To prove a physical taking, Frampton must show governmental action materially injured his access easement, such that he could no longer enjoy the reasonable means of access to which he is entitled. *See Hilton Head Auto.*, 394 S.C. at 30-31, 714 S.E.2d at 310. Despite DOT's contention that Frampton never requested the silt fence be moved to gain

access to 699 Folly, case law does not require the property owner to make such a request before bringing an action at law for a taking. DOT further argues the contractors and subcontractors on the project never refused entrance to 699 Folly to anyone with rights to enter the property. Even if this were true, Frampton testified and provided pictures of constant disturbance and blockage around the access point to 699 Folly. He also testified that when contractors were asked to move their equipment, other contractors would almost immediately move different equipment into the easement for access. Thus, we find this first argument is without merit.

Second, DOT contends the equitable defense of laches is applicable. A review of the record reflects that this argument was not raised to the trial court. Accordingly, we find this argument was not preserved for appellate review. *See Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court.").

For the forgoing reasons, we hold there was sufficient evidence in the record to support the trial court's finding of a taking, and thus, we affirm the trial court's decision.

Finally, DOT states that even if this court finds there is evidence to support a taking, the evidence does not support the finding that the taking existed for sixteen months. However, Frampton testified his tenant paid rent through October of 2008 and left prior to the lease terminating because of the taking. Frampton provided many photographs depicting the activities from construction that blocked the ingress and egress from 699 Folly to Folly Road. After a short marketing period following the reestablishment of access to 699 Folly, his next tenant occupied the property beginning in March of 2010. We find there is evidence in the record to support the trial court's determination of the duration of the taking.

Accordingly, we affirm the trial court's finding of a taking for a length of sixteen months.

Excessive Jury Verdict

DOT argues that even if the trial court properly found that a taking occurred, this court should reduce the jury's verdict because it was excessive and outside the scope of any credible evidence. We disagree.

DOT opposes the method by which Harnett calculated Frampton's damages caused by the taking of 699 Folly's easement for access. Harnett explained his methodology in detail, and DOT had the opportunity to fully cross-examine him and discredit any portion of his testimony. The jury chose to believe and use Harnett's assessment of the damages, and this court may not second-guess determination of credibility by the trier of fact. *See Hobgood v. Pennington*, 300 S.C. 309, 313, 387 S.E.2d 690, 692 (Ct. App. 1989) ("If there is any evidence to sustain the factual findings implicit in the jury's verdict, this court must affirm.").

DOT also argues the rate of interest used by Harnett was improper and maintains the trial court should have taken judicial notice that the market interest rates in the 2008-2009 time period were minimal. We disagree.

"South Carolina case law implies that interest recoverable in inverse condemnation actions is an issue to be charged to the jury for its determination as a measure of damages." *Vick v. S.C. Dep't of Transp.*, 347 S.C. 470, 481, 556 S.E.2d 693, 699 (Ct. App. 2001).; *see S.C. State Highway Dep't v. Miller*, 237 S.C. 386, 392, 117 S.E.2d 561, 564 (1960) (stating, "[a]ssuming, without deciding," that interest was recoverable, "it was the duty of the respondents to call the matter of interest on the award to the attention of the trial [j]udge and request an instruction upon such so that the jury could, by their verdict, determine what was 'just compensation'"). "Moreover, '[t]he court may even consider the market rate of interest rather than the statutory legal rate, if that will be required to compensate the plaintiff fully.'" *Id.* (quoting 11 S.C. Juris. *Damages* § 8(a)).

Despite DOT's argument on appeal, the record reflects DOT agreed to allow Frampton to argue to the jury that he could have earned eight percent on any damages to which he may be entitled. Further, DOT did not object to the charge regarding the interest rate or request that judicial notice be taken of the market interest rates from 2008 to 2009. Therefore, we hold the trial court was within its authority to allow Frampton's expert to testify as to his opinion of the interest rate.

Attorney's Fees and Costs

DOT contends the trial court erred in awarding attorney's fees and costs pursuant to section 28-11-30 of the South Carolina Code (Supp. 2012). DOT maintains section 28-2-510 of the South Carolina Code (2007) is the applicable statute. It argues that under these facts, Frampton was not the prevailing party as set forth in section 28-2-510, and, thus, he was not entitled to attorney's fees and costs. We disagree.

The pertinent portion of section 28-11-30, entitled "Reimbursement of property owners for certain expenses," provides

> To the extent that Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) makes certain requirements pertaining to the acquisition of real property by states prerequisites to federal aid to such states in programs or projects involving the acquisition of real property for public uses, state agencies and instrumentalities and political subdivisions and local government agencies and instrumentalities involved in these programs or projects may expend available public funds as provided in this section, whether or not the program or project is federally aided.
>
> . . . .
>
> (3) Where an inverse condemnation proceeding is instituted by the owner of a right, title, or interest in real property because of use of his property in a program or project, the court, rendering a judgment for the plaintiff in the proceeding and awarding compensation for the taking of property, or the attorney effecting a settlement of a proceeding, shall determine and award or allow to the plaintiff, as a part of the judgment or settlement, a sum that will, in the opinion of the court or the agency's attorney, reimburse the plaintiff for his reasonable costs, disbursements, and expenses, including reasonable

> attorney, appraisal, and engineering fees actually incurred because of the proceeding.

§ 28-11-30.

DOT maintains section 28-2-510 under the Eminent Domain Procedure Act is the appropriate statute to use in determining attorney's fees under these facts because it is the more specific statute. Section 28-2-510, entitled "Award of costs and litigation expenses; procedures; prevailing landowner defined," provides

> (A) If, in the action challenging the condemnor's right to take, the court determines that the condemnor has no right to take all or part of any landowner's property, the landowner's reasonable costs and litigation expenses incurred therein must be awarded to the landowner. If the court determines the right to take issue was not raised and litigated in good faith by the landowner, the court must award the condemnor the reasonable costs and litigation expenses incurred therein.
>
> (B)(1) A landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses by serving on the condemnor and filing with the clerk of court an application therefor within fifteen days after the entry of the judgment. . . .
>
> (2) For the purpose of this section, "prevails" means that the compensation awarded (other than by settlement) for the property, exclusive of interest, is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor.

§ 28-2-510.

We believe section 28-11-30 is the more specific statute. The statute expressly addresses a landowner's ability to receive attorney's fees and costs as a result of prevailing in an inverse condemnation case. *See Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (a specific statutory provision prevails over a more general one).

Further, we are concerned that by applying the language of section 28-2-510 to inverse condemnation cases, a landowner would be forced to essentially "bet against himself." Unlike in a typical condemnation case, where the government and the landowner simply disagree on the value of the land taken, in most inverse condemnation cases, the government denies there was a taking at all, and thus, its valuation of the land is zero. The landowner must then foresee whether the jury would award a judgment at least as close to the highest valuation of the property attested to on his behalf as it is to the likely zero valuation of the property attested to by the government.

Moreover, the landowner in an inverse condemnation case must first establish a taking occurred, a requirement that is not usually present for a landowner in a typical condemnation case. Applying the prevailing party definition of section 28-2-510 to inverse condemnation cases would place a heavier burden on landowners in inverse condemnation cases, a result that we do not think was intended by our legislature.

Based on the forgoing reasons, we find the trial court applied the correct statute in determining whether Frampton was entitled to attorney's fees. Accordingly, we affirm the trial court's decision.

CONCLUSION

For the forgoing reasons, we find DOT did not preserve its arguments regarding prejudice resulting from the failure to hold a non-jury takings phase, the defense of laches, and the interest rate testified to by Harnett. As to its remaining arguments, we affirm the trial court.

HUFF and GEATHERS, JJ., concur.