The Supreme Court of South Carolina

Re: Amended Rule 403, SCACR, Certificate

Appellate Case No. 2016-000638

ORDER

The attached certificate is hereby approved for use with Rule 403, SCACR.

s/Costa M. Pleicones C.J.
FOR THE COURT

Columbia, South Carolina
December 15, 2016

The Supreme Court of South Carolina

C E R T I F I C A T E

This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211, along with a filing fee of $50. Except for the signatures, all entries must be legibly printed or typed. COMPLETED CERTIFICATES SHALL NOT BE ACCEPTED UNTIL AFTER THE APPLICANT HAS BEEN SWORN IN AS A MEMBER OF THE SOUTH CAROLINA BAR.

JURY TRIAL
SOUTH CAROLINA CIRCUIT COURT or U.S. DISTRICT COURT FOR THE DISTRICT OF S.C.

Case Name:_____Date:_____ATTEST:_____
*Signature of Judge

Court:_____Name of Judge:_____

***The signature of the Judge is an attestation that the jury trial experience complied with the requirements of Rule 403(b)(1), SCACR, including the requirement that the trial experience include an opening statement, a closing argument and direct and cross examination of at least two witnesses.**

VIDEO TRIAL OBSERVATION

Program Name:_____ Date Observed: _____

*Attach Certificate of Completion

ADR EXPERIENCE/ADR VIDEO OBSERVATION

Case/Program Name:_____ Date: _____

ATTEST:_____
*Signature of Mediator conducting ADR Proceeding/If Video Attach Certificate of Completion

DAY IN COURT EXPERIENCE (1)

Court:_____ Date: _____

Name of Judge:_____ ATTEST:_____
*Signature of Judge

DAY IN COURT EXPERIENCE (2)

Court:_____ Date: _____

Name of Judge:_____ ATTEST:_____
*Signature of Judge

JUDICIAL OBSERVATION AND EXPERIENCE PROGRAM APPROVED BY THE CHIEF JUSTICE'S COMMISSION ON THE PROFESSION (May be substituted for One (1) Day In Court Experience)

Program Name:_____ Date: To: _____ From: _____

Name of Judge:_____ ATTEST:_____
*Signature of Judge

CERTIFICATION BY ATTORNEY

I, _____, hereby certify that I completed two-thirds of the credit hours needed for law school graduation prior to participating in and/or observing the trials or hearings listed on this form; and/or that I had completed one year of law school prior to my participation in a judicial observation and experience program approved by the Chief Justice's Commission on the Profession. I further certify that I have observed or participated in the above trials, videos, or observation program in accordance with the provisions of Rule 403, SCACR.

Signed this _____ day _____, 20_____. _____
SIGNATURE

NAME: _____

SOUTH CAROLINA BAR NO: _____

STREET OR P.O. BOX: _____

CITY, STATE, and ZIP: _____

TELEPHONE NO. (Home)(____)_____ (Work)(_____)_____

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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N O T I C E

In the Matter of Mark F. Dahle

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on January 19, 2017, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

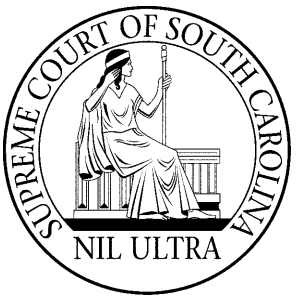
Any individual may appear before the Committee in support of, or in opposition to, the petition.

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

Columbia, South Carolina

December 19, 2016

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



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48
December 21, 2016
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.

Walter M. Bash, Petitioner.

Appellate Case No. 2015-001582

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 27692
Heard September 7, 2016 – Filed December 21, 2016

REVERSED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

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

JUSTICE FEW: Walter Bash was indicted for trafficking in cocaine and cocaine base. The circuit court found officers conducted an illegal search, and suppressed

the drugs. The State appealed. The court of appeals reversed the circuit court's suppression order and remanded for trial. We issued a writ of certiorari to review the court of appeals' decision. We now reverse the court of appeals and reinstate the circuit court's order suppressing the evidence.

I. Facts and Procedural History

The Berkeley County Sheriff's Office drug enforcement unit received an anonymous tip that "drug activity" was occurring at a home on Nelson Ferry Road near Moncks Corner. An unnamed officer in the drug enforcement unit relayed the tip to Sergeant Lee Holbrook, who was patrolling the area with Sergeant Kimberly Milks. Sergeant Holbrook testified, "We were in the Moncks Corner area . . . , and one of the agents . . . received . . . a phone call stating that there was drug activity at a particular residence, and we . . . drove over there and handled it."

He explained that as they located the house they noticed some men "behind the house in a grassy area." To get to the grassy area, Sergeant Holbrook turned his vehicle off Nelson Ferry Road onto a public dirt road called Shine Bash Lane that ran along the side of the property where the house was located. Sergeant Holbrook testified, "As we travelled down . . . Shine Bash, there were several [men] standing . . . by this little shed, and there was a pickup truck pulled in onto the grass area." The "small utility shed" was just outside a fence surrounding the home. Sergeant Milks testified "as we go down Shine Bash Lane, there's a tree that you can see through [into] the yard" where she saw a pickup truck and three men. The officers pulled off of Shine Bash Lane onto the property, approximately twenty feet from the grassy area where the men were standing.

The officers exited the car to talk to the men. Sergeant Milks testified there were two men by a grill and a third man at the back of the truck. Sergeant Holbrook testified one of the men "thr[ew] down . . . what appeared to be cocaine," and "almost instantly" afterward, a fourth man opened the passenger door of the truck and ran into the nearby woods. Sergeant Milks and several other officers chased the man while Sergeant Holbrook detained the men remaining in the grassy area. This group included Bash, who got out of the driver's side of the truck. After detaining the men, Sergeant Holbrook looked through the window of Bash's truck to see "if there [were] other individuals in that truck hiding." He saw "in plain view what appeared to be cocaine weighing scales" and "cocaine base." Sergeant Holbrook arrested Bash. A grand jury subsequently indicted him for trafficking

"four hundred grams or more" of cocaine in violation of subsection 44-53-370(e)(2)(e) of the South Carolina Code (Supp. 2016), and trafficking "ten grams or more, but less than twenty-eight grams" of cocaine base in violation of subsection 44-53-375(C)(1) of the South Carolina Code (Supp. 2016).

Prior to trial, Bash moved to suppress the drugs. He argued the police violated the Fourth Amendment of the United States Constitution by entering the curtilage of the home without a warrant to conduct a search. The circuit court granted Bash's motion. The court of appeals reversed the circuit court's decision to suppress the evidence. *State v. Bash*, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015). We granted Bash's petition for certiorari.

II. Fourth Amendment

The people's right under the Fourth Amendment to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. CONST. amend. IV, "extends . . . to . . . the curtilage of the home," *State v. Herring*, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009) (citing *United States v. Dunn,* 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987) and *Rogers v. Pendleton,* 249 F.3d 279, 287 (4th Cir. 2001)). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (citing *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 298-99 (1978)).

"On appeals from a motion to suppress based on Fourth Amendment grounds, . . . this Court reviews questions of law de novo." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). As to a circuit court's finding of fact, we must affirm "if there is any evidence to support it," and "may reverse only for clear error." *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012).

III. Curtilage

The circuit court ruled the grassy area where Bash and the other men were standing when the officers approached them was part of the curtilage of the home.[1] The

[1] The court of appeals stated "it is unclear whether the circuit court ruled on whether the grassy area at issue was part of the curtilage." 412 S.C. at 425 n.4, 772 S.E.2d at 540 n.4. We disagree that the ruling is unclear. Preliminary to its ruling,

curtilage of a home is "the land immediately surrounding and associated with the home" and is "part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984). As we have stated, curtilage can include "outbuildings, yard around dwelling, garden." *State v. Wiggins*, 330 S.C. 538, 548 n.15, 500 S.E.2d 489, 494 n.15 (1998) (discussing curtilage in the context of the duty to retreat under the law of self-defense (citing 40 Am. Jur. 2d *Homicide* § 168 (1968))); *see also* 79 C.J.S. *Searches* § 34 (2006) ("The curtilage is defined by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. It is the area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life. The primary focus is whether the area harbors those intimate activities associated with domestic life and the privacies of the home." (footnotes omitted)).

We find there is evidence in the record to support the circuit court's determination that the grassy area was within the curtilage of the home. First, both Sergeant Holbrook and Sergeant Milks described the grassy area as part of the "backyard" or "yard area." The grassy area included a grill, and Sergeant Milks testified that when she got out of the vehicle she "saw the two [men] over by the grill." The use of a grill is an activity closely associated with the use of a home.[2] The area also included a shed, and the area was located only a few feet from a fence surrounding the home. In the short distance between the fence and the grassy area, there was a

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the circuit court engaged in extensive discussion with counsel about the legal concept of curtilage and the facts in the record relating to those principles. Then, explaining its ruling, the circuit court stated the officers "suited up and went into the curtilage of this . . . house based on an anonymous tip alone."

[2] *See United States v. Burston*, 806 F.3d 1123, 1127 (8th Cir. 2015) (finding the presence of a cooking grill indicated the resident "made personal use of the area," and thus the grill was one fact supporting a determination the area was part of the curtilage); *Hardesty v. Hamburg Twp.*, 461 F.3d 646, 652 (6th Cir. 2006) (noting the fact the defendants "frequently kept a grill" on their porch as supporting the existence of the area as part of the curtilage).

clothes line.[3] Additionally, Shine Bash Lane—though a public road—is a short dirt road that reaches only a few residences. It runs very close to the home and comes to a dead end on the property where the home sits. Large trees line the side of the road between Shine Bash Lane and the home. These trees continue past the shed and partially block sight from the road to the grassy area where the men were standing. Sergeant Milks testified she had to look through a tree to see into the yard from Shine Bash Lane.[4] Finally, the circuit court had before it numerous photographs showing the house, the yard, and the extent to which the grassy area was connected to the home and concealed from public view.

The State points out the Supreme Court of the United States has identified four factors courts should consider in deciding whether an area is part of the curtilage of a home, citing *Dunn*, 480 U.S. at 301, 107 S. Ct. at 1139, 94 L. Ed. 2d at 334-35. The *Dunn* court stated:

> Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id. The State argues "the circuit court judge did not appear to have considered *any* of the factors." However, the record indicates the circuit court was aware of and did consider *Dunn*. Near the end of the hearing, the State cited *Dunn* and offered

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[3] *See United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir. 1997) (finding the defendants using the area "for such things as hanging their wet laundry on a clothesline to dry" was one fact supporting a finding the area was curtilage).

[4] *See United States v. Johnson*, 256 F.3d 895, 902 (9th Cir. 2001) ("[I]n rural pieces of property . . . , natural boundaries such as thick trees or shrubberies may also indicate an area 'to which the activity of home life extends.'" (citation omitted)).

to provide a copy of it to the court. The circuit court immediately responded, "I have it."

In *Dunn*, the Supreme Court stated "these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." 480 U.S. at 301, 107 S. Ct. at 1140, 94 L. Ed. 2d at 335; *see also United States v. Jackson*, 728 F.3d 367, 373-74 (4th Cir. 2013) (stating the Supreme Court "cautioned" for the limited use of the *Dunn* factors). While the circuit court should have made findings as to the *Dunn* factors,[5] we find the court's analysis was properly focused on the "centrally relevant consideration" the Supreme Court identified in *Dunn*.

We find the circuit court correctly applied the applicable principles of law regarding curtilage, and the evidence supports the court's factual finding that the grassy area in the backyard was sufficiently tied to the home to be within the curtilage. Therefore, we affirm the circuit court's finding the area where the officers encountered Bash was within the curtilage of the home.

IV. Search

A law enforcement officer must have a warrant to enter a home for the purpose of conducting a search, *see State v. Counts*, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015) (stating "the Fourth Amendment requires the police to have a warrant in order to conduct a search"), unless an exception applies, *see State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (listing exceptions to the warrant requirement). *See generally State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014) (stating "warrantless searches and seizures inside a man's home are

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[5] After reciting the four factors, the *Dunn* Court engaged in an extensive analysis of them. 480 U.S. at 302-03, 107 S. Ct. at 1140, 94 L. Ed. 2d at 335-36. In this case, however, the State never requested the circuit court to make findings as to the *Dunn* factors, and the State did not object to the circuit court's failure to do so. Thus, we question whether any error in the lack of findings on the *Dunn* factors is preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

presumptively unreasonable absent a recognized exception to the warrant requirement"). This protection "extends . . . to . . . the curtilage of the home." *Herring*, 387 S.C. at 209, 692 S.E.2d at 494; *see also Covey v. Assessor of Ohio Cty.*, 777 F.3d 186, 192 (4th Cir. 2015) ("The Fourth Amendment protects homes and the 'land immediately surrounding and associated' with homes, known as curtilage . . . ." (quoting *Oliver*, 466 U.S. at 180, 104 S. Ct. at 1742, 80 L. Ed. 2d at 225). The circuit court determined the officers in this case entered the curtilage for the purpose of conducting a search, and thus violated the Fourth Amendment because they did not have a warrant and no exception applied.

When officers "physically occup[y] private property for the purpose of obtaining information," a search has occurred. *United States v. Jones,* 565 U.S. ___, ___, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911, 918 (2012). The majority in *Jones* explained:

> Whatever new methods of investigation may be devised, our task, *at a minimum,* is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

565 U.S. at ___ n.3, 132 S. Ct. at 950–951 n.3, 181 L. Ed. 2d at 919 n.3; *see also* 565 U.S. at ___, 132 S. Ct. at 954, 181 L. Ed. 2d at 923 (Sotomayor, J., concurring) ("I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, '[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area.'"); *United States v. DE L'Isle*, 825 F.3d 426, 431 (8th Cir. 2016) ("It is clear that a physical intrusion or trespass by a government official constitutes a search within the meaning of the Fourth Amendment."); *United States v. Perea-Rey*, 680 F.3d 1179, 1185 (9th Cir. 2012) ("Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches."). *Cf. Jackson*, 728 F.3d at 373 (affirming "the district court's conclusion that the officers' actions did not involve an unlicensed physical intrusion of a constitutionally protected area" and thus was not "an illegal search or seizure" and noting "if [the officers] breached the curtilage of Cox's apartment . . . , it would be fairly clear that their actions . . . would implicate the protections of the Fourth Amendment").

In this case, after receiving an anonymous tip indicating illegal activity was occurring at the home, the officers "drove over there and handled it." Sergeant Holbrook told Sergeant Milks, "Hey, let's go . . . we need to check out this drug tip that we got." On their way, they radioed other officers to meet them there, and they arrived at the home with other officers in cars behind them. Sergeant Milks testified that on their way, "We put on our vests, our hat . . . that we wear that says 'Sheriff' on it; a vest that says 'Sheriff' on it." Later, when applying for a warrant to search the home, Sergeant Milks signed an affidavit stating, "Members of the Berkeley County drug enforcement unit were investigating a suspicious complaint at . . . Nelson Ferry Road . . . ." When Sergeant Holbrook was asked, "What was your reason for pulling on to the grass?" he responded,

> I . . . received a tip that there was some type of active drug activity going on at that time. As I approached the house, I didn't see anybody around it, and that just caught my attention. So, I just simply drove back there, and that activity was supposed to be happening in the . . . rear of the property, so that was my reasoning . . . I just didn't feel the need to actually make contact with the actual house. I just went down Shine Bash Lane.

Based on this evidence, the circuit court found the officers conducted a search. The court stated the Fourth Amendment does not "allow you to roll up in somebody's backyard when your sole purpose for going there is to search it." The court then ruled:

> [The officers] roll[ed] up in the backyard solely to search for drugs. And there's no reasonable interpretation of the officers' testimony other than that's why they were there. They were not there to politely ask the homeowner, Hey, are you selling drugs out of your house? They were there to see if they could find any.

The State contends that the officers did not conduct a search, but entered the property simply to conduct a "knock and talk." The court of appeals accepted the State's argument. *Bash*, 412 S.C. at 428, 772 S.E.2d at 541. A knock and talk "occurs when a law enforcement officer . . . approaches a residence by a route

available to the general public, knocks on the front door of the residence, and speaks with an occupant of the residence who responds to the knocking." 68 Am. Jur. 2d *Searches and Seizures* § 21 (2010).[6] A knock and talk is not a search under the Fourth Amendment. *State v. Counts*, 413 S.C. 153, 164-65, 776 S.E.2d 59, 66 (2015) (discussing the knock-and-talk procedure in detail); *see also United States v. Walker*, 799 F.3d 1361, 1364 n.1 (11th Cir. 2015) (stating "a warrantless . . . knock and talk . . . is not considered a search"); *Rogers v. Pendleton*, 249 F.3d 279, 289–90 (4th Cir. 2001) ("[P]olice officers do not need a warrant to do what any private citizen may legitimately do—approach a home to speak to the inhabitants.").

We agree with the circuit court the officers conducted a search of the grassy area, not a knock and talk. First, Sergeant Holbrook testified, "So instead of actually approaching the house and conducting a knock and talk investigation, we just simply drove toward the backyard." Second, and more importantly, all of the circumstances surrounding the officers' entry into the grassy area objectively demonstrate their purpose was to conduct a search of the grassy area, not to speak to the homeowner. Sergeants Milks and Holbrook (1) radioed other officers to meet them at the home, (2) put on gear indicating they were with the sheriff's office, (3) arrived at the home with other officers in cars behind them, and (4) bypassed the front of the home. Further—in their testimony and in Milks' affidavit—Sergeants Milks and Holbrook gave no indication they were approaching the home in order to speak to the homeowner.

In finding the officers conducted a search—not a knock and talk—the circuit court relied in part on *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). The issue in *Jardines* was "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." ___ U.S. at ___, 133 S. Ct. at 1413, 185 L. Ed. 2d at 499; *see also* ___ U.S. at ___, 133 S. Ct. at 1414, 185 L. Ed. 2d at 500 ("We granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment."). Quoting *Jones*, the

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[6] *See also Bash*, 412 S.C. at 424-25 n.2, 772 S.E.2d at 539 n.2 ("A knock and talk ... is a procedure used by police officers to investigate a complaint where there is no probable cause for a search warrant. The police officers knock on the door, try to make contact with persons inside, and talk to them about the subject of the complaints." (quoting *State v. Dorsey*, 762 S.E.2d 584, 588 n.6 (W. Va. 2014))).

Supreme Court set forth what it called the "simple baseline" of Fourth Amendment protections: "When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" ___ U.S. at ___, 133 S. Ct. at 1414, 185 L. Ed. 2d at 500. After finding "the officers' investigation took place in a constitutionally protected area"—the curtilage—the Supreme Court "turn[ed] to the question of whether [the investigation] was accomplished through an unlicensed physical intrusion." ___ U.S. at ___, 133 S. Ct. at 1415, 185 L. Ed. 2d at 501-02.

In answering that question, the Supreme Court discussed the implied license any person holds to approach the front door of a home, and knock, and talk.

> "A license may be implied from the habits of the country," . . . . We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

___ U.S. at ___, 133 S. Ct. at 1415-16, 185 L. Ed. 2d at 502 (footnote omitted) (first quoting *McKee v. Gratz,* 260 U.S. 127, 136, 43 S. Ct. 16, 17, 67 L. Ed. 167, 170 (1922); then quoting *Breard v. Alexandria,* 341 U.S. 622, 626, 71 S. Ct. 920, 924, 95 L. Ed. 1233, 1239 (1951); and then quoting *Kentucky v. King,* 563 U.S. 452, 469, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865, 881 (2011)).

The Supreme Court then referred back to "the question before the court"—"whether the officers' conduct was [a] . . . search"—and stated:

> As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

___ U.S. at ___, 133 S. Ct. at 1416-17, 185 L. Ed. 2d at 503.

Relying on this reasoning from *Jardines*, the circuit court in this case found the officers' behavior revealed a purpose to conduct a search. The court specifically found, "They were not there to [talk to] the homeowner." Going to the front door of a home for the purpose of speaking to the homeowner is not an "intrusion" because of the implied license to do what any private citizen might do. *See Rogers*, 249 F.3d at 289–90 (stating "police officers do not need a warrant to do what any private citizen may legitimately do—approach a home to speak to the inhabitants"); *Wright*, 391 S.C. at 444, 706 S.E.2d at 328 (stating, "A policeman may lawfully go to a person's home" and "go up to the door"). Rather, the circuit court found the officers were there "to see if they could find any [drugs]," a mission no homeowner licenses a police officer to enter their private property to undertake. *See Jardines*, ___ U.S. at ___, 133 S. Ct. at 1416, 185 L. Ed. 2d at 502-03. Thus, the circuit court found the officers in this case had no license to enter the grassy area, and therefore when they did so they physically intruded onto private property to conduct a search—not a knock and talk. Because no exception to the warrant requirement applied and there was no warrant, the officers violated the Fourth Amendment.

As *Jardines* makes clear, the circuit court was correct to focus on the purpose of the officers' actions. As we have explained, the officers' behavior in this case demonstrates objectively the purpose of searching for drugs. We also note the officers' subjective intent is consistent with their objective purpose. Sergeant Holbrook testified that "instead of actually approaching the house and conducting a knock and talk investigation, we just simply drove toward the backyard." Sergeant Milks said the same thing in her affidavit, they "were investigating a suspicious complaint," not looking for the homeowner.

The court of appeals found the circuit court erred by relying on the officers' intent. *See Bash*, 412 S.C. at 430-31,772 S.E.2d at 542-43 ("We conclude the circuit

court's injection of the officers' subjective intent into its analysis was an error of law."). We find the circuit court did not err. While even this court has made statements to the effect that the subjective intent of the officer is irrelevant,[7] that principle of law does not apply to the question of *whether* officers conducted a search. The Supreme Court explained in *Jardines*:

> The State points to our decisions holding that the subjective intent of the officer is irrelevant. But those cases merely hold that a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason.

___ U.S. at ___, 133 S. Ct. at 1416, 185 L. Ed. 2d at 503.

Thus, when an officer's *actions* are objectively reasonable under the Fourth Amendment, the officer's subjective *intent* to the contrary will not invalidate the officer's actions. Here, the officers' subjective intent to conduct a search for drugs is consistent with the circuit court's finding regarding their objective purpose.

The court of appeals also relied on *Wright* to support its conclusion the officers in this case did not conduct a search. Quoting *Wright*, the court of appeals stated, "A police officer without a warrant is privileged to enter private property to investigate a complaint or a report of an ongoing crime." *Bash*, 412 S.C. at 426–27, 772 S.E.2d at 540 (quoting *Wright*, 391 S.C. at 444, 706 S.E.2d at 328). The quoted statement from *Wright*—applicable there—is not applicable here. The key distinction between this case and *Wright* is the officers in *Wright* had probable cause to believe a crime was in progress *before* they departed their path to the front door, and immediately thereafter, they observed exigent circumstances to excuse

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[7] *See, e.g.*, *State v. Moore*, 415 S.C. 245, 252, 781 S.E.2d 897, 901 (2016) (regarding an officer's justification for extending a traffic stop); *State v. Provet*, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (regarding the existence of reasonable suspicion); *Wright*, 391 S.C. at 444, 706 S.E.2d at 328 (regarding the existence of exigent circumstances); *State v. Banda*, 371 S.C. 245, 252 n.3, 639 S.E.2d 36, 40 n.3 (2006) (regarding the existence of reasonable suspicion or probable cause); *State v. Freiburger*, 366 S.C. 125, 133, 620 S.E.2d 737, 741 (2005) (regarding the validity of a search incident to arrest).

the warrant requirement. From a public road, the officers in *Wright* "observed a large number of vehicles . . . and saw spotlights." 391 S.C. at 445, 706 S.E.2d at 328. The officers then turned down the private dirt road on their way to the front door. *Id.* We explained:

> The deputies' observations as they drove down the dirt road corroborated the anonymous tip and gave them ample reason to believe dogfighting was in progress. Exigent circumstances developed when the suspects started fleeing. Moreover, the presence of dogs created a potential danger to the deputies. Hence, the deputies had the authority to perform a protective sweep of the premises.

391 S.C. at 445, 706 S.E.2d at 328.

The officers in *Wright*, therefore, observed facts that gave rise to probable cause to believe a crime was in progress—before they "physically intrud[ed]" onto private property—and the exigent circumstances exception to the warrant requirement permitted them to proceed without a warrant. *See Herring*, 387 S.C. at 210, 692 S.E.2d at 494 ("A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement."). In this case, on the other hand, Sergeants Holbrook and Milks observed nothing incriminating—and therefore did not have probable cause for a search—until *after* they drove onto the grassy area and saw one of the men throw down what appeared to be cocaine.

The court of appeals also stated "the Fourth Circuit has adopted the position police may bypass the front door of a residence and proceed to the backyard or other entrance for a knock and talk provided they have reason to believe the person they are attempting to contact will be found there." *Bash*, 412 S.C. at 428, 772 S.E.2d at 541. For this statement, the court of appeals cited *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998). *Id.* However, *Alvarez* does not support the court of appeals' conclusion the officers in this case acted within the Fourth Amendment. The facts of *Alvarez*—quite different from the facts of this case—led the Fourth Circuit to this basic conclusion: "the officers in this case had a 'legitimate reason' for entering the Alvarezes' property 'unconnected with a search of such premises.'" 147 F.3d at 358. Those facts included (1) the officers "were

responding to a 911 call;" (2) "about an underage drinking party;" (3) where the officers found "alcohol containers and . . . awkwardly parked cars;" (4) which caused them to "believe[] they had found the party." *Id.* Also unlike this case, the officers actually approached the front door of the Alvarezes' home. 147 F.3d at 357. When they did so, they observed a sign that read "Party In Back" with "an arrow pointing toward the backyard." *Id.* Following the sign's directive, the officers "entered the backyard." *Id.* The Fourth Circuit specifically found the officers did not enter the backyard for the purpose of conducting a search, but rather, "They entered the Alvarezes' property simply to notify the homeowner or the party's host about the complaint and to ask that no one drive while intoxicated." 147 F.3d at 358.

The circuit court in this case found that Sergeants Holbrook and Milks and an unknown number of other officers entered the grassy area behind this home not simply to speak with the homeowner about the complaint, but rather for the purpose of searching for drugs. In making these findings, the circuit court correctly applied the applicable principles of law. As to the circuit court's factual findings, there is ample evidence in the record to support them. Therefore, the court of appeals erred in reversing the circuit court's finding that a search occurred.

V. Conclusion

The officers entered the curtilage of this home for the purpose of conducting a search for drugs. These actions implicate the Fourth Amendment. Because the officers did not have a warrant for the search and no exception to the warrant requirement was applicable, the officers violated the Fourth Amendment's prohibition against unreasonable searches and seizures. For this reason, we **REVERSE** the court of appeals,[8] and we reinstate the circuit court's order suppressing the drugs.

PLEICONES, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice DeAndrea Benjamin, concur.

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[8] We also granted certiorari to determine whether the police violated article I, section 10 of the South Carolina Constitution by entering the backyard of the home. We need not reach this issue because we affirm the circuit court's ruling suppressing the evidence under the Fourth Amendment. *State v. Gamble*, 405 S.C. 409, 420, 747 S.E.2d 784, 789 (2013).

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Hampton County and Allendale County. Effective January 17, 2017, all filings in all common pleas cases commenced or pending in Hampton County and Allendale County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Clarendon	Lee	Greenville
Sumter	Williamsburg	Pickens
Spartanburg	Cherokee	Anderson
Oconee	Beaufort	Jasper

Hampton and Allendale—Effective January 17, 2017

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

Columbia, South Carolina
December 15, 2016

The Supreme Court of South Carolina

Re: Amendments to Rule 403, South Carolina Appellate Court Rules

Appellate Case No. 2016-000638

ORDER

Pursuant to Article V, Section 4 of the South Carolina Constitution, Rule 403, SCACR, is amended as set forth in the attachment to this Order. The amendments, which were prepared at the direction of the Chief Justice's Commission on the Profession, update the rule to eliminate some of the current required experiences and add new required experiences. In particular, the amendments add a requirement that lawyers complete an Alternative Dispute Resolution experience and two "Day in Court" experiences. To add flexibility, lawyers may complete the Alternative Dispute Resolution experience, as well as one of the required trial experiences, by viewing video experiences that have been prepared with assistance from individual lawyers and the South Carolina Bar and approved by this Court. The approved videos are available on the South Carolina Bar's website.

The amended version of Rule 403 and an amended Rule 403 Certificate are set forth in the attachment to this Order and are effective immediately. However, a lawyer who has begun completing the Rule 403 requirements under the former version of the rule may prove completion of the required Rule 403 trial experiences under the former rule by filing the prior version of the Rule 403 Certificate within one year of the date of this Order. Regardless of which Certificate a lawyer uses to establish compliance, a filing fee of $50 shall accompany the filing of the Certificate.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
December 15, 2016

RULE 403
TRIAL EXPERIENCES

(a) General Rule. Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Except for Military Spouse Attorneys licensed under Rule 430, SCACR, attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

(b) Trial Experiences Required. An attorney must complete the following four (4) trial experiences. The required trial experiences are:

(1) Observation of or actual participation in one (1) civil or criminal jury trial in the Circuit Court of South Carolina or in the United States District Court for the District of South Carolina. The trial must include an opening statement, a closing argument, and direct and cross-examination of at least two (2) witnesses. Credit for actual participation requires actual participation in an entire jury trial if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the approved attorney is present throughout the hearing or trial;

(2) Observation of one (1) video trial that has been approved by the Supreme Court;

(3) Observation of one (1) Alternative Dispute Resolution proceeding in a Court of Common Pleas, Family Court, or Federal District Court matter or observation of one (1) video of an Alternative Dispute Resolution experience that has been approved by the Supreme Court; and

(4) Two (2) "day in court" experiences, selecting from the Court of Common Pleas, the Court of General Sessions, the Family Court, or a state or federal

Administrative Law Court governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, provided the administrative hearing(s) must take place within South Carolina. The presiding judge must attest on an approved form the presence of the student or attorney from the commencement of court through adjournment of court for the day, which must include a minimum of four (4) hours in court per day/experience.

One (1) of the "day in court" experiences required under this subsection may be satisfied by participation in a judicial observation and experience program approved by the Chief Justice's Commission on the Profession.

(c) When Trial Experiences May be Completed. Rule 403(b) trial experiences may be completed any time after the completion of two-thirds (2/3) of the credit hours needed for law school graduation. However, participation in a judicial observation and experience program approved by the Chief Justice's Commission on the Profession may be completed after a law student has completed one-third (1/3) of the credit hours needed for law school graduation. The supervising judge shall sign the certificate giving credit for the trial experience upon completion of the program.

(d) Certificate to be Filed. The attorney shall file with the Supreme Court a Certificate showing that the trial experiences have been completed. This Certificate, which shall be on a form approved by the Supreme Court, shall state the names of the cases, the dates, and the tribunals involved and shall be attested to by the respective judge, master, referee, administrative officer, or mediator. In the case of a video trial experience or video Alternative Dispute Resolution experience, the attorney shall attach a Certificate of Completion, which may be printed following completion of the video on the South Carolina Bar's website. Completed Rule 403 Certificates shall not be accepted until after an applicant has been sworn in as a member of the South Carolina Bar. A filing fee of $50 shall accompany the Certificate.[1]

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[1] In accordance with the December 15, 2016, Order amending this rule, a lawyer may prove completion of the required experiences under the prior version of Rule 403 by filing the prior version of the Rule 403 Certificate on or before December 15, 2017. The prior version of Rule 403, SCACR, can be accessed at http://www.sccourts.org/courtReg/HTMLfiles/APP/403.0.original.htm, and the

(e) Attorneys Admitted in Another State. An attorney who has been admitted to practice law in another state, territory, or the District of Columbia for two (2) years may satisfy the requirements of this rule by providing proof of equivalent experience in the other jurisdiction for each category of experiences specified in (b) above. This proof of equivalent experience shall be made in the form of an affidavit and shall include at least the name of the case, the case number, and the type of trial experience used to satisfy the requirements of (b) above. To provide the definitive evidence required of attorneys under this section, a letter from a judge of a court of record in the other jurisdiction with personal knowledge of the attorney, attesting to that attorney's trial competence, may be substituted for detailed evidence of such experience. The affidavit shall be filed with the Supreme Court. A filing fee of $50 shall accompany the affidavit.

(f) Judge Advocate General Lawyers. The Judge Advocate General's Corps of any service of the Armed Forces of the United States (including the United States Coast Guard) shall be considered a jurisdiction for the purposes of (e) above. Further, for the purposes of (e) above, an attorney who has been a judge advocate for two (2) years or more, either active or reserve, may satisfy the requirements of this rule by providing proof of equivalent experience as a judge advocate, which shall include court-martial proceedings, separation actions, and other similar contested proceedings. Additionally, an attorney who has served on active duty as a judge advocate for two (2) years or more may submit a letter from a military judge or staff judge advocate with personal knowledge of the attorney attesting to the attorney's trial competence, and this letter shall have the same effect as the letter from a judge under (e) above. The military judge or staff judge advocate submitting the letter must have the rank of Colonel or above in the Army, Air Force, or Marines or Captain or above in the Navy or Coast Guard. All other requirements of (e) must be complied with.

(g) Circuit Court Law Clerks and Federal District Court Law Clerks. A person employed full time for nine (9) months as a law clerk for a South Carolina circuit court judge or as a law clerk for a United States District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by observing one (1) experience described in (b)(3) above. A part-time

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prior version of the Rule 403 Certificate can be accessed at http://www.sccourts.org/forms/PDF/SCACRIV403Original.pdf.

law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (d) above) must be submitted for the experience.

(h) Appellate Court Law Clerks and Staff Attorneys. A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina, the South Carolina Court of Appeals, or the United States Court of Appeals for the Fourth Circuit may be certified as having completed the requirements of this rule by observing one (1) experience described in (b)(3) above. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice, or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see (d) above) must be submitted for the experience.

(i) Bankruptcy Law Clerks. A person employed full time for nine (9) months as a law clerk for a United States Bankruptcy Judge in South Carolina may be certified as having completed the requirements of this rule by participating in or observing one trial experience described in (b)(1) or (b)(2) and also one experience in (b)(3) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (d) above) must be submitted for the experiences.

(j) Approval or Disapproval. The Court will notify the attorney if the trial experiences submitted in the Certificate or affidavit have been approved or disapproved.

(k) Confidentiality. The confidentiality provisions of Rule 402(m), SCACR, shall apply to all files and records of the Clerk of the Supreme Court relating to the administration of this rule. The Clerk may, however, disclose whether an attorney's trial experiences have been approved and the date of that approval.

The Supreme Court of South Carolina

RE: Rule 402 of the South Carolina Appellate Court Rules

Appellate Case No. 2016-002474

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the following amendments are made to the South Carolina Appellate Court Rules (SCACR):

(1) Rule 402(h)(2), SCACR, is amended to read:

> **(2) Special Admission Ceremonies.** The Supreme Court may authorize an applicant to be admitted at a special admissions ceremony conducted before a justice, clerk or deputy clerk of the Court. An applicant seeking admission based on a bar examination administered in South Carolina must file a petition seeking to be admitted at a special ceremony. The petition must be based on a compelling circumstance such as illness or irreconcilable conflict which prevents the applicant from appearing at one of the ceremonies established in (1) above. Further, applicants who are ineligible to participate in one of the admission ceremonies established in (1) above due to their failure to timely submit proof of completion of the MPRE or the Course of Study on South Carolina Law are not eligible to be admitted at a special admission ceremony.

(2) The sentence at the end of Rule 402(h)(3), SCACR, is amended to read:

The oath or affirmation shall be administered during the ceremony, and all persons admitted shall sign their names in a book, kept for that purpose, in the office of the Clerk of the Supreme Court.

These amendments are effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
December 21, 2016

The Supreme Court of South Carolina

Re: Amendments to Rule 410(q), South Carolina Appellate Court Rules

Appellate Case No. 2016-002240

ORDER

The South Carolina Bar has filed a petition seeking to amend Rule 410(q), SCACR, to expand the types of organizations through which inactive or retired members of the South Carolina Bar may provide pro bono legal services.

We grant the Bar's petition to amend Rule 410(q), with some modifications to clarify the eligible organizations and to incorporate a provision allowing inactive or retired members to provide legal services if working with a program receiving funding from the South Carolina Bar Foundation. The amendments to Rule 410(q), SCACR, which are effectively immediately, are set forth below:

> **(q) Pro Bono Participation by Inactive and Retired Members.** An inactive or retired member as defined in section (h) above may provide pro bono legal services if the member:
>
> > **(1)** is working on a case or project through the South Carolina Bar Pro Bono Program or is working with a program funded in whole or in part by a grant from the South Carolina Bar Foundation, Inc., using interest and dividends remitted under the procedure established in Rule 412, SCACR, or is associated with: (A) an approved legal services organization which receives, or is eligible to receive, funds from the Legal Services Corporation; (B) an American Bar Association accredited law school clinic; (C) a federal or state prosecutor's office or public defender's office; (D) a South Carolina non-profit corporation; or (E) a federal or state agency that provides human services;

(2) performs all pro bono legal services under the supervision of an attorney who is a regular member of the South Carolina Bar and is employed by, or participating as a volunteer for, the organization through which the legal services are being provided, and that regular member assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the attorney participates; and

(3) neither asks for nor receives compensation of any kind for the legal services provided to the client.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
December 21, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frank R. Mead, III, Respondent,

v.

Beaufort County Assessor, Appellant.

Appellate Case No. 2014-002355

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5460
Heard April 13, 2016 – Filed December 21, 2016

AFFIRMED AS MODIFIED

Stephen P. Hughes and James Andrew Yoho, both of Howell Gibson & Hughes, PA, of Beaufort, for Appellant.

Burnet Rhett Maybank, III and James Peter Rourke, both of Nexsen Pruet, LLC, of Columbia, for Respondent.

KONDUROS, J.: In this appeal from the administrative law court (ALC), the Beaufort County Assessor appeals the ALC's reversal of the Assessor's determination Frank Mead, III was not eligible for the homestead exemption in 2011 because for over fourteen days that year he rented out the home he owned. The Assessor contends the ALC erred in finding the primary residence classification and homestead exemption are unrelated. We affirm as modified.

FACTS/PROCEDURAL HISTORY

Mead was born in 1939 and turned sixty-five years old in 2004. Mead owns one home, which is located on Hilton Head Island, South Carolina. He purchased the home in 1976. From 2005 to 2010, he received the homestead exemption on his property. In 2011, he rented his home out for at least one hundred thirty-eight days. While his home was being rented, he traveled or stayed in an apartment for which he paid rent.

The Assessor revoked Mead's homestead exemption for the 2011 tax year because she believed his property no longer qualified for it as a result of his renting out his home for more than fourteen days. Mead appealed the determination to the Beaufort County Tax Equalization Board. Following a conference with both parties' attorneys, the Board denied Mead's relief by letter.

Mead requested a contested case hearing before the ALC. Both parties filed motions for summary judgment, agreeing the sole issue was whether the homestead exemption under section 12-37-250 of the South Carolina Code is available only to property that also qualifies for the preferential residential assessment ratio in section 12-43-220(c) of the South Carolina Code.

Following a hearing, the ALC issued an order granting Mead's motion for summary judgment, finding Mead had met the requirements for the homestead exemption. The ALC determined Mead had been a resident of South Carolina for at least one year, was over the age of sixty-five, was granted the homestead exemption in 2005, and had not done anything that would amount to a change affecting eligibility. The ALC further found the homestead exemption applies to a person's dwelling place and despite Mead's practice of renting out his house and living in a rented apartment, he does not hold out any other property as his primary residence and thus, the subject property is his dwelling place. Additionally, the ALC determined the homestead exemption and the primary residence classification are "two ships in the night" because the two classifications relate to different constitutional provisions, statutes, requirements, incentives, and types of qualifying properties. The ALC further found the fourteen-day rental rule does not apply to the homestead exemption. Accordingly, the ALC granted Mead's motion for summary judgment, finding he was entitled to the homestead exemption for 2011 and subsequent years.

The Assessor filed a motion for reconsideration. The ALC did not rule on the motion, and the Assessor considered the motion to be denied after thirty days pursuant to South Carolina Administrative Law Court Rules. This appeal followed.

STANDARD OF REVIEW

"[T]he South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 527-28 (2010) (citing Rule 68, SCALCR). The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). "[C]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012) (alteration by court) (quoting *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir. 1981)). "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)). "The question of statutory interpretation is one of law for the court to decide." *Alltel Commc'ns, Inc.*, 399 S.C. at 316, 731 S.E.2d at 870. "The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008).

I. Chapter 37

The Assessor argues the ALC erred in determining Chapter 37 is the sole determinant of homestead exemption availability and failed to acknowledge section 12-43-220(c) imposes an additional requirement for qualification of the homestead exemption. She also asserts the ALC erred in its interpretation of section 12-37-252. She contends there is not a separate 4% assessment ratio for the homestead exemption; the only 4% assessment ratio is provided by section 12-43-220(c). Additionally, the Assessor maintains the ALC erred in finding the 4% assessment under section 12-37-252 is separate from the 4% assessment under 12-43-220(c) because only one 4% assessment is authorized by the South Carolina Constitution.[1] We disagree.

> (A) Pursuant to the provisions of [s]ection 3, [a]rticle X of the [s]tate [c]onstitution and subject to the provisions of [s]ection 12-4-720, there is exempt from ad valorem taxation:
>
> . . .
>
> (9) a homestead exemption for persons sixty-five years of age and older, for persons permanently and totally disabled and for blind persons in an amount to be determined by the General Assembly of the fair market value of the homestead under conditions prescribed by the General Assembly by general law . . . .

S.C. Code Ann. § 12-37-220(A) (2014); *see also* S.C. Const. art. X, §3 ("There shall be exempt from ad valorem taxation . . . (i) a homestead exemption for persons sixty-five years of age and older, for persons permanently and totally disabled and for blind persons in the amount of ten thousand dollars of the fair market value of the homestead under conditions prescribed by the General Assembly by general law; *provided*, that the amount may be increased by the General Assembly by general law, passed by a majority vote of both houses . . . .").

[1] This section incorporates several of the Assessor's arguments that are essentially the same issue.

> The first fifty thousand dollars of the fair market value of the dwelling place of a person is exempt from county, municipal, school, and special assessment real estate property taxes when the person:
> (i) has been a resident of this [s]tate for at least one year and has reached the age of sixty-five years on or before December thirty-first;
> . . . .

S.C. Code Ann. § 12-37-250(A)(1) (2014). "'Dwelling place' means the permanent home and legal residence of the applicant." S.C. Code Ann. § 12-37-250(A)(5) (2014).

"The homestead exemption initially granted pursuant to [s]ection 12-37-250 continues to be effective for successive years in which the ownership of the homestead or the other qualifications for the exemption remain unchanged." S.C. Code Ann. § 12-37-255(A) (2014). "Notwithstanding any other provision of law, property that qualifies for the homestead exemption pursuant to [s]ection 12-37-250 is classified and taxed as residential on an assessment equal to four percent of the property's fair market value." S.C. Code Ann. § 12-37-252(A) (2014).

> When a person qualifies for a refund pursuant to [s]ections 12-60-2560 and 12-43-220(c) for prior years' eligibility for the four percent owner-occupied residential assessment ratio, the person also may be certified for a homestead tax exemption pursuant to [s]ection 12-37-250. This refund does not extend beyond the immediate preceding tax year. The refund is an exception to the limitations imposed by [s]ection 12-60-1750.

S.C. Code Ann. § 12-37-252(B) (2014).

The version of section 12-43-220(c) in effect for the 2011 assessment provided:

> The legal residence and not more than five acres contiguous thereto, when owned totally or in part in fee or by life estate and occupied by the owner of the

> interest, . . . are taxed on an assessment equal to four percent of the fair market value of the property. If residential real property is held in trust and the income beneficiary of the trust occupies the property as a residence, then the assessment ratio allowed by this item applies if the trustee certifies to the assessor that the property is occupied as a residence by the income beneficiary of the trust. When the legal residence is located on leased or rented property and the residence is owned and occupied by the owner of a residence on leased property, even though at the end of the lease period the lessor becomes the owner of the residence, the assessment for the residence is at the same ratio as provided in this item. If the lessee of property upon which he has located his legal residence is liable for taxes on the leased property, then the property upon which he is liable for taxes, not to exceed five acres contiguous to his legal residence, must be assessed at the same ratio provided in this item. If this property has located on it any rented mobile homes or residences which are rented or any business for profit, this four percent value does not apply to those businesses or rental properties. For purposes of the assessment ratio allowed pursuant to this item, a residence does not qualify as a legal residence unless the residence is determined to be the domicile of the owner-applicant.

S.C. Code Ann. § 12-43-220(c)(1) (Supp. 2010).

> To qualify for the special property tax assessment ratio allowed by this item, the owner-occupant must have actually owned and occupied the residence as his legal residence and been domiciled at that address for some period during the applicable tax year. A residence which has been qualified as a legal residence for any part of the year is entitled to the four percent assessment ratio provided in this item for the entire year, for the exemption from property taxes levied for school

> operations pursuant to [s]ection 12-37-251 for the entire year, and for the homestead exemption under [s]ection 12-37-250, if otherwise eligible, for the entire year.

S.C. Code Ann. § 12-43-220(c)(2)(i) (Supp. 2015).

> Notwithstanding any other provision of law, the owner-occupant of a legal residence is not disqualified from receiving the four percent assessment ratio allowed by this *item*, if the taxpayer's residence meets the requirements of Internal Revenue Code Section 280A(g)[[2]] as defined in [s]ection 12-6-40(A) and the taxpayer otherwise is eligible to receive the four percent assessment ratio.

S.C. Code Ann. § 12-43-220(c)(7) (Supp. 2010) (emphasis added), *repealed by* 2014 S.C. Acts 259, §1.B.

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[2] Section 280A(g) of the Internal Revenue Code provides:

> Special rule for certain rental use.—Notwithstanding any other provision of this section . . . , if a dwelling unit is used during the taxable year by the taxpayer as a residence and such dwelling unit is actually rented for less than 15 days during the taxable year, then—
>
> (1) no deduction otherwise allowable under this chapter because of the rental use of such dwelling unit shall be allowed, and
>
> (2) the income derived from such use for the taxable year shall not be included in the gross income of such taxpayer under section 61.

Ford v. Beaufort Cty. Assessor, 398 S.C. 508, 514-15, 730 S.E.2d 335, 339 (Ct. App. 2012) (alteration by court) (quoting I.R.C. § 280A(g)).

Black's Law Dictionary defines the term "item" as "[i]n drafting, a subpart of text that is the next smaller unit than a subparagraph" and also as "[a] piece of a whole, not necessarily separated." Item, *Black's Law Dictionary* (10th ed. 2014).

"A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Lockwood Greene Eng'rs, Inc. v. S.C. Tax Comm'n*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987). "Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). "Where the language of [a] statute is plain and unambiguous . . . the court has no right to look for or impose another meaning." *Clarendon Cty. ex rel. Clarendon Cty. Assessor v. TYKAT, Inc.*, 394 S.C. 21, 25, 714 S.E.2d 305, 307 (2011) (alterations by court) (quoting *Wynn ex rel. Wynn v. Doe*, 255 S.C. 509, 512, 180 S.E.2d 95, 96 (1971)). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)).

"However, 'the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect.'" *Id.* (quoting *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). "We therefore should not concentrate on isolated phrases within the statute." *Id.* "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id.* "[W]e must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *Id.* (second and third alterations by court) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 650, 651, 654 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010)).

"[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (alteration by court) (quoting *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). The

Department of Revenue (the Department) is "the agency charged with administering this State's revenue laws." *CFRE, LLC*, 395 S.C. at 77, 716 S.E.2d at 882.

In 1997, the Department issued a ruling determining

> (1) because property that qualifies for the homestead exemption is classified and taxed as residential on an assessment equal to four percent of the property's fair market value – see . . . [s]ection 12-37-252(A); and (2) because a person who qualifies for a refund for prior years' eligibility for the four percent owner-occupied residential assessment ratio may also be certified for a homestead tax exemption – see . . . [s]ection 12-37-252(B), that the ownership and occupancy requirements for the homestead exemption and for the 4% legal residence assessment ratio are the same.

SCDOR Rev. Ruling 97-18. However, two years later, the Department withdrew that ruling. *See* SCDOR Inform. Letter 99-4 ("SC Revenue Ruling # 97-18 is hereby withdrawn.").

Nothing in the statutes providing the requirements for eligibility for the homestead exemption make reference to the primary residence classification. Section 12-37-252(A) specifically states, "Notwithstanding any other provision of law, property that qualifies for the homestead exemption pursuant to [s]ection 12-37-250 is classified and taxed as a residential assessment equal to four percent . . . ." The plain and ordinary language indicates despite what any other provision of law says, property is taxed at a rate of 4% if the owner meets the requirements of 12-37-250. Those requirements are the property must be "the dwelling place of a person" who "(i) has been a resident of this State for at least one year and has reached the age of sixty-five years on or before December thirty-first; (ii) has been classified as totally and permanently disabled by a state or federal agency . . . ; or (iii) is legally blind." Without dispute, Mead meets the requirements of subsection (A)(i). The Assessor's basis for her argument is the requirements from the primary residence classifications statutes also must be met for a person to be entitled to the homestead exemption. However, the clear language of the homestead exemption statutes states otherwise.

Section 12-43-220(c)(7)'s requirement the taxpayer's residence must comply with Internal Revenue Code Section 280A(g)—that the property cannot be rented for more than fourteen days—only applies to the four percent assessment ratio allowed by that *item*. This would not include the homestead exemption because that item, which by definition is smaller than a subparagraph, only deals with the primary residence assessment ratio. The homestead exemption is found in another chapter entirely.

Further, if we were to accept the Assessor's references to the 4% assessment ratio in the statutes providing for the homestead exemption would be superfluous, and we are to assume the Legislature would not enact such a statute. *CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 ("[W]e must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" (second and third alterations by court) (quoting *Sweat*, 379 S.C. at 377, 382, 665 S.E.2d at 651, 654)). Additionally, the Department—the agency charged with administering our state's tax laws—once took the same view as the Assessor but withdrew that position just a few years later. *See* SCDOR Inform. Letter 99-4. Accordingly, the ALC correctly found Chapter 37 is the sole determination of homestead exemption availability. Therefore, we affirm the ALC's decision.

II. Fourteen-Day Rule

The Assessor argues the ALC erred by failing to apply the fourteen-day rule, as clarified by this court in *Ford*. We disagree.

Ford concerned homeowners who became ineligible for a 4% tax assessment on their home after renting their home out for over fourteen days in one year.[3] 398 S.C. at 510, 730 S.E.2d at 336-37. That case contained no mention of Chapter 37 or the homestead exemption. As stated by this court in that case, "The primary focus of this appeal is section 12-43-220(c) of the South Carolina Code (Supp.

[3] In 2014, section 12-43-220(c)(2)(iv) of the South Carolina Code was amended to increase the number of days triggering the loss of the 4% assessment from more than fourteen to more than seventy-two. *See* 2014 S.C. Act 259, §1.A, B.

2011), which governs the eligibility of a legal residence to be taxed on an assessment ratio equal to four percent of the fair market value of the property." *Id.* at 511, 730 S.E.2d at 337 (footnote omitted).

The fourteen-day rule as provided by *Ford* derives from section 12-43-220(c). As stated above, the homestead exemption requirements are found in Chapter 37, not in Chapter 43. Accordingly, the language in section 12-43-220(c) does not apply to the homestead exemption. Chapter 37 does not contain any parallel language to the specific language that creates the fourteen-day rule in Chapter 43. Because all the requirements for the homestead exemption are in Chapter 37 and it does not provide any limitations on renting the primary residence, the ALC correctly found the fourteen-day rule clarified by *Ford* does not apply.

III. Proration

The Assessor maintains the ALC erred in determining section 12-43-220(c)(2) is solely a proration statute and failed to consider the statute's broader purpose. We disagree.

Section 12-43-220(c)(2)(i) provides:

> To qualify for the special property tax assessment ratio allowed by this item, the owner-occupant must have actually owned and occupied the residence as his legal residence and been domiciled at that address for some period during the applicable tax year. A residence which has been qualified as a legal residence for any part of the year is entitled to the four percent assessment ratio provided in this item for the entire year, for the exemption from property taxes levied for school operations pursuant to [s]ection 12-37-251 for the entire year, and for the homestead exemption under [s]ection 12-37-250, if otherwise eligible, for the entire year.

Prorate is defined as "[t]o divide or distribute proportionately; to assess ratably." Prorate, *Black's Law Dictionary* (10th ed. 2014). "There is no statute in this State authorizing the apportionment of ad valorem taxes levied on personal property." *Atkinson Dredging Co. v. Thomas*, 266 S.C. 361, 365, 223 S.E.2d 592, 594 (1976).

Apportionment is defined as "[t]he act of allocating or attributing moneys or expenses in a given way." Apportionment, *Black's Law Dictionary* (10th ed. 2014).

The Assessor relies on the same arguments made above to show why section 12-43-220(c)(2) is not solely a proration statute; that Chapters 37 and 43 must be read together because they are inextricably linked. As explained above, this is not the case. Therefore, the ALC's finding was not in error.

IV. Public Policy

The Assessor asserts the ALC's order violated public policy. We find this issue abandoned. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When an appellant provides no legal authority regarding a particular argument, the argument is abandoned and the court can decline to address the merits of the issue. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). The Assessor provided no case law on the issue, particularly no case law or other authority on public policy and what constitutes a violation of it. Accordingly, this issue is abandoned.

V. Construction of Ambiguities

The Assessor maintains the ALC erred in failing to construe ambiguities in the relevant statutes in her favor. We disagree.

> Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature. *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). However, "[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) (citing *Cooper River Bridge, Inc. v. S.C. Tax*

> *Comm'n*, 182 S.C. 72, 188 S.E. 508 (1936)). "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Cooper River Bridge, Inc.*, 182 S.C. at 76, 188 S.E. at 509-10; *see also SCANA Corp. v. S.C. Dep't of Revenue*, 384 S.C. 388, 394 n.3, 683 S.E.2d 468, 471 n.3 (2009) (Beatty, J., dissenting) (noting general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government).

Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (alterations by court).

> In conjunction with these rules of statutory construction, we must also be cognizant of our policy to strictly construe a tax credit against the taxpayer as it is a matter of legislative grace. *See CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 ("[I]nterlaced with these standard canons of statutory construction is our policy of strictly construing tax exemption statutes against the taxpayer."); *SCANA Corp. v. S.C. Dep't of Revenue*, 384 S.C. 388, 394, 683 S.E.2d 468, 471 (2009) (recognizing that a tax credit is analogous to a tax deduction and, thus, is strictly construed against the taxpayer (Beatty, J., dissenting)). "This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor." *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citation omitted). "It does not mean that we will search for an interpretation in [DOR]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* at 74-75, 716 S.E.2d at 881. "It is only when the literal application of the statute produces an absurd result will we consider a different meaning." *Id.* at 75, 716 S.E.2d at 881 (citation omitted).

Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 140, 750 S.E.2d 65, 69 (2013) (alterations by court).

In sum, *Alltel Communications*, 399 S.C. at 321, 731 S.E.2d at 873, provides the enforcement of tax statutes should be construed in favor of the taxpayer if the statutes are ambiguous. However, *Centex International*, 406 S.C. at 140, 750 S.E.2d at 69, clarifies statutes regarding tax *credits or exemptions* should construed against the taxpayer if the statutes are ambiguous. Because the specific issue in this case has to do with an exemption, those cases concerning exemptions would control if there were any ambiguity. However, the statutes providing the homestead exemption do not contain any ambiguity, and therefore, there is nothing to construe in any party's favor. Accordingly, the statutes at play here should be interpreted according to their plain meaning because there is no ambiguity. *See Centex Int'l, Inc.*, 406 S.C. at 140, 750 S.E.2d at 69 ("'This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor.' 'It does not mean that we will search for an interpretation in [the Department's] favor where the plain and unambiguous language leaves no room for construction.'" (quoting *CFRE*, 395 S.C. at 74-75, 716 S.E.2d at 881)).

VI. Exemptions for Other Years

The Assessor argues the ALC erred in determining Mead's eligibility for the homestead exemption and 4% ratio beyond the 2011 tax year. We agree.

"In general, this court may only consider cases where a justiciable controversy exists. 'A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.'" *Sloan v. Greenville Cty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (citation omitted) (quoting *Pee Dee Elec. Coop., Inc. v. Carolina Power Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

The ALC should not have decided Mead's status for years after 2011 because the challenge was only to the 2011 year and no evidence was presented regarding the following years. While Mead should continue to receive the homestead exemption if nothing changes, the ALC did not put any conditions on his eligibility. Mead could buy another residence in or out of state and claim that as his primary

residence, which could affect Mead's ability to qualify for the homestead exemption on this residence in the future. Although the ALC's order was issued in 2014, the contested case was filed for the 2011 tax year. The issue of the tax years following 2011 are not be ripe for review because we do not know Mead's circumstances changed in subsequent years or if the Assessor has even denied his eligibility for the homestead exemption for those years. Accordingly, we modify the ALC's order to provide Mead's eligibility to the homestead exemption in subsequent years is contingent on no change in his circumstances.

CONCLUSION

We affirm the ALC's decision that Mead is entitled to the homestead exemption for the 2011 tax year but modify the decision as to the years following 2011.

AFFIRMED AS MODIFIED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Albert C. Myers, Appellant,

v.

South Carolina Department of Health and Human Services, Respondent.

Appellate Case No. 2014-000418

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5461
Heard April 5, 2016 – Filed December 21, 2016

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Patricia Logan Harrison, of Columbia, for Appellant.

Damon C. Wlodarczyk, of Riley Pope & Laney, LLC, of Columbia; Richard G. Hepfer and Byron R. Roberts, of South Carolina Department of Health and Human Services, of Columbia; all for Respondent.

WILLIAMS, J.: In this appeal from the administrative law court (ALC), Albert Myers claims the South Carolina Department of Health and Human Services (DHHS)—and more specifically, its agent, the South Carolina Department of Disabilities and Special Needs (DDSN) (collectively, the Department)—erred in

failing to properly notify him of his reduction in Medicaid services in violation of his statutory and constitutional rights. Myers also contends the ALC erred in permitting a reduction or termination of his Medicaid services when the Department's decision did not comply with regulations promulgated in accordance with the South Carolina Administrative Procedures Act[1] (APA). Further, Myers claims the ALC erred in upholding the Department's denial of requested services by Myers' treating physician because the Department failed to provide any evidence from a qualified source that contradicted the treating physician's opinion as to which services were medically necessary for Myers' care. Last, Myers claims the ALC erred in concluding the Department did not violate the anti-retaliatory provisions of section 504 of the Rehabilitation Act of 1973,[2] the Americans with Disabilities Act (ADA) of 1990,[3] and Title VI of the Civil Rights Act of 1964[4] based upon Myers' mother's public advocacy efforts after the Department either reduced or terminated Myers' Medicaid services. We affirm in part, reverse in part, and remand.

I. FACTS/PROCEDURAL HISTORY

Myers is a thirty-eight-year-old Medicaid-eligible individual, who is mentally and developmentally disabled. He is nonverbal and suffers from athetoid quadriplegia, cerebral palsy, severe scoliosis, epilepsy, and arthrogroposis. Because Myers cannot swallow properly, he must ingest food and medications through a gastric tube. Myers filed this action after the Department either reduced or eliminated certain services that Myers received pursuant to the South Carolina Intellectual Disability/Related Disabilities (ID/RD) waiver program.

The ID/RD waiver program, created pursuant to 42 U.S.C. § 1396n(c) (2012), permits states to waive the requirement that persons with mental retardation or a related disability reside in an institutional setting to receive certain Medicaid

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[1] S.C. Code Ann. § 1-23-110 (2005 & Supp. 2016) (outlining the procedures for promulgating regulations).

[2] 29 U.S.C. § 794 (2012).

[3] 42 U.S.C. §§ 12101–12213 (2012).

[4] 42 U.S.C. §§ 2000d–2000d-7 (2012).

services. *See Doe v. Kidd*, 501 F.3d 348, 351 (4th Cir. 2007). The waiver program provides Medicaid reimbursement to participant states for providing community-based services to individuals who would otherwise require institutionalized care. *See* 42 U.S.C. § 1396n(c).

Because the waiver program is governed by federal statute, when a state elects to participate in the program, it must comply with all federal Medicaid laws and regulations. *Kidd*, 501 F.3d at 351. Among other requirements, a state's waiver program "must specify the amount, duration, and scope of each service it provides." 42 C.F.R. § 440.230(a) (2012). States are expressly authorized to place limits on services or reduce the amount, duration, or scope of a provided service, so long as such reductions are approved by the federal government prior to implementation and such reductions are not done in an arbitrary manner or upon some other impermissible basis. *Id*. § 440.230(b)–(d). Once a waiver program is approved, the waiver remains in effect for a period of three years, but it may be renewed thereafter in five-year increments. 42 U.S.C. § 1396n(c)(3).

Federal law mandates a single state agency administer a state's Medicaid plan. 42 U.S.C. § 1396a(5). In South Carolina, DHHS is the state agency responsible for administering and supervising the state's Medicaid programs, including the ID/RD waiver program. *See* S.C. Code Ann. § 44-6-30(1) (Supp. 2016); *Kidd*, 501 F.3d at 351. After DHHS submits the waiver plan to the federal government and the plan is approved, DDSN is then responsible for the daily administration of the waiver program and its services. S.C. Code Ann. § 44-20-240 (Supp. 2016).

In 2009, South Carolina submitted to the Centers for Medicare & Medicaid Services (CMS) a waiver renewal application, which eliminated certain nonmandatory services and implemented service limitations or caps on other categories of services. *See Stogsdill v. S.C. Dep't of Health & Human Servs.*, 410 S.C. 273, 275, 763 S.E.2d 638, 639 (Ct. App. 2014). CMS approved the waiver renewal application, and the renewed waiver—including the service caps—became effective January 1, 2010. *Id.*

Prior to the 2010 waiver renewal, Myers received the following: dental services; specialized medical equipment, medical supplies, and assistive technology; one hour of physical therapy per week; forty-five hours of personal care aide (PCA) II per week; six hours of community services per week; six hours of day services per week; forty-eight days of daily respite care; and 456 hours of hourly respite care per year. PCA services consist of hands-on personal care that Myers needs to

accomplish his activities of daily living such as bathing, toileting, dressing, and eating. *See id.* "Respite [c]are can be a range of services, including personal care[,] but is designed to provide services when the normal caregiver is absent or needs relief." *Id.*

After the waiver renewal, Myers' services were modified as follows: physical therapy and daily respite care were eliminated; twenty-eight hours per week of PCA II services (reduction of seventeen hours); one full day of adult day health care services in lieu of the half-day community and day services; and sixty-eight hours per month of respite care, with an exception granting Myers an additional thirty-three hours per month (total of 101 hours of respite care per month). Beginning January 12, 2011, Myers was authorized to receive six hours of PCA I services and psychological counseling. Myers was subsequently institutionalized in a long-term care facility in December 2011. At the time of his institutionalization, he was the youngest resident of the nursing home by forty years.

Myers filed this appeal in December 2009 when his services coordinator informed him that his Medicaid services would be reduced on January 1, 2010. On January 13, 2010, two weeks after Myers' services were altered, the director of DDSN notified Myers in writing that his request for reconsideration was denied. A hearing officer for DHHS issued an interlocutory order on February 25, 2010, in which the officer requested that Myers submit any allegations of error pertaining to his service modifications. Counsel for Myers responded on March 15, 2010, and DDSN replied to Myers' allegations. Based on these filings, the DHHS hearing officer issued an order of dismissal on May 6, 2010. However, the hearing officer failed to conduct an evidentiary hearing prior to issuing the order of dismissal.

In light of his failure to receive an evidentiary hearing, Myers appealed the order of dismissal to the ALC on June 18, 2010, challenging DHHS's May 6, 2010 order of dismissal (First Appeal). The ALC issued an order on November 9, 2011 (November 2011 Order), finding—among other things—that Myers' argument regarding the Department's failure to provide adequate notice was abandoned, and Myers was entitled to an evidentiary hearing regarding the reduction or elimination of his services to comply with due process. The ALC accordingly remanded Myers' case to the DHHS hearing officer for an evidentiary hearing. After the hearing officer conducted a hearing, she issued an order on February 9, 2012, upholding the reductions in Myers' services. Myers timely filed a motion to alter

or amend, which the hearing officer denied on March 19, 2012. Myers then appealed to the ALC on April 13, 2012 (Second Appeal), challenging DHHS's final decision in this matter.

Myers raised the same issues[5] to the ALC in the Second Appeal that are before this court on appeal. In its February 3, 2014 order (February 2014 Order) affirming DHHS's decision, the ALC found the following: (1) Myers failed to preserve the issue of insufficient notice because Myers only raised the notice and due process arguments in the facts section of his brief to the ALC, and in the alternative, despite the Department's failure to comply with the technical requirements of the federal statute concerning notice, Myers failed to prove he was prejudiced; (2) the newly imposed service caps were not binding because they had not been promulgated as regulations under this state's APA; (3) because the service caps were not binding, the ALC was required to consider other evidence specific to Myers' case, a review of which demonstrated substantial evidence supported the Department's decision; and (4) Myers failed to prove the Department retaliated against him in violation of the ADA and the Civil Rights Act. This appeal followed.

II. STANDARD OF REVIEW

This court's standard of review is governed by the APA. *See* S.C. Code Ann. § 1-23-380(5) (2005 & Supp. 2016). Pursuant to the APA, the court of appeals may affirm the agency's decision or remand the matter for further proceedings. *Id.* The court may also reverse or modify the decision

> if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;

[5] Myers also claimed DHHS and an employee of DDSN improperly engaged in ex parte communications concerning his case. Myers, however, does not specifically raise that issue on appeal to this court.

> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Stogsdill*, 410 S.C. at 276, 763 S.E.2d at 640 (quoting *S.C. Dep't of Mental Health v. Moore*, 295 S.C. 42, 45, 367 S.E.2d 27, 28 (1988)). "When determining whether the record contains substantial evidence to support an administrative agency's findings, [the appellate court] cannot substitute its judgment on the weight of the evidence for that of the agency." *Moore*, 295 S.C. at 45, 367 S.E.2d at 28 (quoting *S.C. Dep't of Mental Retardation v. Glenn*, 291 S.C. 279, 281–82, 353 S.E.2d 284, 286 (1987)). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached . . . to justify its action." *Fragosa v. Kade Constr., LLC*, 407 S.C. 424, 428, 755 S.E.2d 462, 465 (Ct. App. 2013) (quoting *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006)).

III. LAW/ANALYSIS

A. Notice & Due Process

Myers first claims his due process rights were violated because the Department failed to properly notify him of the reduction or termination in his Medicaid services. We disagree.

42 C.F.R. § 431.210 (2013) addresses the content of notices regarding changes in the waiver program as follows:

> A notice required under § 431.206(c)(2), (c)(3), or (c)(4) of this subpart must contain—

> (a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;
>
> (b) The reasons for the intended action;
>
> (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
>
> (d) An explanation of—
>
> > (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
> >
> > (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
>
> (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

It is uncontested that the Department's notice to Myers failed to include a citation to a specific regulation supporting the reduction in his benefits, or the changes in federal or state law requiring the reduction, in compliance with 42 C.F.R. § 431.210(c). Despite this shortcoming, the ALC ruled in both its November 2011 Order in the First Appeal and February 2014 Order in the Second Appeal that the issue of notice was unpreserved because Myers failed to adequately argue the issue before the ALC.

In its November 2011 Order, the ALC stated Myers failed to preserve the issue because the notice argument was only referenced in the facts section of his brief and was not designated separately as a ground for appeal. The ALC also held Myers failed to include any citation to legal authority on the notice issue within the discussion section of his brief.

In Myers' motion to alter or amend the ALC's November 2011 Order, Myers quoted the argument section of his brief to the ALC, wherein he stated, "States that accept Medicaid funds obligate themselves to comply with all federal Medicaid laws. *Doe v. Kidd*, [501 F.3d 348, 351 (4th Cir. 2007)]. CMS, the federal Medicaid agency, has promulgated regulations to implement the statutes at 42

C.F.R. 431.200 et seq. which [the Department] is bound to follow." Myers then argued DHHS was aware of his notice argument because it responded in its brief with a full citation to 42 C.F.R. 431.210 and a statement that "[Myers] knew exactly what was being reduced and eliminated and what to appeal." Despite these arguments, the ALC denied Myers' motion to alter or amend, holding it appropriately ruled upon the notice issue in its initial November 2011 Order.

When Myers raised the defective notice issue in the Second Appeal to the ALC, the ALC noted the ruling from November 2011. However, the ALC also ruled on the merits of Myers' notice argument, finding, to overturn the Department's decision, Myers had to establish he was substantially prejudiced by the defective notice. Upon a review of the record, the ALC concluded

> [Myers] was sufficiently aware of the proposed changes in his services as a result of the waiver renewal, he was afforded the opportunity to a fair hearing, and he was represented by an attorney throughout the appeals process before [the Department]. [Myers] has not shown how the process or his fair hearing would have been conducted differently had the notices complied with the technical requirements of 42 C.F.R. § 431.210. As such, [Myers] has simply not provided any evidence to the [c]ourt of how he was prejudiced by the lack of technical compliance with 42 C.F.R. § 431.210.

Initially, we are not convinced the ALC's ruling regarding preservation of Myers' notice claim is properly before this court. Myers contends it was the Department's responsibility to compile and present the record to the ALC, and the Department intentionally omitted Myers' brief, thus precluding the ALC from having sufficient evidence to make a proper decision in its November 2011 Order. While it appears the ALC did in fact have Myers' brief to consider in the First Appeal,[6] even if the ALC was deprived of Myers' brief, Myers failed to include his brief in the record on appeal to this court. As a result, we question whether the preservation component of his notice argument, and whether it was adequately argued to the

[6] In its November 2011 Order, the ALC responded to Myers' claim that he did not receive a fair hearing before DHHS's hearing officer by stating "[w]hile some documents were omitted from the record in this matter, all documents omitted are now a part of the record."

ALC in the First Appeal, is preserved for our review. *See Bonaparte v. Floyd*, 291 S.C. 427, 444, 354 S.E.2d 40, 50 (Ct. App. 1987) (stating the appellant bears the burden of providing a record on appeal sufficient for intelligent review); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

Assuming Myers' notice argument was adequately raised to the ALC, Myers argues he was substantially prejudiced because if the Department had provided adequate notice that the medical necessity of his services would be challenged, then he could have provided live testimony from his treating physicians and dentist about the medical necessity of home-based services. We disagree.

"Any party in an administrative agency proceeding is entitled to certain procedural opportunities of notice and a fair hearing." *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984). "Furthermore, proof of a denial of due process in an administrative proceeding requires a showing of substantial prejudice." *Id.*

We are not persuaded by Myers' claim that his inability to introduce live testimony before the hearing officer resulted in substantial prejudice. As the Department stated in its brief, Myers provided a statement and affidavit from his treating physician, which was introduced into evidence and considered by the Department hearing officer on remand from the ALC. The hearing officer also considered testimony regarding Myers' needs and his condition from Myers' speech pathologist, his psychological counselor, his personal care aide, and his mother. In addition, the Department submitted its prehearing brief to Myers prior to the DHHS hearing setting forth its arguments and justifications for the modification to his services. Accordingly, we find Myers failed to prove he was substantially prejudiced by the Department's failure to comply with the technical requirements of § 431.210.

In *Stogsdill*, this court addressed a similar factual and legal scenario.[7] *See* 410 S.C. 273, 763 S.E.2d 638. Similar to Myers, Stogsdill was receiving a combination of

[7] Although *Stogsdill* had not been decided prior to the parties' submission of their briefs—and thus, was not addressed by either party in this case—the supreme court eventually dismissed Stogsdill's petition for certiorari as improvidently granted. *See Stogsdill v. S.C. Dep't of Health & Human Servs.*, 415 S.C. 242, 781 S.E.2d

home-based and community-based services pursuant to the ID/RD waiver. *Id*. at 275, 763 S.E.2d at 639. Once the state's waiver program was renewed in January 2010, Stogsdill's occupational and speech therapies were discontinued and his personal care aide, companion care, and respite care services were all reduced. *Id.* at 275–76, 763 S.E.2d at 639. Stogsdill appealed the reduction in services through the administrative process, and the reduction was ultimately affirmed by the ALC. *Id.* at 276, 763 S.E.2d at 639. Stogsdill raised the same notice argument to this court that Myers raises in his appeal. *Id.* at 281, 763 S.E.2d at 642. This court concluded that, although DDSN's notice regarding Stogsdill's reduction in services failed to comply with 42 C.F.R. § 431.210, the record demonstrated Stogsdill fully exercised his opportunity for a hearing and judicial review, and thus, he could not establish he was substantially prejudiced. *Id.* at 281–82, 763 S.E.2d at 642. Therefore, like in *Stogsdill*, we find Myers failed to demonstrate he was substantially prejudiced and decline to find his due process rights were violated.[8]

B. Lawfulness of Reduction in Waiver Services

Myers next claims the reduction in his Medicaid services was unlawful because they were not promulgated as regulations pursuant to the APA. We disagree.

Under the APA, "'[r]egulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4) (2005).

> [W]hether an agency's action or statement amounts to a rule—which must be formally enacted as a regulation—or a general policy statement—which does not have to be enacted as a regulation—depends on whether the action or statement establishes a "binding norm." When the

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719 (2016). Likewise, the United States Supreme Court denied certiorari on October 3, 2016. *See* 2016 WL 5640231.

[8] We again, as we did in *Stogsdill*, reiterate our concern regarding the Department's non-compliance with the mandatory statutory notice requirement set forth in 42 C.F.R. § 431.210. Despite our finding that Myers suffered no prejudice, we do not condone the Department's shortcoming in this respect as this regulation is intended to ensure affected recipients have the fullest and fairest opportunity to exercise their rights.

> action or statement "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it is a binding norm which should be enacted as a regulation. But if the agency remains free to follow or not follow the policy in an individual case, the agency has not established a binding norm.

Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 475–76, 636 S.E.2d 598, 610 (2006) (quoting *Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369, 1377 (11th Cir. 1983)), *overruled on other grounds by Joseph v. S.C. Dep't of Labor, Licensing, & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016).

We again turn to *Stogsdill*, wherein this court addressed the same issue of whether the 2010 Medicaid service caps under the ID/RD waiver program were lawful when the changes to the waiver program were not passed as regulations pursuant to the state's APA. 410 S.C. at 277, 763 S.E.2d at 640. The court agreed with Stogsdill's position that DDSN had established a binding norm by reducing the types and amount of services offered under the waiver program. *Id.* at 278, 763 S.E.2d at 640. We also acknowledged the record contained no explanation for the reduction in Stogsdill's services—only that the cap was instituted as a result of the 2010 waiver. *Id.*

However, we went on to hold that, "based on the relevant statutory scheme and federal/state nature of Medicaid and the [w]aiver, DDSN was not required to pass a regulation to enact the cap as an enforceable provision." *Id.* Specifically, this court concluded that 42 U.S.C. § 1396n(c) permits states to waive federal Medicaid requirements to provide enhanced community support services to Medicaid recipients who would otherwise require institutionalization. *Id.* at 280, 763 S.E.2d at 642. Because CMS approved South Carolina's waiver plan, the terms of the waiver program carried the force and effect of federal law and were not required to be promulgated as regulations under the state's APA. *Id.*

The *Stogsdill* court also highlighted our supreme court's holding in *Doe v. South Carolina Department of Health & Human Services*, 398 S.C. 62, 727 S.E.2d 605 (2011), as support for the conclusion that the state may change its waiver program so long as those changes are included and approved in the waiver application to the federal government. 410 S.C. at 279, 763 S.E.2d at 641. The precise issue in *Doe*—whether the state could impose a definition of mental retardation that was

more restrictive than the federal definition for purposes of determining eligibility for waiver services—is not before this court. However, we find the holding of *Doe*—that federally approved waiver provisions carry the force and effect of law—answers the question Myers raises here. As a result, it is unnecessary for such provisions to be promulgated as state regulations to be enforceable. *See Doe*, 398 S.C. at 74, 727 S.E.2d at 611 (explaining "it is clear that South Carolina *could have* listed additional criteria in the waiver application for the purpose of defining the population to whom it would provide waiver services" and finding that because DDSN took no steps to formally impose more restrictive eligibility requirements, either through the federal waiver application process or through the state process for promulgating regulations, DDSN could not subsequently alter waiver eligibility requirements merely by issuing an informal policy decision); *see also Dallas v. Lavine*, 358 N.Y.S.2d 297, 302 (N.Y. Sup. Ct. 1974) (explaining that states have the authority to restrict the scope of Medicaid benefits they will finance and a state's lawful decision to reduce Medicaid benefits does not constitute the adoption of a policy that requires publication or promulgation).

Based upon this court's holding in *Stogsdill*, we disagree with the ALC's finding in its February 2014 Order that "CMS's approval of the State's Medicaid Plan . . . does not make it a binding document. . . . Although CMS approved South Carolina's proposed waiver reductions, the new service caps do not have the force and effect of law." Consistent with *Stogsdill*, we find approval by state regulation was not required for the 2010 service caps to carry the force and effect of law. Consequently, we modify the ALC's holding that the waiver caps were not binding because they had not been promulgated as regulations.

C. Medical Necessity of Services

Myers argues the ALC erred in disregarding the overwhelming evidence from Myers' treating physician and other qualified sources regarding the amount and types of services that were medically necessary to prevent Myers' institutionalization.[9] We agree.

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[9] Myers frames this issue as whether the ALC failed to give Myers' treating physician, Dr. Munn, the "greatest deference" as required by Justice Kennedy's concurrence in *Olmstead* as well as whether the ALC's decision ignored the overwhelming evidence regarding the medical necessity of Myers' services. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 610 (1999) ("It is of central

In *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599–602 (1999), the United States Supreme Court held that requiring the plaintiffs—women suffering from intellectual disability and mental illnesses—to be institutionalized and segregated from the general population was discriminatory and violated the anti-discrimination provision contained in the public services portion (Title II) of the ADA. To that end, the Supreme Court held that care and treatment for qualified, disabled individuals was to be provided in the most integrated, least restrictive environment possible. *Id.* at 602. In the post-*Olmstead* case of *Pashby v. Delia*, 709 F.3d 307, 321–23 (4th Cir. 2013), the United States Court of Appeals for the Fourth Circuit addressed whether Medicaid-eligible individuals were entitled to a preliminary injunction that would prevent the termination of in-home services based on claims that, without the injunction, these individuals were at risk of institutionalization in violation of the ADA's integration mandate. The Fourth Circuit concluded the plaintiffs presented testimony in the record from qualified

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importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers."). Although Myers does not specifically raise an ADA argument in this section of his brief, we find the crux of his argument is that substantial, reliable evidence in the record proves Myers' reduction in services poses a substantial risk of institutionalization in violation of the ADA. Accordingly, we address the argument as such.

We believe this approach is proper considering this court's resolution of the same issue in *Stogsdill*. 410 S.C. at 284–85, 763 S.E.2d at 644 (disagreeing with plaintiff's argument regarding lawfulness of waiver caps and lack of due process but finding DHHS presented no probative evidence contrary to the testimony of plaintiff, his treating physician, his psychologist, and his mother, and as a result, the ALC's conclusion that the plaintiff's risk of institutionalization was speculative was unsupported by substantial evidence in the record). Further, because we believe the probative, reliable evidence supports the conclusion that a reduction in services would pose a risk of institutionalization for Myers, we decline—as this court did in *Stogsdill*—to address the "greatest deference" argument advanced by Myers. *See id.* at 285 n.5, 763 S.E.2d at 644 n.5 (declining to address plaintiff's "greatest deference" argument based on this court's determination that the record contained substantial evidence to support the plaintiff's risk of institutionalization argument).

sources that these individuals were at a significant risk of institutionalization with the termination of in-home services. *Id.* at 322.

We believe that, consistent with *Olmstead* and *Pashby*, Myers has presented an overwhelming amount of evidence that a reduction or termination of his services would place him at risk of institutionalization. Myers' treating physician, Dr. Susan Munn, stated that Myers requires continuous and constant supervision due to his "extremely medically complex condition," and because "[h]is mother is well trained in his medical needs and is able to supervise and monitor the care provided by others in [Myers'] home[,] [t]his is the least restrictive environment for him at the present time." Dr. Munn also concluded Myers needs physical and occupational therapy to prevent regression and contractures. Further, Dr. Munn concluded "[i]f the services and supports that were ordered had been provided, including the number of hours of nursing and personal care attendant services determined to be medically necessary, it is likely that Mr. Myers would have been able to remain in the community in a less restrictive setting."

Myers also provided the testimony of Sandra Ray, Myers' guardian ad litem and a certified speech language pathologist. Ray stated the best place for Myers' care was in his home because his mother could anticipate his physical and emotional needs and could "in essence [be] the expert for him and about him." Ray also concluded Myers needed a speech-generating device, which was available pursuant to the waiver program, physical therapy and nursing services to prevent hospitalization, and grief counseling to prevent depression.

Lennie Mullis, Myers' psychological counselor, also discussed Myers' need for psychological services and how respite care was an unacceptable substitute for the personal care services Myers received prior to the waiver renewal. Mullis also concurred with Dr. Munn's assessment of which specialized services Myers needed. Although Mullis acknowledged that Myers was eligible for physical therapy and a certain amount of nursing services under the Medicaid state plan, she believed Myers needed a speech-generating device, dental services, and psychological services to maintain his quality of life and avoid hospitalization, and these services were only available under the waiver program.

Significantly, we find the Department failed to present *any* medical evidence to dispute the treatment decisions of Dr. Munn. While we do not suggest the ALC is required to absolutely defer to the treating physician's recommendations, we find no evidence in the record that the Department considered other medical testimony

or other conflicting, yet credible, opinions regarding the necessary services for Myers' care. We are not persuaded by the service coordinator's testimony that the Department "considers" the opinions of a waiver participant's treating physician while giving "equal weight to all of the information" to obtain a "holistic picture" of the case, particularly in light of DDSN's director's statement that the reduction in services was a direct result of "devastating budget cut reductions." And while the ALC recounted each service Myers needed in its order and that "it [wa]s *likely*" Myers would be eligible for most of those services under the State Medicaid plan, we are not convinced the ALC's conclusion that "the combination of services *appear* to be in a sufficient amount to cover [Myers'] daily needs" is supported by substantial evidence in the record.

Accordingly, we reverse the ALC's conclusion that the Department presented substantial evidence that Myers' daily needs were being met under the revised provisions of the waiver and remand the case for an assessment of required hours and services without reference to the caps in the waiver.[10] *See Stogsdill*, 410 S.C. at 286, 763 S.E.2d at 644–45 (finding substantial evidence in the record did not support the ALC's determination that Stogsdill's risk of institutionalization was merely speculative and remanding to DDSN for consideration of which services would be appropriate without the restrictions of the 2010 waiver).

IV. CONCLUSION

We hold the caps in the waiver were not required to be promulgated as regulations to carry the force and effect of law, and we conclude Myers was not denied due process by the Department's inadequate notice. However, based on the substantial evidence in the record, we find the ALC erred in concluding Myers' reduction in services did not pose a substantial risk of institutionalization. Consequently, we remand Myers' case to DDSN for a consideration of the appropriate services to be provided without reference to the restrictions in the 2010 waiver. Based on the foregoing, the ALC's order is

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[10] We decline to address Myers' claim that the Department retaliated against him and his mother in violation of federal anti-retaliation law because resolution of Myers' risk of institutionalization argument is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing an appellate court need not address an issue when resolution of a prior issue is dispositive).

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of Eris Singletary Smith

In re:

Eris Gail Smith, Appellant,

v.

Judy Smith Jones, Jacquelyn Brown, James Ervin Smith, Timothy David Smith, Jamie Smith, and Mikie Smith, Defendants,

Of whom Judy Smith Jones is the Respondent.

Appellate Case No. 2013-002810

Appeal From Florence County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5462
Heard October 15, 2015 – Filed December 21, 2016

AFFIRMED

C. Mitchell Brown and William C. Wood, Jr., both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, and Gary Ivan Finklea, of Finklea Law Firm, of Florence, for Appellant.

Jon Rene Josey and Jeffrey L. Payne, both of Turner Padget Graham & Laney, PA, of Florence; and Robert E. Lee, of Robert E. Lee, LLC, of Marion, for Respondent.

KONDUROS, J.: Eris Gail Smith (Smith) appeals the circuit court's order granting summary judgment to her sister, Judy Jones (Jones), in this dispute over the will of their deceased mother, Eris Singletary Smith (the Testator). On appeal, Smith argues (1) the circuit court prematurely granted summary judgment before the parties had a full and fair opportunity to complete discovery and (2) summary judgment was improper because genuine issues of material fact existed regarding the presence of undue influence and fraudulent inducement in the execution of the Testator's purported will. We affirm.

FACTS/PROCEDURAL HISTORY

The Testator died on March 11, 2013. On March 13, 2013, Jones submitted a petition to be appointed as the Testator's personal representative (PR) and to probate the Testator's October 18, 2011 will (the Lee Will), which the Testator executed with the assistance of attorney Robert E. Lee. The Lee Will appointed Jones as the PR of the Testator's estate and Rebecca Jones Cain (Becky), the Testator's granddaughter and Jones's daughter, as the alternate PR. The Lee Will divided the residue of the Testator's estate into six equal shares—a share for each of the Testator's five surviving children and a share to be inherited and split by two of her grandsons, Jamie and Mikie Smith. Two witnesses, attorney Cyrus Sloan and receptionist Brittany Hooks, and the Testator signed the Lee Will and a self-proving affidavit on October 18, 2011.

On April 1, 2013, Smith filed with the probate court a petition challenging the Lee Will as the product of undue influence and fraudulent inducement. Smith also submitted a petition to be appointed as the PR of the Testator's estate and to probate a different will the Testator had executed with the assistance attorney Frederick A. Hoefer, II, on March 30, 2011 (the Hoefer Will). The Hoefer Will appointed Smith as the PR of the Testator's estate, appointed Hoefer as the alternate PR, and divided the Testator's home and the residue of the estate equally between the Testator's five surviving children. On May 14, 2013, the claim was removed from the probate court to the circuit court.

On May 31, 2013, Jones moved for summary judgment on Smith's petition, arguing Smith failed to produce any evidence the Testator was unduly influenced or fraudulently induced into signing the Lee will. In support of her motion, Jones submitted a memorandum, the Lee will, a sworn affidavit from Lee, and the depositions of Hooks and Sloan. In opposition, Smith submitted the Hoefer will, Smith's deposition, and the deposition of Pam Jordan, Lee's paralegal, who was also Jones's daughter and the Testator's granddaughter.

On August 7, 2013, the circuit court held a hearing on the summary judgment motion. At the hearing, Smith informed the circuit court she had scheduled several depositions for September 11, 2013, and asked the circuit court to grant a continuance and defer summary judgment until she had an opportunity to conduct them. Smith argued the depositions of several of the Testator's caregivers would demonstrate the Testator thought she was going to Lee's office to execute only a healthcare power of attorney and was taken there by Jones's daughter, Becky, "under the guise of a brunch." According to Smith, the evidence would show the Testator would not have allowed Lee to draft a will for her, because she believed Lee improperly handled the will of her deceased son, Wayne. Smith also contended the Testator did not realize she was executing a will, and the Testator told people the Hoefer Will was her will.

The circuit court rejected Smith's request for additional time to conduct depositions, orally granted Jones's summary judgment motion, and requested Jones prepare an order. The circuit court determined no genuine issue of material fact existed because no affidavits were submitted from caregivers or others demonstrating "there was some type of influence that overcame [the Testator's] will" when she executed the Lee Will.

On August 29, 2013, Smith filed a supplemental memorandum in opposition to summary judgement and an affidavit from her counsel concerning the need for a continuance. In the affidavit, Smith's counsel asserted summary judgement was premature because the parties had not had a full and fair opportunity to complete discovery. According to counsel, the parties initiated discovery as soon as the matter was filed and everyone involved had been diligent in prosecuting the case. Counsel stated the case was filed on April 1, 2013; the first round of depositions was held on May 1, 2013; the second round of depositions was held on May 17, 2013; and the third round of depositions was scheduled for September 11, 2013. Counsel explained that before the September 11, 2013 depositions, he "wanted to

have an opportunity to thoroughly review the depositions taken in May and analyze the elements of proof, applicable law[,] and other issues prior to the next round of fact witness [depositions]." Counsel listed the testimony he expected the September 11, 2013 depositions to elicit and explained he expected the scheduled depositions to support Smith's fraudulent inducement claims.

On October 8, 2013, Smith submitted to the circuit court copies of the September 11, 2013 examinations under oath (EOUs) of Mary Alice Tompkins, Sharon Graham, Rachell Pringle, Janet Altman, Hoyt Leggette Smith, and Karen Deas McCall. With the EUOs, Smith's attorney submitted a letter explaining his client requested he depose the witnesses even though the circuit court granted Jones's summary judgment motion. The letter stated the EUOs supported the arguments Smith made at the summary judgment hearing. Jones objected to the EUOs.

On October 22, 2013, the circuit court signed a written order granting summary judgment to Jones and appointing Jones as PR of the Testator's estate. The written order states Jones offered Lee's affidavit and Sloan's and Hooks's depositions in opposition to the motion. The order does not mention the submission of the EUOs and does not say whether the circuit court considered the EUOs in rendering its decision. Smith filed a motion to reconsider which was denied. This appeal followed.

STANDARD OF REVIEW

"In reviewing the grant of summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCP . . . ." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003). Rule 56(c) states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015). "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Id.* (quoting *Town of*

Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 588–89, 635 S.E.2d 649, 654 (Ct. App. 2006). If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. *Id*.

LAW/ANALYSIS

Smith argues the circuit court erred in granted Jones's motion for summary judgment because genuine issues of material fact existed regarding the propriety of the making of the Lee will. We disagree.

"Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). "For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition." *Id*. "Where the testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but does not change it, the court as a general rule considers the effect of undue influence destroyed." *Id*. at 217, 578 S.E.2d at 333-34. Furthermore, the "mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *Wilson v. Dallas*, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013).

No evidence in the record, including information contained in the EUOs, indicate the Testator was the victim of threats, force, or restricted visitation.[1] Smith indicated she was the primary caregiver for the Testator in October of 2011 as Jones was frequently busy caring for her young grandchildren. While our courts have found a parent and child may have a fiduciary relationship with one another, Jones was not with the Testator when she made the Lee Will and no allegations were made that Jones coerced the Testator or substituted her judgment for that of

[1] Smith conceded at oral argument any additional discovery information she hoped obtain was essentially contained in the EUOs, which were before the court when summary judgment was granted.

the Testator. Lee and Sloan both attest to the Testator's willingness and capacity to execute the Lee will, and both attorneys indicate they met privately with the Testator when discussing her will. Additionally, Smith admits the Testator had the opportunity to change the Lee Will had she so desired. Accordingly, we conclude Jones demonstrated the absence of a genuine issue of material fact as to Smith's undue influence claim, and Smith failed to produce contrary evidence beyond mere allegations.

"To recover on a claim for fraud in the inducement, the plaintiff must show the defendant made a false representation relating to a present or preexisting fact, the defendant intended to deceive the plaintiff, and the plaintiff had a right to rely on the false representation." *Smith v. Hastie*, 367 S.C. 410, 416, 626 S.E.2d 13, 16 (Ct. App. 2005). "Similarly, the intent to deceive is an essential element of an action for fraud." *Id*.

Lee's affidavit indicates the Testator came to his office on October 18, 2011 to discuss her will. He asked the Testator to write down what she wanted in her will and to sign and date those notes. Her handwritten notes, attached to Lee's affidavit, indicate the Testator wanted her estate to be divided into sixths with one share going to each of her surviving children and one share to be divided between her grandsons, Jamie and Mikie. She also wrote her personal representative should be Judy Jones with Pam Jordan as a secondary alternate. These changes were made to the will previously on file with Lee's office and given back to the Testator for her to review with attorney Sloan. Sloan's handwritten notes from his meeting with the Testator, also attached to Lee's affidavit, indicate they discussed her medications, her deceased husband, the identity of her six children and her two grandsons, Jamie and Mikie. The notes also generally outline the larger items in her estate. The Testator signed the will before witnesses Sloan and Hooks.

Finally, Lee's office made some revisions, at the Testator's request, to a memorandum previously on file with them regarding the distribution of her personal property. She reviewed the changes and the memorandum is initialed by her on each page and signed and dated at the end, October 18, 2011.

Sloan's deposition reflects he met with the Testator on October 18 at Lee's request to review her will. The two of them sat in a room and went through the will paragraph by paragraph. Sloan testified she appeared competent and under no duress. Additionally, Sloan testified the Testator corrected his assumption that

Jamie and Mikie were the children of her deceased son, Wayne. His notes reflect this information that Jamie and Mikie are the children of James Ervin Smith.

Smith submitted her deposition indicating the Testator had stated on numerous occasions that she would never use attorney Lee to prepare a will because she believed something about Wayne's will had been handled improperly. She also testified the Testator said she was a "nervous jerk" after having been to Lee's office and indicated she did not know what she had done or signed. Smith stated the Testator thought she was going to Lee's office to execute a healthcare power of attorney and was tricked into executing the Lee Will. Smith also stated the Testator called Lee's office to obtain a copy of the will but was never provided with one. The EOUs submitted by Smith essentially state the same or similar information.

The record demonstrates the Testator changed her will to provide for two of her grandchildren to whom she had been particularly close after their father's divorce. Smith admits this was something the Testator had considered doing in the past. Lee's affidavit and Sloan's testimony indicate the Testator knew and understood she was creating a will, not simply signing a healthcare power of attorney as Smith maintains. The Testator's handwritten notes from that day indicate creating a will was her desire and she desired to appoint Jones as her personal representative. Additionally, Sloan's notes reflect his discussion with her was about the distribution of her estate, not a healthcare power of attorney, she was competent, and she knew she was allotting one-sixth of her estate to Jamie and Mikie. Furthermore, Smith maintains the Testator disliked and distrusted Lee. Yet Smith maintains the Testator went to him for a healthcare power of attorney and not a will. If the Testator's dislike was so intense, it is illogical to believe she would go to him for either legal document.

The evidence presented by Jones regarding the propriety of the making of the Lee Will demonstrates the absence of a genuine issue of material fact as to Smith's fraudulent inducement claim. Against that backdrop, the inferences Smith asks us to draw are not reasonable and the alleged conduct or statements she relies upon do not create a *genuine* issue of material fact to support her fraudulent inducement claim.

Accordingly, we affirm the circuit court's grant of summary judgment in Jones's favor as to Smith's claims for undue influence and fraud in the inducement.[2]

AFFIRMED.

FEW, A.J., concurring in a separate opinion, and LOCKEMY, C.J., dissenting in a separate opinion.

FEW, A.J., concurring: I concur in the majority opinion. I write separately to explain my position that the circuit court acted within its discretion to refuse to continue the summary judgment hearing to allow for additional discovery. The summary judgment order should also be affirmed on this basis.

Rule 56(f) of the South Carolina Rules of Civil Procedure provides parties an easy mechanism for notifying the circuit court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion for summary judgment. Pursuant to Rule 56(f), the non-moving party or counsel may submit an affidavit stating the reasons "he cannot . . . present by affidavit facts essential to justify his opposition" to the motion. In this case, Appellant did not comply with Rule 56(f).[3] When a party seeks additional time, but fails to comply with the Rule setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request.

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[2] I decline to address Smith's argument regarding the prematurity of summary judgment based on a lack of time to complete discovery. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when decision regarding a prior issue is dispositive).

[3] Rule 56(f) contemplates an affidavit will be filed at or before the hearing. *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 856–57 (2001) ("disagree[ing] . . . with the Court of Appeals' conclusion that the trial court abused its discretion in refusing to permit Doe's attorney to file Rule 56(f), SCRCP affidavits after the hearing" and stating, "Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery"). Here, Appellant filed an affidavit explaining why further discovery was needed more than three weeks *after* the summary judgment hearing.

When the defendants in *Baughman v. American Telephone and Telegraph Company* filed motions for summary judgment, the plaintiffs sought additional time to locate "a medical expert who could testify to the necessary degree of medical certainty." 306 S.C. 101, 104, 410 S.E.2d 537, 539 (1991). After the circuit court granted a motion for partial summary judgment as to medical causation, the plaintiffs submitted a letter from "a recently-discovered expert witness . . . in which she made a preliminary assessment of the case and recommended further study." 306 S.C. at 105, 410 S.E.2d at 539. The supreme court characterized a subsequent letter from the same expert as "highlight[ing] the need for further testing and analysis of Plaintiffs' medical conditions." 306 S.C. at 113, 410 S.E.2d at 544. In finding the circuit courts' order granting "partial summary judgment on the personal injury claims was premature," 306 S.C. at 112, 410 S.E.2d at 544, the supreme court made several other observations about *Baughman* that clearly distinguish it from this case. First, the court noted "the complexity of these cases" and that "proof of causation is especially difficult in actions seeking recovery for prolonged exposure to toxic substances." 306 S.C. at 113, 410 S.E.2d at 544. Second, relying on the defendants' exclusive possession of certain information, the court stated, "Plaintiffs had not yet received satisfactory responses to their interrogatories regarding the substances emitted from the Nassau plant, information critical to their obtaining expert opinion evidence concerning causation." *Id.* Finally, the court found, "Plaintiffs have demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation." 306 S.C. at 112, 410 S.E.2d at 544.

In this case, on the other hand, the issues are simple, Appellant had within her control all of the information she needed to defend the motion, and the time requested for more discovery was not necessary to "uncover additional evidence," but rather only to document existing evidence. While there were depositions set for shortly after the hearing, it would have been a routine task for Appellant to obtain and file affidavits from the same witnesses setting forth the evidence Appellant wished to present in defense of the motion. Nevertheless, Appellant chose to proceed in the hope the circuit court would not enforce the Rules of Civil Procedure. The Rules, however, are designed to be enforced, *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("If a rule's language is plain, unambiguous, and conveys a clear meaning, . . . the stated meaning should be enforced."), and we have repeatedly stated we allow trial judges the discretion in which to do so, *see, e.g.*, *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) ("A trial court's rulings in matters related to discovery

generally will not be disturbed on appeal in the absence of a clear abuse of discretion.").

The circuit court correctly enforced a plainly-written rule, and therefore, its decision to deny additional time in which to complete discovery was within its discretion.

LOCKEMY, C.J., dissenting: I respectfully dissent and would reverse the order granting summary judgment and remand this case for trial on both issues.

"A motion for a continuance is addressed to the sound discretion of the trial [court], whose judgment will be reversed only on showing an abuse of discretion." *Crout v. S.C. Nat. Bank*, 278 S.C. 120, 123, 293 S.E.2d 422, 423 (1982).

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975)). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.*; *see also Robertson v. First Union Nat. Bank*, 350 S.C. 339, 346-47, 565 S.E.2d 309, 313 (Ct. App. 2002) ("Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case."). "The non-moving party in a motion for summary judgment must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." *Schmidt v. Courtney*, 357 S.C. 310, 322, 592 S.E.2d 326, 333 (Ct. App. 2003) (internal quotation marks omitted).

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP. "Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery. The rule does not apply in the situation . . . where no affidavits [are] filed whatsoever." *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001); *but see Baughman*, 306 S.C. at 112 n.4, 410 S.E.2d at 544 n.4 (stating although the plaintiffs "did not file an affidavit invoking [Rule 56(f)], other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where . . . the need for further discovery is otherwise made known to the trial court").

Our appellate courts have indicated a trial court should deny a request for further discovery before granting summary judgment where the request came a year or more after the case was filed, where the request came after the expiration of the discovery deadline, or where the opposing party failed to demonstrate further discovery would create a genuine issue of material fact. *See e.g.*, *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 55, 677 S.E.2d 32, 36 (Ct. App. 2009) (finding the trial court did not err in hearing the defendants' summary judgment motion because the discovery deadlines had expired and the plaintiff was afforded a full and fair opportunity to conduct discovery; and noting the plaintiff failed to demonstrate further discovery would uncover additional relevant evidence or create a genuine issue of material fact); *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 131, 591 S.E.2d 643, 646 (Ct. App. 2004) (finding the plaintiff was not entitled to further discovery before the trial court granted summary judgment to the defendant where the plaintiff failed to demonstrate further discovery would be beneficial, the case was approximately twenty-one months old when the defendant filed its summary judgment motion, and the plaintiff's ability to sustain her claims should not have hinged upon speculative deposition evidence that might be obtained).

However, the *Batson* court held the circuit court abused its discretion by granting summary judgment before the plaintiff had a full and fair opportunity to complete discovery. 345 S.C. at 322, 548 S.E.2d at 857. In *Batson*, the parent of a child who was sexually molested filed a lawsuit against the child's abuser and the abuser's mother. *Id*. at 318, 548 S.E.2d at 855. In determining the trial court abused its discretion, our supreme court noted the plaintiff was not dilatory in pursuing discovery; several depositions—including the depositions of the abuser and his mother—were scheduled for the week following the hearing; and even

though the delay was not attributable to the defendant, it was not solely attributable to the plaintiff. *Id*. at 322, 548 S.E.2d at 857.

I would find the circuit court abused its discretion by denying Smith's motion for a continuance and prematurely granting summary judgment to Jones in its first and only order in this case. Although I recognize the circuit court had discretion to grant or deny the motion for a continuance, I believe the court should have given Smith time to conduct the depositions scheduled the month after the date of the hearing. The circuit court granted summary judgment to Jones merely five months after the case was filed, three months after the case was removed from the probate court, and two months after Jones filed her summary judgment motion. Further, nothing in the record suggests that a scheduling order was in place, that the circuit court previously ordered the parties to complete discovery within a certain time period, or that the circuit court had granted discovery extensions.

In addition, Smith's counsel explained further discovery would show the existence of a genuine issue of material fact, and he submitted a Rule 56(f) affidavit explaining the need for further discovery. In the affidavit, Smith's counsel asserted summary judgment was premature because the parties had not had a full and fair opportunity to complete discovery, the parties initiated discovery as soon as the matter was filed, and everyone involved had been diligent in prosecuting the case. Counsel explained the case was filed on April 1, 2013; the first round of depositions was held on May 1, 2013; the second round of depositions was held on May 17, 2013; and the third round of depositions was scheduled for September 11, 2013. Counsel stated he wanted an opportunity to thoroughly review the May depositions and analyze the applicable law before conducting the September 11, 2013 depositions. In the affidavit, Smith's counsel stated he expected the witnesses' testimony to support Smith's claims, and he listed the testimony he expected the depositions to elicit.

Like the plaintiff in *Batson*, Smith was not dilatory in pursuing discovery. Also, as in *Batson*, the depositions of several witnesses—including the Testator's caregivers—were scheduled to be conducted soon after the summary judgment hearing. Neither of these two facts is disputed. Accordingly, I believe Smith demonstrated she did not have a full and fair opportunity for discovery and the circuit court abused its discretion by denying her motion for a continuance and prematurely granting summary judgment to Jones.