The Supreme Court of South Carolina

In the Matter of Hammond A. Beale, Jr., Deceased.

Appellate Case No. 2022-001787

ORDER

Hammond A. Beale, Jr., passed away on November 21, 2022. Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Commission Counsel has filed a Petition for Appointment of the Receiver in this matter. The petition is granted.

IT IS ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Mr. Beale's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Beale maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Beale's clients. Mr. Lumpkin may make disbursements from Mr. Beale's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Beale maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Beale, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Beale's mail and the authority to direct that Mr. Beale's mail be delivered to Mr. Lumpkin's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
December 20, 2022

The Supreme Court of South Carolina

In the Matter of Brian Charles Pitts, Deceased.

Appellate Case No. 2022-001782

ORDER

Brian Charles Pitts passed away September 5, 2022. Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Commission Counsel has filed a Petition for Appointment of the Receiver in this matter. The petition is granted.

IT IS ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Mr. Pitts' client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Pitts maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Pitts' clients. Mr. Lumpkin may make disbursements from Mr. Pitts' trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Pitts maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Pitts, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Pitts' mail and the authority to direct that Mr. Pitts' mail be delivered to Mr. Lumpkin's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS FURTHER ORDERED that Lauren Ramsey, Manager of Prime Storage Hilton Head, shall ensure that all legal files contained in any storage units held by Mr. Pitts at Prime Storage Hilton Head are turned over to Mr. Lumpkin within sixty days. There shall be no charge to the South Carolina Judicial Branch for turning over these files.[1]

s\ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
December 20, 2022

[1] This is without prejudice to any ability Prime Storage may have to recoup these costs as provided by law.

The Supreme Court of South Carolina

In the Matter of Jean Perrin Derrick, Deceased.

Appellate Case No. 2023-000055

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), a Petition for Appointment of the Receiver has been filed in this matter. The petition is granted.

IT IS ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Ms. Derrick's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. Derrick maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Ms. Derrick's clients. Mr. Lumpkin may make disbursements from Ms. Derrick's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. Derrick maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Ms. Derrick, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Ms. Derrick's mail and the authority to direct that Ms. Derrick's mail be delivered to Mr. Lumpkin's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s\ John W. Kittredge A.C.J.
FOR THE COURT

Columbia, South Carolina
January 18, 2023

The Supreme Court of South Carolina

In the Matter of James David Watson (Deceased).

Appellate Case No. 2023-000122

ORDER

James David Watson, Esquire, passed away January 13, 2023. Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Commission Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

IT IS ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Mr. Watson's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Watson maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Watson's clients. Mr. Lumpkin may make disbursements from Mr. Watson's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Watson maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Watson, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Watson's mail and the authority to direct that Mr. Watson's mail be delivered to Mr. Lumpkin's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s\ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
January 26, 2023

The Supreme Court of South Carolina

In the Matter of Kenneth Stanley Inman Jr. (Deceased).

Appellate Case No. 2023-000093

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Commission Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

IT IS ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Mr. Inman's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Inman maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Inman's clients. Mr. Lumpkin may make disbursements from Mr. Inman's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Inman maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Inman, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Inman's mail and the authority to direct that Mr. Inman's mail be delivered to Mr. Lumpkin's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s\ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
January 26, 2023

The Supreme Court of South Carolina

In re Dushyant Amish Jethwa (Deceased).

Appellate Case No. 2023-000190

ORDER

The Commission on Lawyer Conduct has filed a petition advising the Corut that Dushyant Amish Jethwa, Esquire, passed away on February 3, 2023, and requesting the appointment of a Special Receiver pursuant to Rule 31(b), RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Kevin Daniel Mulet, Esquire, is hereby appointed to assume responsibility for Mr. Jethwa's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Jethwa maintained. Mr. Mulet shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Jethwa's clients. Mr. Mulet may make disbursements from Mr. Jethwa's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Jethwa maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Jethwa, shall serve as notice to the bank or other financial institution that Kevin Daniel Mulet, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Kevin Daniel Mulet, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Jethwa's mail and the authority to direct that Mr. Jethwa's mail be delivered to Mr. Mulet's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s\ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
February 10, 2023

N O T I C E

IN THE MATTER OF ALLAN RILEY HOLMES, JR., PETITIONER

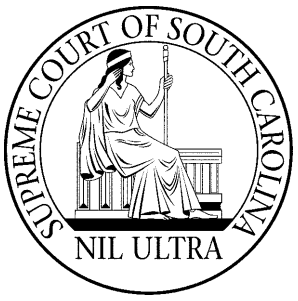
Petitioner was suspended from the practice of law for nine months. *In re Holmes*, 405 S.C. 174, 747 S.E.2d 492 (2013). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
February 15, 2023



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 15, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jerry Buck Inman, a/k/a Jerry Buck Inmon, Respondent-Petitioner,

v.

State of South Carolina, Petitioner-Respondent.

Appellate Case No. 2020-000881

Appeal From Pickens County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 28135
Submitted January 26, 2023 – Filed February 15, 2023

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Deputy Attorney General Melody Jane Brown, of Columbia, for Petitioner-Respondent.

E. Charles Grose, Jr., of Grose Law Firm LLC, of Greenwood; Diana L. Holt, of Diana Holt LLC, of Columbia, for Respondent-Petitioner.

PER CURIAM: Both parties appeal from an order of the post-conviction relief (PCR) court granting PCR to Respondent-Petitioner Jerry Buck Inman. The PCR court ruled upon only one issue raised by Inman—that section 16-3-20(B) of the

South Carolina Code (2015) is unconstitutional. The PCR court ruled it was unconstitutional. We reverse the order of the PCR court on that issue and remand for the PCR court to address Inman's remaining issues, as required by S.C. Code Ann. § 17-27-80 (2014).

Inman pled guilty to murder, first-degree burglary, first-degree criminal sexual conduct (CSC), and kidnapping. In electing to plead guilty, Inman waived his right to a jury trial and to have a jury hear his case in sentencing. *See* S.C. Code Ann. § 16-3-20(B) ("If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding *must* be conducted before the judge." (emphasis added)). The plea court sentenced Inman to death for murder and two consecutive sentences of thirty years' imprisonment for first-degree burglary and first-degree CSC.[1] This Court affirmed Inman's guilty pleas and sentences, and the United States Supreme Court denied Inman's request for a writ of certiorari. *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011), *cert. denied sub nom. Inman v. South Carolina*, 568 U.S. 863 (2012).

In his PCR application, Inman asserted a number of claims. However, the PCR court addressed *only* one: whether section 16-3-20(B) was constitutional.[2] The PCR court found section 16-3-20(B) unconstitutional pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016). In *Hurst*, the United States Supreme Court considered a Florida statute under which a jury in a capital trial rendered an advisory sentence, but the trial judge sentenced the defendant notwithstanding the recommendation of the jury, even in cases where the defendant exercised the right to a jury trial. *Id.* at 95–96. The Supreme Court held this scheme violated the Sixth Amendment. *Id.* at 99.

We recently addressed the application of *Hurst* to section 16-3-20(B) in *State v. Jenkins*, 436 S.C. 362, 872 S.E.2d 620 (2022). In *Jenkins*, we noted that we have repeatedly addressed the argument that section 16-3-20(B) is unconstitutional and

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[1] The plea court did not impose a sentence for kidnapping as Inman was sentenced for the related murder charge. *See* S.C. Code Ann. § 16-3-910 (2015) (providing a mandatory minimum sentence for kidnapping unless the defendant was sentenced for murder).

[2] Both Inman and the State filed Rule 59(e), SCRCP, motions, which the PCR court denied.

have held the statute constitutional on each occasion. *Id.* at 372, 872 S.E.2d at 625. We further held *Hurst* is distinguishable from cases involving section 16-3-20(B) because the Florida sentencing procedure at issue applied even in cases where the defendant exercised the right to a trial by jury. *Id.* at 373, 872 S.E.2d at 626. Section 16-3-20(B) applies only after a defendant has knowingly and voluntarily *waived* the Sixth Amendment right to a jury trial. Therefore, we reiterate what we have held on many prior occasions—section 16-3-20(B) is constitutional. *Id.* ("We once more affirm the constitutionality of the subsection 16-3-20(B) requirement that a capital defendant who pleads guilty to murder must be sentenced by the trial court."). The PCR court erred in finding section 16-3-20(B) unconstitutional and in granting Inman PCR as to this issue. Accordingly, we reverse the PCR court's ruling on that issue.

We further hold the PCR court erred in failing to address Inman's remaining PCR claims as required by S.C. Code Ann. § 17-27-80 (providing the PCR court must make specific findings of fact and state expressly its conclusions of law relating to each issue presented). *See Simmons v. State*, 416 S.C. 584, 592–93, 788 S.E.2d 220, 225 (2016) (holding the PCR court erred in failing to make specific findings of fact and rulings of law on each issue raised by the petitioner despite granting PCR on one issue).

III. CONCLUSION

Because we hold section 16-3-20(B) is constitutional, we grant both petitions for writs of certiorari, dispense with further briefing, reverse the PCR court's decision granting Inman PCR relief, and remand the case for an order that complies with section 17-27-80 as to Inman's remaining issues.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, and JAMES, JJ., concur. FEW, J., not participating.

The Supreme Court of South Carolina

Re: Amendment to Rule 411, South Carolina Appellate Court Rules

Appellate Case No. 2022-001776

ORDER

The South Carolina Bar has filed a petition seeking to amend Rule 411(b), SCACR, to increase the number of lawyer members of the Lawyers' Fund for Client Protection Committee from twelve to thirteen.

Pursuant to Article V, Section 4 of the South Carolina Constitution, we amend Rule 411(b), SCACR, to increase the number of lawyer members of the Committee to thirteen. This amendment is effective immediately

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 8, 2023

The Supreme Court of South Carolina

In the Matter of Ray A. Lord, Petitioner.

Appellate Case No. 2022-001817

ORDER

Respondent has submitted a motion to resign in lieu of discipline pursuant to Rule 35, RLDE, Rule 413, SCACR. Respondent faces two disciplinary complaints alleging that he violated certain Lawyer Advertising Rules and that he was convicted of a serious crime. In the affidavit attached to his motion, Respondent acknowledges that Disciplinary Counsel can prove the allegations against him and states he does not desire to contest or defend against those allegations.

We grant Respondent's motion. In accordance with the provisions of Rule 35, RLDE, Respondent's resignation shall be permanent. Respondent will never again be eligible to apply and will not be considered for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

Within fifteen days, Respondent shall surrender his Certificate of Admission to Practice Law to the Clerk of the Supreme Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 8, 2023

The Supreme Court of South Carolina

In the Matter of James Watson Smiley, IV, Petitioner.

Appellate Case No. 2022-000630

ORDER

By opinion dated April 21, 2021, Petitioner was suspended from the practice of law in South Carolina for four months. *See In re Smiley*, 433 S.C. 253, 857 S.E.2d 894 (2021) (requiring Petitioner to appear before the Committee on Character and Fitness prior to being reinstated). Following a hearing, the Committee on Character and Fitness has filed a Report and Recommendation recommending the Court reinstate Petitioner to the practice of law.

We find Petitioner has met the requirements of Rule 32, RLDE, Rule 413, SCACR, and is eligible to be reinstated as a regular member of the South Carolina Bar. Therefore, we grant the petition for reinstatement upon the following conditions:

1. Within thirty days, Petitioner must enter into with a contract with a Law Office Monitor selected by Counsel to the Commission on Lawyer Conduct. Petitioner must comply with this contract for a minimum of one year, including timely payment of the Monitor's fee.

2. Petitioner shall ensure the Monitor files with the Commission on Lawyer Conduct monthly reports which detail Petitioner's cooperation and progress.

3. Within ninety days, Petitioner must enter into a reasonable payment plan to reimburse the Lawyers' Fund for Client Protection for all sums paid on Petitioner's behalf.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 8, 2023

The Supreme Court of South Carolina

In the Matter of Scott David Robinson, Respondent

Appellate Case No. 2023-000184

ORDER

The Office of Disciplinary Counsel (ODC) asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Alternatively, ODC requests that Respondent be transferred to interim incapacity status pursuant to Rule 28(a)(2), RLDE, Rule 413, SCACR. The petition also seeks appointment of the Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court. The petition to transfer Respondent to interim incapacity status is denied without prejudice.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

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

s\ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
February 9, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amanda Leigh Huskins and Jay R. Huskins, Appellants,

v.

Mungo Homes, LLC, Respondent.

Appellate Case No. 2018-000889

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5916
Heard May 5, 2021 – Filed June 1, 2022
Withdrawn, Substituted, and Refiled February 15, 2023

AFFIRMED AS MODIFIED

Charles Harry McDonald, of Belser & Belser, PA; Beth B. Richardson, of Robinson Gray Stepp & Laffitte, LLC; Brady Ryan Thomas, of Richardson, Thomas, Haltiwanger, Moore & Lewis; and Matthew Anderson Nickles, of Rogers, Patrick, Westbrook & Brickman, LLC, all of Columbia; and Terry E. Richardson, Jr., of Richardson, Thomas, Haltiwanger, Moore & Lewis, of Barnwell, all for Appellants.

Steven Raymond Kropski and David W. Overstreet, both of Earhart Overstreet, LLC, of Charleston, for Respondent.

LOCKEMY, A.J.: Amanda Leigh Huskins and Jay R. Huskins (collectively, the Huskinses) appeal the circuit court's order granting Mungo Homes, LLC's (Mungo's) motion to dismiss and compel arbitration. The Huskinses argue the circuit court erred in (1) finding the limitations period contained in the arbitration provision was not one-sided, oppressive, and unconscionable; (2) finding the arbitration provision applied mutually to Mungo and the Huskinses; (3) failing to consider the one-sided and oppressive terms of a limited warranty provision in determining whether the arbitration agreement was unconscionable; and (4) granting the motion to dismiss the Huskinses' claims involving the limited warranty provision even though it concluded the arbitration provision did not include claims arising under the limited warranty provision. We affirm the circuit court's order as modified.

FACTS AND PROCEDURAL HISTORY

The Huskinses entered into a purchase agreement (the Purchase Agreement) with Mungo in June 2015 for the purchase of a new home in the Westcott Ridge subdivision in Irmo. The Purchase Agreement consisted of three pages. The top of the first page provided: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ."[1] The second page included a paragraph with the heading "LIMITED WARRANTY" (the Limited Warranty provision), which stated the following:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
>
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO

[1] *See* S.C. Code Ann. § 15-48-10 to -240 (2005) (establishing the South Carolina Uniform Arbitration Act (the UAA)).

> THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.
>
> The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

The next page contains a paragraph with the heading "ARBITRATION AND CLAIMS" and states,

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto,

> shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties [sic] selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

In July 2017, the Huskinses filed an action against Mungo alleging the Purchase Agreement violated South Carolina law by disclaiming certain implied warranties without providing a reduction in sales price or other benefit to the purchaser for relinquishing such rights. The Huskinses alleged causes of action for (1) breach of contract and the implied covenant of good faith and fair dealing, (2) unjust enrichment, (3) violation of the South Carolina Unfair Trade Practices Act (SCUTPA),[2] and (4) declaratory relief regarding the validity of the waiver and release of warranty rights and the validity of Mungo's purported transfer of all remaining warranty obligations to a third party. They did not allege any problems with the home.

Mungo filed a motion to dismiss and compel arbitration, arguing the Huskinses' claims were subject to arbitration pursuant to the Arbitration and Claims provision (the Arbitration Clause) contained in the Purchase Agreement. The Huskinses filed a memorandum opposing the motion, arguing the Arbitration Clause was unconscionable and unenforceable. They asserted the court should consider the Purchase Agreement's limitations on warranties as part of the agreement to arbitrate and thus find the Arbitration Clause was unconscionable. In addition, the Huskinses argued a provision contained in the Arbitration Clause that limited the

[2] S.C. Code Ann. § 39-5-10 to -730 (1976 & Supp. 2021).

time to bring a claim to thirty or ninety days was unconscionable, could not be severed, and rendered the entire Arbitration Clause unenforceable.

After hearing the motion, the circuit court issued an order granting the motion to dismiss and compelling arbitration. The circuit court found that although the Huskinses lacked a meaningful choice, the terms of the Arbitration Clause were not one-sided and oppressive, and the Arbitration Clause was therefore not unconscionable. In considering whether the terms were one-sided and oppressive, the circuit court found that (1) the Limited Warranty provision must be read in isolation from the Arbitration Clause, and (2) the terms in the Arbitration Clause pertaining to the ninety-day time limit were not one-sided and oppressive because they did not waive any rights or remedies otherwise available by law. The Huskinses filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court summarily denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding the provision limiting the time in which to bring a claim was not one-sided, oppressive, and unconscionable?

2. Did the circuit court err in failing to consider the Limited Warranty provision as part of the Arbitration Clause and thus failing to find the Arbitration Clause unconscionable?

3. Did the circuit court err by granting Mungo's motion to dismiss the Huskinses' action when it involved claims falling under the Limited Warranty provision?

STANDARD OF REVIEW

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Id.*

"Arbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably

supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citation omitted).

LAW AND ANALYSIS

I. APPEALABILITY

As an initial matter, Mungo maintains the circuit court's order is not immediately appealable. The Huskinses argue that under *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), the order was immediately appealable because it granted Mungo's Rule 12(b)(6), SCRCP, motion to dismiss. We agree.

Our supreme court has held our state procedural rules—rather than the Federal Arbitration Act (FAA)—govern appealability of arbitration orders.[3] *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding that "because South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, [wa]s applicable, the court's order compelling arbitration [wa]s not immediately appealable"). Ordinarily, an order granting a motion to compel arbitration is not immediately appealable. *See* § 15-48-200(a) (providing that "[a]n appeal may be taken from: (1) An order denying an application to compel arbitration . . . ; (2) An order granting an application to stay arbitration . . . ; (3) An order confirming or denying confirmation of an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of th[e UAA]"). However, the "[d]ismissal of an action pursuant to Rule 12(b)(6) is appealable." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

In *Widener*, this court held an order dismissing the action without prejudice and ordering arbitration was immediately appealable, reasoning that "[b]y dismissing [the] action, the [circuit] court finally determined the rights of the parties[, and]

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[3] *See* 9 U.S.C. § 16(a)(3) (providing that under the FAA, an appeal may be taken from "a final decision with respect to an arbitration"); *see also Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (holding "when a district court compels arbitration in a proceeding in which there are no other issues before the court, that order is final . . . because the court has disposed of the whole case on the merits").

therefore, [this court had] jurisdiction pursuant to section 14-3-330 of the South Carolina Code [(2017)]." 381 S.C. at 524, 674 S.E.2d at 173-74; *see also* § 14-3-330(2) (providing the appellate courts have jurisdiction in an appeal from "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, . . . or (c) strikes out . . . any pleading in any action"). The appellant in *Widener* argued the dismissal of the action prejudiced him because the statute of limitations would bar him from bringing any future action after the conclusion of the arbitration proceedings. *Id.* at 525, 674 S.E.2d at 174. This court did not decide the merits of the case but reversed and remanded the matter to the trial court to vacate the dismissal and enter an order staying the action "pending the outcome of the arbitration proceedings." *Id.* In contrast, the court in *Toler's Cove*—which did not involve a Rule 12(b)(6) dismissal—found the order compelling arbitration was not immediately appealable but addressed the merits of the appeal "because [the] issues [we]re capable of repetition and need[ed] to be addressed." 355 S.C. at 611, 586 S.E.2d at 584-85.

Here, as in *Widener*, the Huskinses appeal an order dismissing the case, which is an appealable order. *See Williams*, 347 S.C. at 233, 553 S.E.2d at 500 (stating an order dismissing an action pursuant to Rule 12(b)(6) is immediately appealable). In dismissing the Huskinses' claims, the circuit court addressed only the issue of the enforceability of the Arbitration Clause. Unlike the appellant in *Widener*, the Huskinses do not argue the dismissal prejudiced them; rather, they ask this court to address the merits of the circuit court's decision as to the enforceability of the Arbitration Clause and reverse the order compelling arbitration. We find the order granting the motion to dismiss and compelling arbitration is appealable, and we address the merits because the issue is capable of repetition. *See Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584-85 (finding an order compelling arbitration was not immediately appealable but reviewing the issues on the merits because they were "capable of repetition and need[ed] to be addressed").

II. ENFORCEABILITY OF ARBITRATION AGREEMENT

The Huskinses argue the Arbitration Clause was unenforceable because it included unconscionable terms that cannot be severed, including the Limited Warranty provision and a "limitation of claims" provision. We address each of these arguments in turn.

A. Limited Warranty Provision

The Huskinses challenge the validity of the Limited Warranty provision and assert it must be read together with the Arbitration Clause because it encompassed warranty claims and the provisions cross-referenced one another and were thus substantively intertwined. We disagree.

"Arbitration clauses are separable from the contracts in which they are imbedded." *Hous. Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003) (quoting *Jackson Mills Inc. v. BT Cap. Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994)). "[T]he issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." *Id.* (alteration in original) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision."[4] *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (quoting *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (noting the "*Prima Paint* doctrine" required that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

In *D.R. Horton*, instead of considering the arbitration agreement separately from the entire contract, our supreme court considered the warranty provisions and the arbitration provisions of the contract together and construed "the entirety of paragraph 14, entitled 'Warranties and Dispute Resolution,' as the arbitration agreement." 417 S.C. at 48, 790 S.E.2d at 4. The court stated,

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[4] Although the circuit court determined the UAA governed the parties' dispute, the application of the UAA as opposed to the FAA does not affect our analysis. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole."); *Simpson*, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1 (noting that "even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause").

> As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

Id. The Arbitration Clause in this case differs from that in *D.R. Horton*. Although *D.R. Horton* also involved a home purchase agreement, there, Paragraph 14 of the agreement was titled "Warranties *and Dispute Resolution*" and consisted of subparagraphs 14(a) through 14(j). *Id.* at 45, 790 S.E.2d at 2 (emphasis added). Two of the subparagraphs stated the parties agreed to arbitrate any disputes related to the warranties contained in the purchase agreement and any claims arising out of the construction of the home. *Id.* In most of the remaining subparagraphs of Paragraph 14, D.R. Horton expressly disclaimed all warranties except for a ten-year structural warranty, and subparagraph 14(i) stipulated D.R. Horton was not "liable for monetary damages of any kind." *Id.* Here, however, the Limited Warranty provision is a completely separate provision in the Purchase Agreement and contains no reference to arbitration or the Arbitration Clause. Further, the Arbitration Clause contains no cross references to the Limited Warranty provision. Because the two provisions were completely separate and did not cross-reference one another, this court need not construe them together to determine the scope of the warranties or how different disputes were to be handled. This case is therefore distinguishable from *D.R. Horton*, and the circuit court did not err in reviewing the Arbitration Clause in isolation from the remainder of the Purchase Agreement, including the Limited Warranty provision.

B. Limitation of Claims Provision

The Huskinses argue the Arbitration Clause was unenforceable because it required a demand for arbitration to be filed within ninety days of the date the claim, dispute, or other matter arose, or within thirty days if the claim, dispute, or other matter arose from either party's termination of the Purchase Agreement or such claims would be forever barred. They assert this "limitation of claims" provision restricted the statutory limitations period from three years to ninety days and was not severable from the Arbitration Clause. The Huskinses additionally contend that, as a practical matter, this provision applied only to purchasers and such "lack

of mutuality" further demonstrated the "one-sided and oppressive nature" of the arbitration clause. We agree this provision abbreviates the statute of limitations period and is one-sided and oppressive. Nevertheless, we find the arbitration clause is enforceable because the unconscionable provision is severable.

"Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *see also Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), ("[W]hen considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration."), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021. "[A] contract may be invalid—and courts may properly refuse to enforce it—when it is unconscionable. A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability." *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

1. Unconscionability

a. Absence of Meaningful Choice

We conclude the evidence showed the absence of a meaningful choice on the part of the Huskinses. *See id.* at 25, 644 S.E.2d at 669 ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the

inclusion of the challenged clause; and the conspicuousness of the clause." (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989))); *id.* ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue."). The Huskinses were average purchasers of residential real estate, were not represented by independent counsel, and were not a substantial business concern to Mungo such that they possessed more bargaining power than any other average homebuyer would. Therefore, evidence supports the circuit court's finding that the Huskinses lacked a meaningful choice in entering the agreement to arbitrate.

b. Oppressive and One-Sided Terms

Next, we conclude the evidence does not support the circuit court's finding that the terms contained in the limitation of claims provision were not one-sided and oppressive.

South Carolina provides for a three-year statute of limitations in an "action upon a contract, obligation, or liability, express or implied." S.C. Code Ann. § 15-3-530(1) (2005). Section 15-3-140 of the South Carolina Code (2005) provides:

> No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

The final two sentences of the Arbitration Clause effectively shorten the statutory period to ninety days and provide an even shorter period of thirty days when the "claim, dispute[,] or matter in question" arises from either party's termination of the Purchase Agreement. Even though this provision purports to apply equally to both parties, as a practical matter, it would disproportionately affect the homebuyer's ability to bring a claim. Further, it is not "geared towards achieving

an unbiased decision by a neutral decision-maker." *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. We conclude this provision violates sections 15-3-140 and 15-3-530 and is therefore unconscionable and unenforceable. *See id.* at 29-30, 644 S.E.2d at 671 ("The general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution."). We next consider whether this provision is severable or renders the entire Arbitration Clause unenforceable.

2. Severability

Although the Arbitration Clause contains no severability clause, section 36-2-302(1) allows this court to effectively sever the unconscionable provision.[5] *See* S.C. Code Ann. § 36-2-302(1) (2003) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); *see also Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result."); *see also Doe*, 430 S.C. at 615, 846 S.E.2d at 880 ("Courts have discretion though to decide whether a[n arbitration clause] is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive."); *cf. D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 (declining to consider "whether the unconscionable provisions [we]re severable" when the agreement lacked a severability clause and because "doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions").

As we stated, we find the final two sentences of the Arbitration Clause shortening the statutory limitations period were unconscionable. Nevertheless, we conclude sections 15-3-140 and 36-2-302(1) operate to sever this portion of the Arbitration Clause. *See Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9 (acknowledging

[5] Although title 36 concerns commercial goods and sales, we note our supreme court recently cited section 36-2-302 for the proposition that unconscionable provisions could be severed in a residential home agreement context. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

"many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause"). We find the present case is distinguishable from those cases prescribing severability such that the invalidation of the arbitration clause in its entirety is the more appropriate remedy. Here, as in *D.R. Horton*, the Arbitration Clause did not contain a severability clause. On the other hand, unlike *D.R. Horton*, the offending provision is distinct and constitutes the final two sentences of the Arbitration Clause. Thus, notwithstanding the lack of a severability clause, it is possible for this court to simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement. Based on the foregoing, we sever the final two sentences from the remainder of the Arbitration Clause and we affirm the circuit court's order compelling arbitration as modified.[6]

III. DISMISSAL OF WARRANTY CLAIMS

Finally, we find the Huskinses' contention that the circuit court erred in dismissing claims related to the Limited Warranty provision when it found the Limited Warranty "f[ell] outside" of the Arbitration Clause is without merit. The circuit court did not find such claims fell outside of the scope of the Arbitration Clause. Rather, in considering the enforceability of the Arbitration Clause, the circuit court concluded the Limited Warranty provision was separable and that the Arbitration Clause did not specifically limit the Huskinses' ability to bring a warranty action in a judicial setting. The circuit court additionally concluded the Arbitration Clause provided that all claims and disputes arising out of the Purchase Agreement were subject to arbitration. Thus, we conclude this argument is without merit.

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[6] During the pendency of this case's petition for rehearing, our supreme court issued *Lennar*, 437 S.C. 596, 879 S.E.2d 746. The Huskinses contend *Lennar* controls this case. We respectfully disagree. The Huskinses claim that here, as there, the agreement with the developer had multiple provisions that were one-sided and unreasonable. We are constrained to look only at the arbitration clause because, as we noted earlier, the warranty provisions are separate from the arbitration clause. Section 15-3-140 was not at issue in *Lennar*, and that statute essentially instructs us to ignore the developer's attempt to shorten the limitations period. When we do that, we believe we are left with a valid arbitration clause, not a broken and unenforceable one. There are no other one-sided and unreasonable terms in the arbitration clause, as there were in *Lennar*.

CONCLUSION

For the foregoing reasons, we find the order dismissing the Huskinses' complaint and compelling arbitration was immediately appealable. We affirm, as modified, the order dismissing the complaint and compelling arbitration.

AFFIRMED AS MODIFIED.

MCDONALD and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wendy Grungo-Smith, Respondent,

v.

Joseph Grungo, Appellant.

Appellate Case No. 2020-000934

Appeal From York County
Thomas Henry White, IV, Family Court Judge

Opinion No. 5969
Heard November 16, 2022 – Filed February 10, 2023

REVERSED

John Brandt Rucker and Allyson Sue Rucker, both of The Rucker Law Firm, LLC, of Greenville, for Appellant.

James R. Honeycutt, of Fort Mill, and James B. Richardson, Jr., of Columbia, both for Respondent.

LOCKEMY, A.J.: Wendy Grungo-Smith (Mother) appeals an order from the family court awarding primary custody of Child 1 and Child 2 (collectively, Children) to Joseph Grungo (Father) and granting an award of child support to Father. We reverse.

FACTS/PROCEDURAL HISTORY

In 2012, Mother and Father divorced. Pursuant to a court-approved agreement, the parties were to share joint custody of Children; specifically, a 5-2-2-5 schedule. The divorce decree provided, among other things, that (1) if one parent had Children for more than fifty percent of the time, the other parent would "contribute to the support and maintenance of Children"; (2) Children would be enrolled in any private school agreed to by each party; and (3) each party would abstain from using profanity or making derogatory comments about the other party and ensure others would not make such comments in Children's presence.

In March 2019, Mother filed a custody modification action, asserting Father failed to "take advantage of shared visitation." She sought sole custody of Children, standard visitation for Father, and child support. Father filed an answer and counterclaim seeking essentially the same relief in his favor and alleging numerous changes in circumstances.

At the June 2020 trial, Mother testified Children were eleven and twelve years old. Mother testified she had two jobs and worked during weekdays, every other weekend, and at night, from home, after Children went to sleep. She explained Father never exercised his full custody time, even though she and her husband, Kenneth Smith (Stepfather) did not prevent him from doing so. Mother stated she had moved five or six times since the parties' divorce and each move was to a larger home or closer to Children's school. Mother testified she moved into her current home, which was twenty minutes or twenty-two miles from Father, shortly before trial and was required to live there for fifteen years as a condition of her loan. She stated her current home was closer to Father than her previous home, and the longest Father ever had to travel to her home was thirty-five minutes, assuming there was no traffic. Mother testified Children behaved well and excelled physically, mentally, socially, and academically. Mother indicated Stepfather was a father figure to them, and neither she nor Stepfather spoke badly of Father to Children or discouraged their relationship with him. She stated that although she and Stepfather argued like normal married people, they discussed their issues outside Children's presence.

Stepfather testified Mother was Children's primary caretaker, and neither he nor Mother discouraged Children from having a relationship with Father. He stated

although no one prevented it, Father never utilized all of his allotted custody time. However, he acknowledged Father recently visited Children more often because they were out of school.

Father testified he had lived in Fort Mill for the past thirteen years and owned his own business. He admitted he occasionally missed Monday and Tuesday overnight visits but explained he usually took Children to dinner on those nights. He testified he did not exercise his full custody time because of his work schedule and traffic. Father testified he provided only $1,200 to Mother during the year prior to trial. Father acknowledged he could have taken Children to school earlier or modified his work hours and further acknowledged that neither Mother nor Stepfather prevented him from exercising his custody time. He averred Mother's moves had a negative effect on his ability to spend time with Children because of his commute to pick up Children and drop them off at school. Accordingly, he requested primary custody of Children so they could go to school in Fort Mill.

On cross-examination, Father credited Mother for Children's academic success. He admitted the divorce decree did not prevent either party from moving and it required the parties to share Children's expenses equally. Father also admitted he never tried to legally enforce the school provision.

Several additional witnesses testified about Mother, Father, and Children. Gwen Catron, Children's maternal grandmother, testified Mother was a loving mother, Stepfather was a good father-figure, and Father was a good dad. John Willfong, a former administrator from Children's school, testified he believed Children excelled academically due, in part, to Mother's involvement in their education.

The guardian ad litem (Guardian), testified she conducted five in-person visits with Children and spoke to them five or six additional times on the phone, with the last occurring on the day of trial. She testified she was welcomed at Mother's and Father's homes, and both parties were cooperative throughout her investigation. The Guardian stated Children indicated Mother and Stepfather yelled and fought a lot in front of them and belittled Father to them. The Guardian testified Children told her Mother put oil on their heads to "be blessed" before they spoke to her and so they would not say anything negative about her to the Guardian. She stated that at Mother's home, Children were "much more uptight," appeared "very nervous," whispered to her so no one would overhear them, and requested to go to their bedrooms for the visits. She also stated that during one visit, Child 1 showed her videos of Mother and Stepfather arguing. The Guardian testified that at Father's

home, Father let her speak to Children privately and Children appeared very relaxed. She stated Children loved both parents, did not want to be torn between the situation, and were credible. The court requested the Guardian provide a recommendation because "of the disparity in the testimony before [it] today" and that neither party provided "a middle ground." Upon the court's request, the Guardian stated she believed Father would be the better suited custodial parent based on the information provided by Children.

In her written report, the Guardian stated Children were happy, well-mannered children and were always willing to speak with her, regardless of whether they were at Mother's home or Father's. However, she stated they told her they felt comfortable at Father's home and liked his home better because there was "so much peace" and no "stress." She indicated Children told her that at Mother's house, they performed most of the chores and watched their sibling and other children Mother babysat. The Guardian also reported Mother gave her videos of visitation exchanges, which showed Mother telling Father not to come close to her car and Children appearing stressed. She stated she had not found any reason to believe Father was a threat to Mother.

The family court found Father showed a material change in circumstances to warrant a change of custody and such change was in Children's best interests. It stated Father admittedly did not exercise his full custody time. However, it found the parties initially lived within twenty to thirty minutes of each other but after Mother's changes in residences, Father's home was forty-five minutes to an hour away. It found Children had changed schools six times and a daily commute for Father rendered the parenting plan "extraordinarily" difficult. The court determined Mother did not consult with Father about any of her moves or obtain Father's agreement before selecting Children's schools and concluded Mother's moves and Children's schools were not conducive to the 5-2-2-5 parenting plan.

The family court found although Mother and Stepfather denied it, Children told the Guardian that Mother and Stepfather argued in front of them and called Father disparaging names, which impeached Mother's and Stepfather's credibility and lent credence to Father's allegations. It acknowledged Children told the Guardian they loved both parents; however, it found Children also told the Guardian they liked Father's home better because there was "so much peace" and no arguing or stress. The family court determined Children showed the Guardian videos of Mother and Stepfather arguing and told the Guardian they could not speak to her on the phone because they were at Mother's home. It further noted the Guardian recommended

Father be granted custody. Accordingly, the family court granted Father's request for sole custody and awarded him child support. This appeal follows.

ISSUE ON APPEAL

Did the family court err in awarding custody of Children to Father?

STANDARD OF REVIEW

"In family court appeals, this court reviews factual and legal issues de novo." *Whitesell v. Whitesell*, 431 S.C. 575, 584, 848 S.E.2d 588, 592 (Ct. App. 2020). "Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." *Id.*

LAW/ANALYSIS

Mother argues the family court erred in awarding custody of Children to Father. She asserts the evidence showed Children were thriving in her care and all parties agreed Children were exceptional. We agree.

"The paramount and controlling factor in every custody dispute is the best interests of the children." *Brown v. Brown*, 362 S.C. 85, 90, 606 S.E.2d 785, 788 (Ct. App. 2004). In modifying a custody order, the family court must consider the children's best interests and other statutory factors. S.C. Code Ann. § 63-15-240(B) (Supp. 2022).

"In order for a court to grant a change in custody, there must be a showing of changed circumstances occurring subsequent to the entry of the [custody order]." *Latimer v. Farmer*, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004). "A change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown to warrant the conclusion that the best interests of the children would be served by the change." *Id.* (quoting *Stutz v. Funderburk*, 272 S.C. 273, 278, 252 S.E.2d 32, 34 (1979)). "[T]he change of circumstance relied on for a change of custody must be such as would substantially affect the interest and the welfare of the child, not merely the parties, their wishes or convenience." *Shirley v. Shirley*, 342 S.C. 324, 330, 536 S.E.2d 427, 430 (Ct. App. 2000) (quoting *Sharpe v. Sharpe*, 256 S.C. 517, 521, 183 S.E.2d 325, 327 (1971)).

We hold the family court erred in awarding Father custody because Father did not establish a substantial change in circumstances. First, we find the record did not show a change in circumstances sufficient to modify the custody order. During trial, Father admitted, among other things, that: he failed to take advantage of his shared visitation blaming his failure on his work schedule and traffic; he never had Children in his care for more than fifty percent of the time and failed to provide for them financially pursuant to the joint custody agreement; he did not take Children to school because it interfered with his work schedule, yet acknowledged he could have taken Children to school earlier or modified his work hours; neither Mother nor Stepfather prevented him from exercising his custody time and he praised Children's academic success and credited Mother for it; and the divorce decree did not prevent either party from moving, he never tried to enforce the school provision, and the divorce decree required the parties to share Children's expenses equally.

On the other hand, the evidence and testimony demonstrate that Children behaved well and excelled physically, mentally, socially, and academically while under Mother's predominant care while she worked two jobs, working during the weekdays, every other weekend, and remotely at night after Children went to sleep. She moved five or six times to a larger home or closer to Children's school. Several witnesses, including Children's former school administrator, testified Children were well-adjusted, great kids, Mother was a good mom, and Children's academic success was due in part to Mother's involvement in their education. *See* § 63-15-240(B)(1-2), (10-11) (stating that when modifying a custody order, the court should consider "the temperament and developmental needs of the child;" "the capacity and the disposition of the parents to understand and meet the needs of the child;" "the child's adjustment to his or her home, school, and community environments;" and "the stability of the child's existing and proposed residences").

Second, we find the family court erred in concluding Mother's moves and Children's schooling arrangements were not conducive to the parenting plan because she did not consult Father. Rather, we find each move was in the best interests of Children. *See* § 63-15-240(B). Mother testified she moved into a larger home each time or was closer to Children's school and that she was required to live in her current residence for fifteen years as a condition of her loan.

Further, we conclude the family court erred by finding that the moves and changes in schools were not conducive to the current parenting plan because the record did not support such a finding. Rather, the 5-2-2-5 plan was not in practice because

Father did not exercise his full custody rights and Mother had custody of Children more than fifty percent of the time. Additionally, though the divorce decree provided that if one parent had Children for more than fifty percent of the time, the other parent would "contribute to the support and maintenance of Children," Father testified that for the year prior to trial, he only contributed $1,200 while Children were in Mother's care.

We express our concern with the family court requesting a recommendation from the Guardian because it should have only requested a recommendation in extraordinary circumstances, which were not present in this case. We are also concerned with the family court's heavy reliance on the Guardian's report and testimony in its findings because a family court should determine the best interests of Children after considering all the evidence presented at trial. *See Pirayesh* v. *Pirayesh*, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004) ("Rather than merely adopting the recommendation of the guardian, the court, by its own review of all the evidence, should consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child as well as all psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life."); *Shirley*, 342 S.C. at 339, 536 S.E.2d at 435 ("The role of the [Guardian] in making custody recommendations is to aid, not direct, the court. Ultimately, the custody decision lies with the trial judge."). At oral arguments, Father's counsel only pointed to the family court's determination that the 5-2-2-5 plan was rendered difficult to follow, but was unable to identify any other findings in the family court's order establishing a change in circumstances favoring Father that derived from something other than the Guardian's testimony and report.

Father did not present evidence of a substantial change in circumstances. Under Mother's care, Children were well-mannered and excelled academically and socially. Additionally, any changes did not adversely affect Children's well-being and no issues were reported as to their welfare. *See Latimer*, 360 S.C. at 381, 602 S.E.2d at 35 ("The change of circumstances relied on for a change of custody must be such as would substantially affect the interest and welfare of the child."). However, this appeal derives from Mother's custody modification action and Father's counterclaim. As such, both Mother and Father were required to show sufficient facts demonstrating a substantial change in circumstances warranting a change of custody in the best interest of Children. *Id*.

While the testimony and evidence demonstrate that Children excelled under Mother's predominant care, it also demonstrates that Father was a factor in this success and a positive influence. Witnesses testified that Father was a good dad and saw Children at least once or twice a week; he took Children to dinner and spent time with them every other weekend; he demonstrated proactive effort to spend time with Children and participate in their lives; he withheld any disparaging remarks about Mother or Stepfather; and evidence from the Guardian indicated Father created a peaceful atmosphere where Children felt comfortable.

Therefore, based upon the ample evidence demonstrating Children's emotional, social, and academic success under the original joint custody agreement, both parties failed to demonstrate a substantial change in circumstances or that the best interests of Children would be served by a change in custody. Accordingly, we reverse the family court.

REVERSED.

WILLIAMS, C.J., and THOMAS, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jack's Custom Cycles, Inc., d/b/a Jack's Motor Sports, Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appellate Case No. 2019-001831

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

Opinion No. 5970
Heard November 16, 2022 – Filed February 15, 2023

AFFIRMED

Nicole Martin Wooten, Marcus Dawson Antley, III, and Jason Phillip Luther, all of the South Carolina Department of Revenue, of Columbia, for Appellant.

John Aaron Ecton and Margaret Weatherly Dukes, both of Ecton Law Firm, P.A., of Irmo, for Respondent.

THOMAS, J.: The South Carolina Department of Revenue (SCDOR) appeals a decision by the Administrative Law Court (ALC) that held retail sales of all-terrain vehicles (ATVs) and side-by-side vehicles or utility task vehicles (UTVs) are entitled to the South Carolina partial sales tax exemption found in section 12-36-

2110(A) of the South Carolina Code (Supp. 2022). SCDOR argues the ALC erred in (1) broadly construing the partial tax exemption statute by concluding ATVs and UTVs are motor vehicles for the purposes of section 12-36-2110(A); (2) failing to give deference to SCDOR's long-standing interpretation of the statute that it is authorized to administer; and (3) considering Chandler's Law to ascertain the intent of the South Carolina Legislature regarding the partial tax exemption statute. We affirm.

FACTS

Jack's Custom Cycles, Inc. d/b/a Jack's Motor Sports (Jack's) is a retailer in South Carolina in the business of selling ATVs[1] and UTVs.[2] As it is a business that sells tangible personal property, the sales of ATVs and UTVs are subject to the full 7% sales tax unless the transaction is expressly exempted as a matter of law.[3] Jack's collected and remitted sales tax up to $300 on the retail purchase price of each ATV and UTV because Jack's considered them to be "motor vehicles" for the purpose of section 12-36-2110(A).[4] However, SCDOR issued a final agency decision on August 13, 2018, finding the retail sales of ATVs and UTVs at Jack's were not entitled to the partial sales tax exemption found in section 12-36-2110(A).

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[1] The parties stipulated that ATVs are defined as "three-and-four wheeled vehicles, generally characterized by large, low-pressure tire[s], a seat designed to be straddled by the operator and handlebars for steering. ATVs are intended for off-road use. ATVs are capable of being driven forward and in reverse. ATVs also have headlamps and brake lights."

[2] The parties stipulated that UTVs are defined as "four-wheeled vehicles with a steering wheel and foot pedals, wherein the operator sits in a bench styled seat or single seat with seat belts and occupants have side-by-side forward facing seats. UTVs can have single front row or front and back row seating capacity. UTVs are capable of being driven forward and in reverse. UTVs also have [headlamps] and brake lights."

[3] The State's sales tax rate is 6%. *See* S.C. Code Ann. §§ 12-36-910(A) (2014) and 12-36-1110 (2014). Jack's business is located in Lexington County, and Lexington County imposes an additional 1% school district tax on sales at retail. *See* S.C. Code Ann. § 4-10-420 (2021) (providing authority to impose county sales and use taxes for school districts).

[4] Section 12-36-2110(A) provides for a maximum tax of $300 for the sales and leases of motor vehicles and motorcycles.

Thus, SCDOR assessed Jack's $177,642.59 in sales and use tax, penalties, and interest as of September 11, 2018, for the sales and use tax periods of August 31, 2013 through July 31, 2016 (Audit Period).[5] Jack's requested a contested case hearing with the ALC to challenge the agency's decision.

On March 22, 2019, SCDOR filed a motion for summary judgment, which the ALC denied in part and granted in part in an order dated May 15, 2019. The ALC granted SCDOR's motion with respect to the tax assessed on utility trailers but denied the motion as to the ATVs and UTVs. SCDOR filed a premature motion for reconsideration on May 28, 2019, and the court considered it as a part of its decision on the merits.

The ALC held a hearing on July 18, 2019, and issued its final order on September 13, 2019, reversing SCDOR's assessment of Jack's retail sales of ATVs and UTVs during the Audit Period. SCDOR filed a motion to alter or amend pursuant to Rule 59(e), SCRCP and ALC Rule 29(D). On October 2, 2019, the ALC issued an amended final order, reflecting changes made to the initial order upon consideration of SCDOR's motion to alter or amend. In the amended order, the ALC deleted certain findings of fact from the initial order and ruled on two arguments that were presented by SCDOR during the hearing but not ruled upon in the initial order. This appeal followed.

STANDARD OF REVIEW

"Upon exhaustion of his prehearing remedy, a taxpayer may seek relief from the department's determination by requesting a contested case hearing before the Administrative Law Court." S.C. Code Ann. § 12-60-460 (2014). "In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review." *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). S.C. Code Ann. § l-23-610(B) (Supp. 2022) provides the applicable standard:

[5] SCDOT assessed the full 7% sales tax on the retail sales of ATVs and UTVs sold during the Audit Period because it concluded those sales were not entitled to the partial exemption under section 12-36-2110(A).

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by 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.

"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.*, 380 S.C. at 604, 670 S.E.2d at 676. "The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008).

LAW/ANALYSIS

I. Motor Vehicle

SCDOR argues the ALC erred in broadly construing a partial tax exemption statute by concluding ATVs and UTVs are motor vehicles for the purposes of section 12-36-2110(A). We disagree.

"If a statute is ambiguous, the courts must construe its terms." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 343, 762 S.E.2d 561, 567 (2014). The "interpretation of a statute is a question of law for the

[c]ourt." *Hopper v. Terry Hunt Const.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009). This court will correct the decision of the ALC if it is affected by an error of law or if "substantial evidence does not support the findings of fact." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012); *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 741 (Ct. App. 2014). "The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (quoting *John D. Hollingsworth on Wheels, Inc. v. Greenville Cnty. Treasurer*, 276 S.C. 314, 317, 278 S.E.2d 340, 342 (1981)). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002).

Section 12-36-2110(A)(1) (Supp. 2022) provides a maximum tax of $300 is imposed on the sale or lease of the following specific items:

> (a) aircraft, including unassembled aircraft which is to be assembled by the purchaser, but not items to be added to the unassembled aircraft;
> (b) motor vehicle;
> (c) motorcycle;
> (d) boat and watercraft motor;
> (e) trailer or semitrailer, pulled by a truck tractor, as defined in Section 56-3-20, and horse trailers, but not including house trailers or campers as defined in Section 56-3-710 or a fire safety education trailer;
> (f) recreational vehicle, including tent campers, travel trailer, park model, park trailer, motor home, and fifth wheel; or
> (g) self-propelled light construction equipment with compatible attachments limited to a maximum of one hundred sixty net engine horsepower.

S.C. Code Ann. § 12-36-2110(A)(1) (Supp. 2022). The term "motor vehicle" is undefined in Title 12.

SCDOR argues the definition of "motor vehicle" in section 56-3-20(2), of Motor Vehicle Registration and Licensing, should be used to clarify its meaning under section 12-36-2110(A). However, this definition was removed in 2018 by 2017 Act No. 89 (H.3247), § 12.[6] SCDOR further contends the definition "vehicle" in section 56-3-20(1) is necessary to determine the meaning of "motor vehicle." However, this definition was also removed in 2018. SCDOR also argues section 56-15-10(a) (Supp. 2021), titled "Regulation of Manufacturers, Distributors, and Dealers," defines "motor vehicle" as "any motor driven vehicle required to be registered pursuant to Section 56-3-110." Section 56-3-110 (2018) provides that "[e]very motor vehicle . . . driven, operated or moved upon a highway in this State shall be registered and licensed" and "[i]t shall be a misdemeanor for any person to drive, operate or move upon a highway . . . any such vehicle which is not registered and licensed." SCDOR asserts ATVs and UTVs are not motor vehicles and cannot be registered or licensed; thus, they do not meet the requirements of section 56-3-110 and do not satisfy the definition of motor vehicle as stated in section 56-15-10(a). As a result, SCDOR asserts Jack's is not entitled to the partial tax exemption provided for in section 12-36-2110(A) because ATVs and UTVs do not meet the statutory definition of "motor vehicle."

The ALC noted that although SCDOT contends ATVs and UTVs are not motor vehicles, ATVs and UTVs can reach speeds of between 65-110 miles per hour, and Jack's sold ATVs and UTVs to customers who intended to operate them on public highways and have done so. The ALC found that pursuant to section 12-36-2110, the maximum tax applies to both motor vehicles and motorcycles; however, SCDOR did not distinguish between its application of the maximum tax to off-road motorcycles and those driven on the public highways. Therefore, the ALC noted SCDOR's interpretation of the maximum tax statute attaches an additional requirement to motor vehicles that does not exist for motorcycles. The ALC also found SCDOR's reliance on the definition of "motor vehicle" in Title 56 was problematic because it governs motor vehicle registration and licensing of vehicles used on public highways, and off-road vehicles, like ATVs and UTVs, are not

[6] We note the definitions for "motor vehicle" and "vehicle" still remain in section 56-1-10(7) and (28) (Supp. 2022); however, these definitions are not specific to vehicle licensing.

licensed to operate on highways.[7] Moreover, the court wrote that restricting the regulation of "motor vehicles" under Title 56 to a subset of vehicles that are driven on the public highways suggests there are other "motor vehicles" that are not driven on the public highways. The ALC noted that in section 12-36-2110(A)(1)(e), the legislature specifically instructs SCDOR to consult the definitions in Title 56 to determine whether a "house trailer" or a "camper" is entitled the maximum tax, but it does not direct SCDOR to Title 56 for the definition of "motor vehicle." The court noted if the legislature had intended for the definitions of Title 56 to be used to determine what a motor vehicle is under section 12-36-110(A)(1)(b), then presumably the legislature would have referenced the definitions found in Title 56, as it did in section 12-36-2110(A)(1)(e). Further, the court noted the All-Terrain Vehicle Safety Act, also known as Chandler's Law, defines an ATV as "a motorized vehicle designed primarily for off-road travel on low-pressure tires which has three or more wheels and handle bars for steering, but does not include lawn tractors, battery-powered children's toys, or a vehicle that is required to be licensed or titled for highway use." S.C. Code Ann. § 50-26-20 (Supp. 2022). Other parts of Title 56 also recognize ATVs as motorized vehicles, thus supporting a broader definition of motor vehicle than what SCDOR argues. Specifically, section 56-1-10(20) defines an ATV as "a motor vehicle measuring fifty inches or less in width, designed to travel on three or more wheels and designed primarily for off-road recreational use, but not including farm tractors or equipment, construction equipment, forestry vehicles, or lawn and grounds maintenance vehicles." S.C. Code Ann. § 56-1-10(20) (Supp. 2022). Finally, Title 39 defines ATVs as "three-and-four-wheeled motorized vehicles, generally characterized by large, low-pressure tires, a seat designed to be straddled by the operator and handlebars for steering, which are intended for off-road use by an individual rider on various types of nonpaved terrain." S.C. Code Ann. § 39-6-20(7)(d) (2023). Therefore, the ALC found SCDOR erred when it failed to consider all the statutes that clarify the legislature's viewpoint regarding ATVs, and it held ATVs and UTVs are motor vehicles for the purpose of the maximum tax under section 12-36-2110(A).

"Motor vehicle" was defined in *Gunn v. Burnette*, 236 S.C. 496, 499, 115 S.E.2d 171, 172 (1960):

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[7] We again note the definition of "motor vehicle" was removed from section 56-3-20(2) in 2018.

> The word 'vehicle' is derived from the Latin word 'vehere,' meaning to carry, and Webster defines the noun as that in or on which a person or thing is or may be carried from one place to another, etc. In 60 C.J.S. Motor Vehicles § 1, p. 109 a motor vehicle is defined as one which is operated by a power developed within itself and used for the purpose of carrying passengers or materials.

See 60 C.J.S. *Motor Vehicles* § 1, 118-119 (2012) ("[T]he term "motor vehicle" ordinarily means a vehicle which is self-propelled and is designed primarily for travel on the public highways even though the vehicle is not one which may legally be self-propelled or operated upon a highway. . . . Generally, a motor vehicle is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials, and it is commonly defined as including all vehicles propelled by any power other than muscular power except traction engines, road rollers, and such motor vehicles as run only upon rails."); *see also White v. S.C. Dep't of Parks, Recreation & Tourism*, 271 S.C. 91, 94, 245 S.E.2d 125, 127 (1978) (determining under the Tort Claims Act that a tram, a self-propelled vehicle designed to carry passengers that did not operate on highways, comes within the definition of a motor vehicle as defined in *Gunn*); *but see Anderson v. State Farm Mut. Auto. Ins. Co.*, 314 S.C. 140, 143, 442 S.E.2d 179, 181 (1994) (finding for insurance purposes that a farm tractor does not come under the Motor Vehicle Financial Responsibility Act's plain and unambiguous definition of a motor vehicle because it is not "designed for use upon a highway" although it may be incidentally used on a highway). Merriam Webster's Collegiate Dictionary defines a motor vehicle as an "automotive vehicle not operated on rails." *Merriam Webster's Collegiate Dictionary* 760 (10th ed. 1993). The American Heritage College Dictionary defines a motor vehicle as a "self-propelled wheeled conveyance, such as a car or truck, that does not run on rails." *Am. Heritage Coll. Dictionary* 891 (3rd ed. 1993); *see Lee*, 352 S.C. at 91-92, 572 S.E.2d at 303 ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.").

Because Title 12 does not define "motor vehicle," the ALC properly determined it must employ the rules of statutory construction to ascertain and effectuate the intent of the legislature to discern if the maximum tax statute under section 12-36-2110(A) is applicable to ATVs and UTVs. *See Ferguson Fire*, 409 S.C. at 343,

762 S.E.2d at 567 ("If a statute is ambiguous, the courts must construe its terms."); *Hawkins*, 353 S.C. at 39, 577 S.E.2d at 207 ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating the words of a statute must be given their "plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand the statute's operation"). A tax exemption statute is strictly construed against the taxpayer claiming the exemption. *TNS Mills, Inc.*, 331 S.C. at 620, 503 S.E.2d at 476. "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, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (quoting *Se. Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981)). "It does not mean that we will search for an interpretation in [SCDOR]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* "It is '[o]nly when the literal application of a statute produces an absurd result will we consider a different meaning.'" *Id.* at 75, 716 S.E.2d at 881 (quoting *Se. Kusan, Inc.*, 276 S.C. at 489-90, 280 S.E.2d at 58). The clear language of section 12-36-2110(A) does not restrict or condition the exemption to motor vehicles that are used on highways. The dictionary definitions of a motor vehicle are an "automotive vehicle not operated on rails" and a "self-propelled wheeled conveyance, such as a car or truck, that does not run on rails." ATVs and UTVs are motorized, self-propelled, wheeled, and do not run on rails. Further, SCDOR directs us to Title 56, which in section 56-1-10(20) defines an ATV as "a motor vehicle measuring fifty inches or less in width, designed to travel on three or more wheels and designed primarily for off-road recreational use . . . ." Therefore, we find the decision of the ALC that ATVs and UTVs are motor vehicles under section 12-36-2110(A) is supported by substantial evidence. *See Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676 ("The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.").

II. Statutory Interpretation

SCDOR argues the ALC erred in failing to give deference to SCDOR's long-standing interpretation of the statute that it is authorized to administer. We disagree.

"An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose." *SGM-Moonglo, Inc.*, 378 S.C. at 295, 662 S.E.2d at 488. Questions of law are reviewed de novo; however, this court generally gives deference to an agency's interpretation of its own statutes and regulations. *See Blue Moon of Newberry*, 397 S.C. at 260-61, 725 S.E.2d at 483 (stating the construction of a regulation is a question of law that is reviewed de novo); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (recognizing this court "generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation"). "[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." *Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 (Ct. App. 2014) (quoting *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)); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts . . . will defer to the agency's interpretation absent compelling reasons. . . ."). While this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain language of the statute is contrary to the agency's interpretation. *Brown*, 354 S.C. at 440, 581 S.E.2d at 838. "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." *Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 (quoting *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). Further, although the "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," an administrative construction "affords no basis for the perpetuation of a patently erroneous application of the statute." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575-76 (2010) (quoting *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) and *Monroe v. Livingston*, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968)). Courts will reject an agency's interpretation if it conflicts with the statute's plain language. *CFRE, LLC*, 395 S.C. at 77, 716 S.E.2d at 882.

In 2000, SCDOR issued an advisory opinion that "it is the department's opinion that sales of [ATVs] . . . as described in the facts, are not entitled to the maximum tax under Code Section 12-36-2110." S.C. Rev. Advisory Bulletin #00-3, 1. The

opinion defined ATVs as "vehicles with three or more wheels designed for off road use. These vehicles can be titled but cannot be licensed for use on the highways of South Carolina." In 2018, SCDOR issued a ruling that the maximum tax does not apply to the sale or lease of "[ATVs], legend race cars, golf carts and any other items not meeting the definition of a motor vehicle." S.C. Rev. Ruling #18-1, 7.

SCDOR argues the ALC erred in not giving deference to its interpretation because Title 12 defines motor vehicle three times as a vehicle that is registered for highway use.[8] It also argues the ALC relied upon an incomplete definition of "motor vehicle" from the dictionary, and the complete definition supports SCDOR's position that "motor vehicle" is a vehicle that is used upon a highway. SCDOR asserts the Department of Motor Vehicles (SCDMV) is authorized to administer Title 56, and SCDMV issued several publications informing licensed dealers that retail sales of ATVs do not qualify for the partial sales tax exemption.[9] Further, SCDOR states the legislature similarly defined "motor vehicle" in Title 12 and Title 56; thus, these statutes are in pari materia and should be construed together. *See Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014) ("[S]tatutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). SCDOR asserts that under the ALC's interpretation, a lawn mower or battery-powered children's toy would be considered a "motor vehicle" because each are self-propelled and not operated on rails, and courts will not construe a statute in a way that leads to an absurd result.

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[8] Section 12-28-110(41) (2014 & Supp. 2022), "Motor Fuels Subject to User Fees," provides a "motor vehicle" is "a vehicle that is propelled by an internal combustion engine or motor and is designed to permit the vehicle's mobile use on highways," but "does not include: . . . (c) machinery designed principally for off-road use." Section 12-54-122(A)(3) (2014), "Uniform Method of Collection and Enforcement of Taxes Levied and Assessed by the South Carolina Department of Revenue," states a "motor vehicle" is "a self-propelled vehicle which is registered for highway use under the laws of any state or foreign country." Sections 12-37-2810(B), (C) and (D) (Supp. 2022), "Assessment of Property Taxes," provide motor vehicles as being used for the transportation of property on a highway.

[9] In SCDMV's "Dealer Connection" publications from August 2017 and February 2018, dealers were informed that ATVs purchased prior to November 19, 2018, were not subject to the maximum sales tax of $300 and the dealers must remit sales tax to SCDOR.

See Tempel v. S.C. State Election Comm'n, 400 S.C. 374, 378, 735 S.E.2d 453, 455 (2012) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."); *Sonoco Prods. Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."). Finally, it argues case law confirms SCDOR's consistent interpretation of section 12-36-2110(A) is entitled to "great weight" because the legislature has not amended the statute since SCDOR issued guidance to the public in 2000. *See Marchant v. Hamilton*, 279 S.C. 497, 500, 309 S.E.2d 781, 783 (Ct. App. 1983) ("Administrative interpretations of statutes, consistently followed by the agencies charged with their administration and not expressly changed by Congress, are entitled to great weight."). SCDOR states the legislature could have amended the maximum tax statute when it enacted Title 50, Chapter 26 (the All-Terrain Motor Vehicle Safety Act, referred to as "Chandler's Law") in 2011 if it intended to make retail sales of ATVs subject to the maximum sales tax.

The ALC found SCDOR's interpretation was not entitled to deference for several reasons. First, SCDOR argued its resort to Title 56 for a definition of "motor vehicle" was no different from SCDOR turning to a dictionary for the definition; however, the ALC held SCDOR cannot create a flawed definition that is unsupported by the dictionary and apply that definition to its interpretation of the statute and then claim it is entitled to deference. Second, although SCDOR is entitled to deference to its interpretation of statutes in Title 12 because it administers the statutes, it is not permitted to bootstrap its own interpretation of Title 56 to its interpretation of Title 12 because Title 56 is administered by SCDMV. Further, SCDOR ignores the dictionary definition of "motor vehicle" and the plain language defining ATVs as "motor vehicles" in Chandler's Law, both of which are contrary to its interpretation. The ALC notes SCDOR is not insulated from a finding that its interpretation is erroneous just because its interpretation is long-standing.

Because we already found the ALC correctly determined ATVs and UTVs are motor vehicles under section 12-36-2110(A), we also find the ALC correctly found SCDOR's interpretation of section 12-36-2110(A) was not entitled to deference. *See Brown*, 354 S.C. at 440, 581 S.E.2d at 838 (holding that while this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain language of the statute is contrary to the agency's

interpretation); *Be Mi, Inc.*, 408 S.C. at 298, 758 S.E.2d at 741 ("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." (quoting *Epstein*, 393 S.C. at 285, 711 S.E.2d at 917)); *CFRE, LLC*, 395 S.C. at 77, 716 S.E.2d at 882 (stating courts will reject an agency's interpretation if it conflicts with the statute's plain language). We also find the ALC correctly found SCDOR is not entitled to deference of its interpretation of Title 56, which is administered by SCDMV, not SCDOR. *See Brown*, 354 S.C. at 440, 581 S.E.2d at 838 (recognizing this court generally gives deference to an administrative agency's interpretation of an applicable statute). Further, SCDOR's arguments that the ALC erred in not giving deference to its interpretation because Title 12 defines motor vehicle three times as a vehicle that is registered for highway use and the ALC relied upon an incomplete definition of "motor vehicle" from the dictionary were not raised to or ruled upon by the ALC; thus, they are not preserved for our review. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

III. Chandler's Law

SCDOR argues the ALC erred in considering Chandler's Law to ascertain the intent of the South Carolina Legislature regarding a partial tax exemption statute. We already found the ALC did not err in finding ATVs and UTVs are motor vehicles under section 12-36-2110(A) because the substantial evidence supports its decision. Therefore, we need not reach this issue. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, the order of the ALC is

AFFIRMED.

WILLIAMS, C.J., and LOCKEMY, A.J., concur.