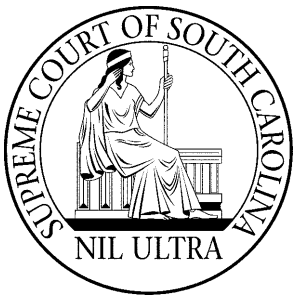

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
March 9, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shawonder Scott, Appellant,

v.

Curtis McAlister, Acquana McAlister, Norma L. Cyrus, Tax Collector for Williamsburg County, the County of Williamsburg, an Unincorporated Subdivision of the State of South Carolina, Hartwell Pendergrass, Sr., and Hattie S. Pendergrass, Defendants,

Of whom Norma L. Cyrus, Tax Collector for Williamsburg County, and the County of Williamsburg, an Unincorporated Subdivision of the State of South Carolina, are the Respondents.

Appellate Case No. 2019-000030

Appeal From Williamsburg County
George M. McFaddin, Jr., Circuit Court Judge

Opinion No. 5897
Heard October 14, 2021 – Filed March 9, 2022

AFFIRMED

Dwight Christopher Moore, of Moore Law Firm, LLC, of Sumter, for Appellant.

William E. Jenkinson, III and William Evan Reynolds,
both of Jenkinson, Kellahan, Thompson & Reynolds, PA,
of Kingstree, for Respondents.

KONDUROS, J.: Shawonder Scott appeals the circuit court's grant of summary judgment in favor of Norma L. Cyrus in her capacity as Tax Collector for Williamsburg County (Tax Collector) and Williamsburg County (collectively, Respondents). Scott contends Respondents violated section 12-51-40 of the South Carolina Code (2014 & Supp. 2021) by not providing her with notice of the delinquent taxes, tax sale, or redemption opportunity for property she claims she was renting to own. Scott asserts the circuit court erred by determining she lacked standing and Respondents did not owe her any duty because she was not the defaulting taxpayer of record, owner, or the grantee of record.[1] We affirm.

FACTS

In 1998, Scott and her uncle, McAlister, allegedly entered into an oral contract for the purchase of residential real estate located at 196 Gausetown Road in Kingstree, South Carolina (the Property) for $35,000. Scott took possession of the Property after providing an initial down payment of $4,000. According to Scott, she agreed to pay the remaining $31,000 in monthly installments of $300.

Conversely, McAlister contended Scott agreed to obtain a loan in order to make a second payment of $31,000. After Scott failed to make a second payment of $31,000, McAlister asserted he told her that she was no longer purchasing the Property and her additional payments were rent. However, McAlister maintained that he would have accepted the remaining balance "in 1998, 1999, or 2000 or at any time after that."[2] Regardless of how the payments were characterized, both

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[1] Scott's action against the former owner and record taxpayer Curtis McAlister (McAlister), his daughter Aquana McAlister (Aquana), the current owner Hattie S. Pendergrass (Pendergrass), and her husband Hartwell Pendergrass, Sr. (Hartwell) is not before us.

[2] Additionally, Respondents' brief states the $31,000 remaining balance was to be paid in monthly installments.

parties later agreed to reduce Scott's monthly payments to $200[3] and arranged for Scott to pay the Property's taxes instead of rent if McAlister was unable to afford them.

In 2007, McAlister commenced eviction proceedings against Scott, alleging she failed to make her monthly payments, and the magistrate court issued an order of ejectment. Scott appealed, asserting she occupied the Property under a land purchase agreement, and the circuit court vacated the order of ejectment. In 2010, McAlister's daughter, Aquana, attempted to get Scott to sign a lease agreement. Scott denied she was renting the Property and refused to sign the document. McAlister then commenced a second ejection action in magistrate court. The Record does not indicate the result of the second eviction action.

Meanwhile, McAlister began living with Aquana in Columbia. While living in Columbia, McAlister suffered a heart attack and stroke. Pursuant to Aquana's telephone requests,[4] Respondents changed the Property's mailing address on October 20, 2010, to a post office box in Columbia, and on June 29, 2011, to Aquana's address in Columbia. The Property's 2011 taxes and late payment penalties totaling $449.35 were never paid. In preparation for the Property's tax sale, Respondents conducted a title search that showed McAlister was the Property's sole owner and taxpayer. Pendergrass[5] purchased the Property at a tax sale on December 3, 2012, and Respondents executed a tax deed conveying the Property to her for $800 on September 9, 2014.

Scott claimed she was unaware of the Property's mailing address changes, delinquent taxes, tax sale, or redemption opportunity until Pendergrass's husband, Hartwell, and a land surveyor entered the Property in 2014 after its conveyance.

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[3] McAlister only received $188 from each of Scott's $200 payments due to Western Union's banking fees, but Scott contended that McAlister agreed to the arrangement.

[4] McAlister and Aquana (collectively, the McAlisters) assert they made the address change request together in person. However, Williamsburg County Assessor's Office (Assessor's Office) policy at that time allowed anyone to change a property's mailing address, and witnesses for Respondents stated the address change forms indicated Aquana made both requests by phone.

[5] McAlister's deceased brother, George McAlister, was married to Pendergrass's sister, Pauline McAlister.

Shortly after, Scott drove McAlister from Columbia to Tax Collector's office in Williamsburg County, where they talked to Tax Collector. Tax Collector informed Scott and McAlister of the Property's mailing address changes,[6] tax sale for delinquent 2011 taxes, and expired redemption opportunity.

In 2015, Scott filed a complaint alleging, *inter alia*, Respondents violated section 12-51-40 because they mailed notice to the Property's updated mailing address rather than its physical address and they failed to post notice on the Property.[7] Scott contended Respondents' violation of section 12-51-40 prevented her from receiving notice of the Property's delinquent taxes, tax sale, or redemption opportunity. As a result, Scott claimed "[s]he [was] denied the opportunity to pay the [Property's] delinquent taxes and protect her interest in the [P]roperty." Scott also claimed she suffered "harassment, humiliation, embarrassment, anxiety, mental anguish, emotional distress, inconvenience[,] and . . . incur[red] legal fees and costs to protect her interest in the [P]roperty." Scott asserted she was entitled to a court order that voided the Property's tax sale, set aside the tax deed to Pendergrass, and awarded actual damages.[8]

The parties conducted discovery, which included depositions of Scott, the McAlisters, Tax Collector, another employee in Tax Collector's office, and an employee in Assessor's Office. Tax Collector claimed her office sent notices of the delinquent taxes to the Property's updated mailing address in Columbia first by regular mail, then by certified mail. After the certified mail was returned to Respondents as unclaimed, Tax Collector asserted an employee[9] posted the required notice on the Property on August 14, 2012. However, McAlister claimed

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[6] Again, the McAlisters maintained they made the change to the Property's mailing address in person. However, Scott contended that McAlister was unaware of the changes before talking to Tax Collector.

[7] The complaint also included causes of action for breach of contract, breach of trust, and civil conspiracy against the McAlisters, Pendergrass and Hartwell (collectively, the Pendergrasses). Again, these actions are not before us.

[8] At oral argument, Scott's attorney stated favorable decisions by this court and a jury on remand would allow Respondents to void the tax sale, but did not mention monetary damages.

[9] Scott's attorney asserted at oral argument the employee, Joshua Gaskins, could not be located.

he never received the mailed notices,[10] and both McAlister and Scott asserted the notice was never posted on the Property.

The parties' discovery also produced a 2002 tax bill for $127.67 with a handwritten note dated November 8, 2004. The note, allegedly written by McAlister, stated Scott was the owner and taxpayer for the Property.[11] However, the origin of the annotated tax bill is uncertain from the record. McAlister denied writing the note, particularly in light of his name being misspelled twice. Additionally, neither Scott nor the three Williamsburg County employees were asked to confirm if they had ever seen the annotated tax bill or whether it was in their files.

Respondents filed a motion for summary judgment on June 28, 2018. Respondents asserted they were entitled to judgment as a matter of law pursuant to Rule 56 of the South Carolina Rules of Civil Procedure because the pleadings, depositions, and evidence lacked a genuine issue of material fact based on the South Carolina public duty doctrine and applicable South Carolina case law regarding that doctrine and its special duty exception. At the September 27, 2018 pretrial motions hearing, Respondents conceded they owed McAlister a special duty to provide him notice of the Property's tax sale; however, Respondents maintained they did not owe Scott that special duty because she was not the record taxpayer, owner, or grantee.

On December 11, 2018, the circuit court granted summary judgment to Respondents after determining Scott lacked standing and Respondents did not owe her any duty under section 12-51-40 because she was not the record taxpayer, owner, or grantee for the property. The order did not address any other

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[10] Initially, McAlister stated he thought he received the notices regarding the Property's taxes, delinquency, and tax sale. However, he later claimed he could not recall receiving any documents from Respondents after 2010. Aquana claimed she and McAlister did not receive any documents regarding the Property's tax sale at her Columbia address, but recalled receiving one tax notice; however, she could not remember whether it was for the 2010 or 2011 tax year or if she paid it.

[11] The annotation reads: "I Curtis McCalister [sic] gets [sic] payment from Ms. Shawonder for house, renting to own[.] She is owner of house[,] she pays taxes on property[.]" The note is signed "Curtis McCalister [sic]."

defendant.[12] Scott contends that a favorable decision from this court would allow her to go back to trial and attempt to void the tax sale to Pendergrass and compel specific performance from McAlister upon a favorable jury verdict. This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). "When reviewing a grant of a summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Id.* (quoting *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "[A] circuit court shall grant summary judgment 'if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Id.* (second omission by court) (quoting Rule 56(c), SCRCP).

In determining whether a genuine issue of fact exists, "a court must view the facts in the light most favorable to the non-moving party." *Id.* (quoting *George*, 345 S.C. at 452, 548 S.E.2d at 874). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

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[12] The current status of Scott's action against the McAlisters and the Pendergrasses is unclear from the record. When asked about the status of Scott's action against McAlister at oral argument, Scott's attorney responded that "some things have happened outside the record."

LAW/ANALYSIS

Scott asserts the circuit court erred by granting Respondents' summary judgment motion because the Record reflected genuine issues of material fact when viewing the facts in the light most favorable to her. Scott contends the property interest she acquired through her contract with McAlister entitled her to notice of the Property's delinquent taxes, tax sale, and redemption opportunity pursuant to section 12-51-40. Scott maintains the Record contained at least a scintilla of evidence that Respondents failed to comply with section 12-51-40 by mailing the delinquency notices to the Property's updated mailing address rather than the Property's physical address and by failing to post notice of the Property's pending tax sale on the Property. We disagree.[13]

"A tax execution is not issued against the property, it is issued against the defaulting tax[]payer." *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S.E.2d, 878, 881 (Ct. App. 1996). "Due process of law requires some sort of notice to a landowner before he is deprived of his property." *Id.* "Tax sales must be conducted in strict compliance with statutory requirements." *In re Ryan Inv. Co.*, 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999). "[A]ll requirements of the law leading up to tax sales [that] are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded [as] mandatory and are to be strictly enforced." *Forfeited Land Comm'n of Bamberg County v. Beard*, 424 S.C.137, 145, 817 S.E.2d 801, 804 (Ct. App. 2018) (alterations in original) (quoting *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct. App. 1989)). "Failure to give the required notice [of a tax sale] is a fundamental defect in the tax proceedings which renders the proceedings absolutely void." *Rives*, 325 S.C. at 293, 478 S.E.2d at 881.

Section 12-51-40 provides the procedural process officials must follow after a taxpayer defaults on taxes for real property. Under section 12-51-40, the officer authorized to collect delinquent taxes, assessments, penalties, and costs must levy

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[13] Scott's complaint asserts Respondents violated the notice requirements of section 12-51-40. Her requested relief to void the tax sale and to receive other monetary damages raises a question as to the precise nature of her claim. However, under any interpretation she is not a taxpayer or grantee of record as contemplated by the statute and cannot therefore pursue a claim against Respondents.

an execution by distress and sell the defaulting taxpayer's real property that generated all or part of the delinquent tax to satisfy the taxes, assessments, penalties, and costs. First, the officer must mail a notice of delinquent property taxes "to the *defaulting* taxpayer and to a grantee *of record* of the property, whose value generated all or part of the tax." § 12-51-40(a) (emphases added). The officer is required to mail the notice to "the best address available, which is either the address shown on the deed conveying the property to him, the property address, or other corrected or forwarding address of which the officer . . . has actual knowledge." *Id.*

If the taxes remain unpaid thirty days after the delinquent notice was mailed, the officer is directed to take exclusive possession of real property by mailing the delinquent notice again by "certified mail, return receipt requested-restricted delivery" to "the *defaulting* taxpayer and *any* grantee *of record* of the property." § 12-51-40(b) (emphases added). The officer is required to send the certified mail to "the address shown on the tax receipt or to an address of which the officer has actual knowledge." *Id.* If the certified mail is returned as undelivered, the officer is directed to post a notice in one or more conspicuous places on the delinquent property that reads, "Seized by person officially charged with the collection of delinquent taxes of (name of political subdivision) to be sold for delinquent taxes." § 12-51-40(c). This posting "is equivalent to levying by distress, seizing, and taking exclusive possession of [the property]." *Id.*

A grantee is "[o]ne to whom property is conveyed." *Grantee*, *Black's Law Dictionary* (11th ed. 2019). Chapter 51 does not define taxpayer; however, chapter 60 defines a taxpayer as "a person who is liable for a tax or who is responsible for collecting and remitting a tax." S.C. Code Ann. § 12-60-30(29) (2014). Additionally, chapter 60 defines a property taxpayer as "a person who is liable for, or whose property or interest in property, is subject to, or liable for, a property tax imposed by this title." S.C. Code Ann. § 12-60-30(22) (2014). Further, section 12-37-610 of the South Carolina Code, titled "[p]ersons liable for taxes and assessments on real property," states:

> Each person is liable to pay taxes and assessments on the real property that . . . he owns in fee, for life, or as trustee, *as recorded* in the public records for deeds of the county in which the property is located, or on the real property that . . . he has care of as guardian, executor, or

> committee or may have the care of as guardian, executor, trustee, or committee.

S.C. Code Ann. § 12-37-610 (2014) (emphasis added).

The circuit court did not err by granting Respondents' summary judgment motion. First, Scott alleges that Respondents violated section 12-51-40(a) and (b) because they mailed the notices to the Property's updated mailing address rather than the Property's physical address. Section 12-51-40(a) requires the officer to mail notice of the tax sale "to the *defaulting* taxpayer and to a grantee *of record* of the property, whose value generated all or part of the tax." § 12-51-40(a). Similarly, section 12-51-40(b) requires the officer to send notice of the tax sale by certified mail to "the *defaulting* taxpayer and any grantee *of record* of the property."[14] § 12-51-40(b).

Here, Scott was never a defaulting taxpayer or a grantee of record of the Property. Scott testified McAlister was responsible for paying the Property's taxes and conceded she was never a grantee of record. Additionally, county records indicated McAlister was the only defaulting taxpayer and grantee of record for the Property. Consequently, Scott was not entitled to receive mailed notice under 12-51-40(a) or (b), regardless of the propriety of the changes to the Property's mailing address.

Scott also asserts that Respondents violated section 12-51-40(c) by failing to conspicuously post notice of the impending tax sale on the Property. Section 12-51-40(c) requires the officer to post notice of the tax sale on the delinquent property if the certified mail required under section 12-51-40(b) is returned as undelivered. § 12-51-40(c). "Ordinarily, under South Carolina's public duty doctrine, public officials are 'not liable to individuals for their negligence in discharging public duties [because] the duty is owed to the public at large rather than [to] anyone individually.'" *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999) (second alteration in original) (quoting *Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617

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[14] Section 12-51-40 was amended in 2000 to substitute "current owner" with "defaulting taxpayer" and "grantee" of record. *See* S.C. Code Ann. § 12-51-40 (1998) (prior to the 2000 amendment); Act No. 399, § 3(X)(3), 2000 S.C. Acts 3471-73 (amending section 12-51-40, effective January 1, 2001).

(1991)). However, our supreme court has recognized exceptions to the public duty doctrine for statutes that create a special duty to particular individuals.[15] *Id.* at 562, 521 S.E.2d at 158.

In *Tanner*, Florence County sold property at a delinquent tax sale while the owner was incarcerated. *Id.* at 556, 521 S.E.2d at 155. The owner alleged he did not receive the notice required under section 12-51-40 despite giving Florence County his prison address. *Id.* Our supreme court noted it had been reluctant to find special duties imposed by statutes. *Id.* at 562, 521 S.E.2d at 158. However, our supreme court recognized that "[a]ll requirements of law leading up to tax sales are intended *for the protection of the taxpayer* against surprise or the sacrifice of his property . . . ." *Id.* at 563, 521 S.E.2d at 158-59 (emphasis added). Accordingly, our supreme court held that "[a]s a notice provision, section 12-51-40 creates a special duty." *Id.* at 563, 521 S.E.2d at 159. Still, our supreme court cautioned that "every failure of *a delinquent taxpayer* to receive notice does not automatically qualify for the special duty exception to the public duty doctrine." *Id.* (emphasis added). Our supreme court elaborated that the special duty exception to section 12-51-40 arises "*only* in cases . . . where *the delinquent taxpayer* asserts that he provided the [c]ounty his correct address and the [c]ounty failed to use that address." *Id.* (emphases added).

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[15] The court in *Tanner* noted:

> [A] 'special duty' to particular individuals may be created by . . . a statute when: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; *and* (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Id. at 562, 521 S.E.2d at 158 (emphasis added).

In *Taylor v. Mill*, real property that had been sold at a federal tax sale to one purchaser was subsequently sold at a county tax sale to a different purchaser. 310 S.C., 526, 527, 426 S.E.2d 311, 312 (1992). The initial purchaser did not notify the county that he was the grantee of the delinquent taxpayer or record his deed before the property was sold at the county tax sale. *Id.* at 527-28, 426 S.E.2d at 312-13. As a result, our supreme court concluded the county "had no obligation to notify [the initial purchaser] of the county tax sale under [section 12-51-40]." *Id.* at 528, 426 S.E.2d at 312-13.

Here, unlike the plaintiff in *Tanner*, Scott was never the defaulting taxpayer or a grantee of record for the Property. While Scott occasionally paid the Property's taxes in lieu of her regular payment to McAlister at his request, the Record is devoid of the number and amount of the Property's tax payments Scott made on McAlister's behalf. Neither Scott nor McAlister provided canceled checks or receipts that showed Scott paid the Property's taxes for any year. Notably, Scott conceded McAlister was responsible for paying the Property's taxes.

Even assuming Scott ordinarily paid the Property's taxes directly to Williamsburg County, her payments were simply on behalf of the taxpayer, McAlister, and in lieu of her monthly payments to McAlister. The fact that Scott's payments to McAlister were accomplished by paying the Property's taxes did not make Scott a taxpayer because she was never liable for the tax; again, Scott conceded McAlister was responsible for paying the Property's taxes. *See* § 12-60-30(29) ("'Taxpayer' means a person who is liable for a tax or who is responsible for collecting and remitting a tax."). Indeed, McAlister remained the only taxpayer of record even after the 2004 note on the 2002 tax bill and two changes to the Property's mailing address.

Moreover, Respondents had no way of knowing that Scott had an interest in the Property. Like the initial purchaser in *Taylor*, Scott did not record her contract with McAlister or a deed listing her as a grantee of the Property with Williamsburg County's register of deeds. Additionally, Scott was never added as a taxpayer on any county document, and McAlister remained the only taxpayer after Aquana changed the mailing address for the Property in the two years before the tax sale. Notably, Scott conceded that Respondents would have no way of knowing she was supposed to have owned the Property because her name was not on the deed. Thus, like the county in *Taylor*, Respondents were not obligated to notify Scott of

the Property's delinquent taxes, tax sale, or redemption opportunity under section 12-51-40.

Additionally, the handwriting on the bottom of the 2002 tax receipt does not even raise a mere scintilla of evidence that Scott was an identifiable taxpayer. The Record contained no indication Respondents were aware of the annotated tax bill or in possession of it. Moreover, the annotation did not contain a mailing address, the Property's tax bills for the following eight years were sent to McAlister and paid in McAlister's name, McAlister denied writing the note, and McAlister's name is spelled wrong twice in the annotation. *See Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31, 61 S.E. 1064, 1067 (1908) ("[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror."); *Priest v. Brown*, 302 S.C. 405, 408-09, 396 S.E.2d 638, 639-40 (Ct. App. 1990) ("The [court] is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine."). Consequently, no document in the Record indicated Respondents were aware that Scott had an interest in the Property because McAlister remained the only record taxpayer, owner, and grantee. Thus, Respondents did not owe Scott a special duty under section 12-51-40. *See Taylor*, 310 S.C. at 528, 426 S.E.2d at 312-13 (finding that the county had no obligation under section 12-51-40 to notify the purchaser of property sold at a federal tax sale of its subsequent county tax sale because he did not notify the county he was the grantee of the delinquent taxpayer or record his deed).

Sadly, the crux of Scott's argument is that she would have paid the delinquent taxes and saved her home regardless of her status regarding the Property if she had known the Property was in danger of foreclosure. While equity may favor her in the confusion as to what her ownership status was regarding the Property, her argument is dependent on her asserting McAlister's rights under section 12-51-40, not her own.

CONCLUSION

Accordingly, the circuit court did not err by granting Respondents' motion for summary judgment. Therefore, the circuit court is

AFFIRMED.

HILL and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Josie M. Bostick, Appellant,

v.

Earl A. Bostick, Sr., Respondent.

Appellate Case No. 2019-000157

Appeal From Beaufort County
Michèle Patrão Forsythe, Family Court Judge

Opinion No. 5898
Heard December 8, 2021 – Filed March 9, 2022

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John Ryd Bush Long, of John R. B. Long, PC, of Augusta, Georgia, for Appellant.

H. Grady Brown, III, and Bridget Hillebrand Norton, both of Brown & Norton, LLC, of Beaufort; and J. Michael Taylor, of Taylor/Potterfield, of Columbia, all for Respondent.

KONDUROS, J.: Josie M. Bostick (Wife) appeals several determinations by the family court in this divorce action. She maintains the family court erred in denying her motion for continuance when her counsel withdrew approximately one week before trial. Wife also contends the family court erred in finding a large

percentage of the sale price of Earl A. Bostick, Sr.'s (Husband's) dental practice constituted personal goodwill and therefore was not a marital asset. Additionally, she argues the family court erred in finding she dissipated marital assets, in reducing her alimony award by a sizeable percentage from the temporary amount, and in awarding Husband $25,000 in attorney's fees. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

Husband and Wife married in 1971. Two children were born of the marriage. Both children were of majority at the time of the divorce. Husband operated a successful dental practice in two locations—one in Ridgeland, South Carolina, Earl Bostick, Sr., D.M.D. and Associates, P.A, and Sea Island Dentistry in Bluffton, South Carolina.[1] Wife worked primarily in the home for much of the marriage but also assisted as a receptionist at times for the dental practice. Additionally, Wife served as pastor for Whosoever Will Outreach Ministry (the Church). This service was the source of marital discord as Wife began spending more and more time at the Church. In particular, Wife spent time with another Church leader, Prophet Scottie Johnson, both at the Church and elsewhere. The parties discussed counseling but Wife was uncooperative. Eventually, Wife's time spent away from home and with Prophet Johnson created sufficient strain in the marriage that Wife filed for divorce in August of 2015. However, the time for proceeding with the case expired, and the action was dismissed. Wife filed for divorce again in January of 2017.

Prior to the problems in their marriage, Husband and Wife had been financially generous to their churches. For example, Husband and Wife loaned $100,000 to make repairs and improvements to a church building that Wife had been given.[2] However, according to Husband's testimony, certain donations were not jointly made after the marriage began deteriorating. In 2014, Wife withdrew the entirety of one of her retirement accounts and gave it to the Church. In 2015, Wife made additional withdrawals from her retirement even though the marital home bills were being paid, she and Husband were taking an allowance from marital funds, and Wife had access to the parties' joint checking account. Wife's testimony was

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[1] Husband had sold Sea Island Dentistry prior to the parties' marital issues as will be discussed further in section II.

[2] This church ultimately became the Church.

inconsistent as to how she spent this money. She claimed to have used it for living expenses as well as donating a large portion to the Church. Wife provided no documentation of these expenditures. As pastor, Wife had access and signatory privileges to the Church's bank funds.

Wife filed for divorce a second time in 2017. In September of 2018, Husband sold his Ridgeland dental practice to the parties' son for $569,000 plus $51,113.15 in accounts receivable. Wife reviewed the contract of sale and agreed to its terms. The contract divided the sale price into two components: (1) $144,860 for purchased assets and (2) $424,140 for goodwill. Husband was retiring from the practice, which had previously borne his name, and the practice of dentistry altogether. After the sale, Husband was to be available for up to sixty days to assist with transitioning the practice which would be denominated Ridgeland Smiles, LLC. The sales contract also contained a covenant not to compete.

One week prior to trial, Wife's counsel requested to withdraw from representing Wife indicating he could no longer serve as her attorney out of "professional considerations." Wife's counsel asked for a continuance for Wife to obtain new representation, but the family court denied the request, noting Wife had engaged several attorneys over the course of the two years since the filing and had failed to comply with various scheduling orders. Wife secured new representation, and her new counsel appeared at the hearing, prepared to proceed although acknowledging the short timeframe for preparing Wife's case and the family court's previous ruling on the motion for continuance.

The parties had stipulated to a 50/50 division of the marital estate. However, there were several points of contention at trial including the division of the proceeds from the sale of the Ridgeland dental practice, alimony, and Wife's dissipation of two of her retirement accounts. The family court held the hard assets and accounts receivable components of the dental practice sale were marital assets to be divided 50/50. However, the family court concluded the goodwill component of the sales prices was a nonmarital asset because it was personal goodwill attributable to Husband's professional status pursuant to *Moore v. Moore*, 414 S.C. 490, 779 S.E.2d 533 (2015). Furthermore, after considering all the factors for alimony set forth by statute, particularly that Husband was 72 years old and was retiring, the family court reduced Wife's temporary alimony award from the temporary amount

of $4,000 per month to $500 per month.[3] Finally, the family court held Wife had dissipated the funds in her two retirement accounts and therefore counted $246,771 against her share of the marital estate. The family court awarded Husband $25,000 in attorney's fees, stating Wife could afford to pay the fees and her lack of diligence and cooperation in discovery protracted the litigation. This appeal followed.

STANDARD OF REVIEW

In appeals from family court, an appellate court reviews findings of fact and law de novo. *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). Nevertheless, this court recognizes the family court is in a superior position to make credibility determinations, and the appellant is not relieved of the burden to demonstrate error in the family court's findings. *Id*. The standard for reviewing a family court's evidentiary or procedural rulings is abuse of discretion. *Stoney v. Stoney*, 422 S.C. 593, 595 n.2, 813 S.E.2d 486, 487 n.2 (2018). "'An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support.'" *Sellers v. Nicholls*, 432 S.C. 101, 113, 851 S.E.2d 54, 60 (Ct. App. 2020) (quoting *Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004)).

LAW/ANALYSIS

I. Motion for Continuance

Wife argues the family court erred in failing to continue the family court hearing after permitting withdrawal of Wife's legal counsel. We disagree.

"A motion for a continuance is a procedural matter involving the progress of a case." *Sellers*, 432 S.C. at 113, 851 S.E.2d at 60 (citing Rule 40(i)(1), SCRCP). "The denial of a motion for a continuance 'will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant.'" *S.C. Dep't of Soc. Servs. v. Laura D.*, 386 S.C. 382, 385, 688 S.E.2d 130, 132 (Ct. App. 2009) (quoting *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)).

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[3] Section 20-3-130 of the South Carolina Code (2014) sets forth the alimony factors.

In *Sellers*, this court affirmed the denial of a continuance to the mother in a child custody case. 432 S.C. at 116, 851 S.E.2d at 61-62. In that case, the mother was represented by two attorneys, one who sought relief because the mother had failed to pay her fees and the second who was disqualified due to her becoming a witness in the case. *Id*. at 116, 851 S.E.2d at 61. Additionally, the mother signed a consent order seven days prior to the custody hearing indicating she would represent herself if new counsel could not be obtained. *Id*.

Although Wife never *consented* to go forward in this case, she was represented at trial by competent counsel after having parted ways with multiple prior attorneys over the course of several years. The reason for the multiple changes in representation is not readily apparent from the record. However, Wife's last attorney indicated he could no longer represent Wife based on "professional considerations." This suggests any issue arose from within the attorney/client relationship with Wife as opposed to some outside force beyond Wife's control. Additionally, Wife had failed to comply with various scheduling orders, and the record demonstrates Wife was ably represented by her counsel and obtained certain beneficial results based on his representation. Based upon all the foregoing, we conclude the family court did not abuse its discretion in denying Wife's motion for continuance, nor was she prejudiced thereby. Accordingly, we affirm the family court's decision.[4]

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[4] Husband argues Wife waived her right to appeal the denial of the continuance motion because her counsel did not formally renew the request the first day of trial. This argument is without merit. The family court's denial of the request was final and definitive when it denied the motion and instructed Wife to retain counsel and be ready for trial. Nothing changed between the time of the family court's ruling and the day of the hearing except that Wife successfully complied with the family court's instructions and secured new representation. To seek a continuance at that time would have been futile. *Cf. Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993) (holding when the court had overruled an objection that had been properly raised and passed on by the court, seeking a mistrial on that same basis would be futile).

II. Personal Goodwill and Husband's Dental Practice

Next, Wife contends the family court erred in finding a majority of the sale of Husband's Ridgeland dental practice constituted nonmarital, personal goodwill and was, therefore, not subject to equitable division. We agree.

In *Moore*, the supreme court recognized a business may contain two types of goodwill—enterprise, that attaching to the business itself, independent of any one individual, and personal, that attaching to the individual based on her skill and reputation. 414 S.C. at 511-12, 779 S.E.2d at 544. *Moore* adopted the viewpoint that enterprise goodwill is a marital asset subject to equitable division, while personal goodwill is a nonmarital asset belonging solely to the professional. *Id*.

> "Enterprise goodwill is that which exists independently of one's personal efforts and will outlast one's involvement with the business." *In re Marriage of Alexander*, 857 N.E.2d 766, 769 (Ill. App. 3d 2006). "Enterprise goodwill 'is based on the intangible, but generally marketable, existence in a business of established relations with employees, customers and suppliers.'" *Yoon v. Yoon*, 711 N.E.2d 1265, 1268 (Ind. 1999) (quoting Allen Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 Fam. L.Q. 213, 215 (1984)). "[E]nterprise goodwill attaches to a business entity and is associated separately from the reputation of the owners. . . . The asset has a determinable value because the enterprise goodwill of an ongoing business will transfer upon sale of the business to a willing buyer." *Wilson v. Wilson*, 706 S.E.2d 354, 361 (W. Va. 2010). Many courts have found "[e]nterprise goodwill is an asset of the business and accordingly is property that is divisible in a dissolution to the extent that it inheres in the business, independent of any single individual's personal efforts and will outlast any person's involvement in the business." *Yoon,* 711 N.E.2d at 1268-69 (citations omitted).

"In contrast, [p]ersonal goodwill is associated with individuals." *Wilson*, 706 S.E.2d at 361. "It is that part of increased earning capacity that results from the reputation, knowledge and skills of individual people." *Id.* "The implied assumption is that if the individual were not there, the clients would go elsewhere." Business Valuation Resources, LLC, *BVR's Guide to Personal v. Enterprise Goodwill* 19 (Adam Manson & David Wood eds., 2011) . . . . "Accordingly, the goodwill of a service business, such as a professional practice, consists largely of personal goodwill." *Wilson*, 706 S.E.2d at 361. "[A]ny value that attaches to a business as a result of this 'personal goodwill' represents nothing more than the future earning capacity of the individual and is not divisible [in a divorce proceeding]." *Yoon*, 711 N.E.2d at 1269. In the family court setting, future earning capacity based on a spouse's reputation, knowledge and skills—personal goodwill—is considered nonmarketable and thus not property subject to division. *See Butler v. Butler*, 663 A.2d 148, 156 (Pa. 1995) ("[W]here there has been an award of alimony, . . . to also attribute a value to goodwill that is wholly personal to the professional spouse, would in essence result in a double charge on future income.").

One court noted the distinction as follows: "[w]here goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of a business." *Prahinski v. Prahinski,* 540 A.2d 833, 843 (Md. App. 1988) (citing *Wilson v. Wilson*, 741 S.W.2d 640 (Ark. 1987); *Taylor v. Taylor*, 386 N.W.2d 851 (Neb. 1986)). However, "[i]f the goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual." *Id.*

Moore, 414 S.C. at 509-11, 779 S.E.2d at 543-44 (all alterations and omissions by the court).

In the instant case, if the dental practice were an ongoing concern, the majority, if not all, of the goodwill associated with it would be personal as it closely follows the factors set out in *Moore*.[5] However, *Moore* involved a *continuing* home décor and lighting business as opposed to a professional practice that was sold after the parties separated, but prior to the equitable division of the marital estate. *Id*. at 498, 779 S.E.2d at 537-38. *Moore*, and all the cases cited to therein, recognize the issue of goodwill arises when the family court must discern a value for that intangible element of an ongoing business or professional practice. Here, the family court was not tasked with ascertaining a value for the goodwill in the business. The amount was set pursuant to the sales contract, and Husband was retiring altogether from the practice of dentistry. This is simply a factual scenario that does not lend itself to the same type of analysis as *Moore*.

Notably, Husband had sold the other branch of his practice located in Bluffton, South Carolina, to another dentist, Dr. Farnsworth, in 2009, and Husband ceased practicing in that location. Like the disputed sale in this case, the Farnsworth sales contract called for installment payments and included a goodwill component and covenant not to compete. In the equitable division, Husband and the family court treated the remaining payments as marital property in the form of an account receivable to be evenly divided between Husband and Wife. The amount of the

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[5] Indicators of personal goodwill include:
• Small entrepreneurial business highly dependent on employee-owner's personal skills and relationships.
• No employment agreement between company and employee-owner.
• Personal service is an important selling feature in the company's product or services.
• No significant capital investment in either tangible or identifiable tangible assets.
• Only employee-owners own the company.
• Sales largely depend on the employee-owner's personal relationships with customers.
• Product and/or services know-how and supplier relationships rest primarily with the employee-owner.
Moore, 414 S.C. at 514, 779 S.E.2d at 546.

remaining payments was placed on Husband's side of the ledger in making the equitable distribution. While the handling of the Sea Island Dentistry sale is not governing as to the present dispute, we discern no reason for treating the sale of this practice differently.[6]

One unpublished case from Hawaii dealt with a very similar fact pattern. Although in no way precedential, the court's disposition of the case is instructive. In *Timon v. Timon*, No. 30713, 2014 WL 1003611, at *6 (Haw. Ct. App. March 13, 2014), the husband sold his dental practice pursuant to a mutually approved sales agreement after the parties separated but prior to the equitable distribution of assets. *Id*. The sales agreement attributed a portion of the sales price to personal goodwill, but also stipulated the court was not bound by the allocation of the purchase price. *Id*. The court concluded no evidence supported a finding a portion of the sales price was nonmarital, personal goodwill when the sales agreement did not require the husband to remain active in the dental practice.[7] *Id*. at 7.

> [T]here is nothing in the Dental Sale Agreement that required [the h]usband's continued presence as part of the dental practice that he sold. Indeed, although [the h]usband argues that he helped to transition patients and left his name on the office door for a period of time, he admitted that the Dental Sale Agreement did not obligate

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[6] Husband argues Wife's review of and agreement to the sales contract waived her right to claim the goodwill portion of the sale was not Husband's personal goodwill and nonmarital property. This argument is without merit. The goodwill in the sales contract was not denominated as personal goodwill or otherwise described as nonmarital property. As noted, the proceeds from the very similar Farnsworth sale were treated as marital property, and Wife had no reason to understand this transaction would be treated differently.

[7] As the dissent notes, the sales contract in this case required Husband to be available to assist in transitioning the dental practice for up to sixty days and contained a covenant not to compete. However, the covenant not to compete was a hollow promise in this case as Husband was retiring from the practice of dentistry due to his age and health issues. Additionally, a sixty-day wrap-up period is readily distinguishable from a professional's ongoing, open-ended participation in a professional business.

> him to do such things. Therefore, because there was nothing in the Dental Sale Agreement that required [the h]usband's continued presence related to the dental practice, there is no evidence to support allocating part of the sale to his personal goodwill.

Id.

Likewise, in this case, no evidence supports the conclusion that any of the sales price constituted personal goodwill. Therefore, we conclude the family court erred in not treating the entirety of the sales price as marital property. We remand this matter to the family court so that it may modify the equitable division as necessary to effectuate the agreed upon 50/50 division of marital property.

III. Dissipation of Assets

Wife contends the family court erred in finding she had dissipated marital assets of $246,771.00 by withdrawing this amount from her retirement accounts and deducting this amount from her share of the equitable division. We disagree.

"[A] spouse who removes or secretes marital property in contemplation of divorce is required to either account for it or have some part of its value charged against that spouse's share of the marital property." *Cooksey v. Cooksey*, 280 S.C. 347, 351-52, 312 S.E.2d 581, 584-85 (Ct. App. 1984), *overruled on other grounds by Dawkins v. Dawkins*, 386 S.C. 169, 687 S.E.2d 52 (2010). "[T]here must be some evidence of willful misconduct, bad faith, intention to dissipate marital assets, or the like, before a court may alter the equitable distribution award for such misconduct." *McDavid v. McDavid*, 333 S.C. 490, 496, 511 S.E.2d 365, 368 (1999). "[I]t is not unlawful for spouses to make outright gifts to other[s] during the marriage." *Panhorst v. Panhorst*, 301 S.C. 100, 106, 390 S.E.2d 376, 379 (Ct. App. 1990). However, "cases involv[ing] fraudulent transfers or dissipation of marital assets in contemplation of breakdown of the marriage" are distinguishable from simply "spen[ding] marital funds foolishly or selfishly" or "invest[ing] them unprofitably." *Id*. at 105, 390 S.E.2d at 379.

Wife maintains because Husband failed to prove she acted in bad faith, the family court erred in concluding she dissipated marital funds. Husband and Wife had been having marital problems, centered on Wife's time spent at the Church and

specifically, her contact with Prophet Johnson, since 2012. Wife first saw an attorney about a divorce in December of 2014. As previously discussed, the time for proceeding with her initial divorce action passed and it was dismissed, but the parties never reconciled their differences. Wife again filed for divorce in January of 2017. From 2014 through 2016, Wife withdrew a total of $246,771 from retirement accounts and testified she either donated the money to the Church or used it for living expenses and attorney's fees. Had Wife simply donated money to a charity or organization, she might argue her decision was just foolish or unwise. However, her contributions, without Husband's assent, to the Church where she and Prophet Johnson had access to those funds, supports the family court's determination Wife acted in bad faith. Furthermore, these withdrawals occurred during the period of time the parties were experiencing significant marital discord even though the litigation that finally resulted in their divorce was not filed until 2017. Additionally, Wife was evasive in providing documentation about these accounts in discovery and was inconsistent with her testimony about them at trial. Reviewing the question of dissipation and equitable division de novo, we agree with the family court's findings, and Wife has failed to prove its decision on this issue is against the preponderance of the evidence. Accordingly, we affirm the family court's determination Wife dissipated marital assets and in deducting the amount from the equitable division.

IV. Alimony Reduction

Next, Wife maintains the family court erred in reducing her temporary monthly alimony of $4,000 to a final award of $500 per month. We remand this issue for consideration.

> Per statute, the complete list of factors the family court can consider in setting alimony include: "(1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses and needs of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12)

> prior support obligations; as well as other factors the court considers relevant."

Butler v. Butler, 385 S.C. 328, 338-39, 684 S.E.2d 191, 196 (Ct. App. 2009) (quoting S.C. Code Ann. § 20-3-130(C) (Supp. 2008)).

Wife argues the family court erred in not considering other employment opportunities for Husband beyond practicing dentistry. The record shows the family court made findings relating to the different factors set forth in section 20-3-130. The parties were dividing a sizeable marital estate, approximately $3.1 million, 50/50, both parties received social security benefits, and Wife was receiving income-generating property in the equitable division. Wife's contention the family court should have considered other employment opportunities for Husband is unpersuasive. In *Fuller v. Fuller*, 397 S.C. 155, 164, 723 S.E.2d 235, 240 (Ct. App. 2012), this court reviewed the family court's decision to reduce the wife's alimony award based on a change in circumstances, that being the husband's retirement at age 67. The court concluded the family court's finding regarding a spouse's earning capacity justifying a reduction in alimony could not be based *solely* on the spouse's age. *Id*. The court "decline[d] to adopt a bright-line rule that, where the supporting spouse reaches a particular age, that age alone is sufficient to justify a reduction or termination of alimony. Rather, the court should consider all relevant evidence and determine whether there has been a substantial or material, unanticipated change in circumstances warranting a reduction in a supporting spouse's alimony obligation." *Id*.

In this case, Husband was five years older than the husband in *Fuller*, but more importantly, the family court considered Husband's health issues in finding he had no future earning capacity. His cataracts, tremors, post-traumatic stress disorder, and blood pressure issues all impeded his ability to continue working. Additionally, Husband had no other identifiable education or skills that would allow him to work in another field considering his health limitations. Furthermore, the parties had contemplated during the marriage that Husband would eventually retire and the parties would live on their social security benefits and savings.

In sum, we find the family court did not err in declining to impute income to Husband because he had retired. However, because our decision regarding the goodwill in Husband's dental practice results in a change of the equitable distribution, we remand the overall issue of alimony to the family court for

reconsideration. *See Srivastava v. Srivastava*, 411 S.C. 481, 499 n.6, 769 S.E.2d 442, 452 n.6 (Ct. App. 2015) (acknowledging alimony determinations may warrant remand if the court's decision will alter the equitable distribution between the parties).

V. Attorney's Fees

Finally, Wife argues the family court erred in awarding Husband attorney's fees. We remand this issue for reconsideration.

In deciding whether to award attorney's fees the family court should consider the requirements of *E.D.M. v. T.A.M.*: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living." 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). As to the amount of an attorney's fee award, the family court should consider the requirements of *Glasscock v. Glasscock*: "(1) the nature, extend, and difficulty of the case; (2) the time necessarily devoted. to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." 304 S.C. 158, 161, 403 S.E. 2d 313, 315 (1991). Additionally, South Carolina courts have upheld an attorney's fees award, simply on the basis of misconduct by one party during the course of the litigation. *See Spreeuw v. Barker*, 385 S.C. 45, 72-73, 682 S.E.2d 843, 857 (Ct. App. 2009); *see also Taylor v. Taylor*, 333 S.C. 209, 220, 508 S.E.2d 50, 56 (Ct App. 1998).

In this case, the family court ordered Wife to pay $25,000 of Husband's attorney's fees. It determined Wife had ample resources to pay a portion of his fees, and Wife's retention of numerous attorneys and lack of cooperation in discovery warranted the award in that amount. However, the family court also found Husband prevailed on essentially all of the contested issues in the case including determining the goodwill in Husband's dental practice was nonmarital, Wife's dissipation of assets, and the reduction in alimony from the temporary order. Because we reverse the family court on the goodwill issue, the calculus changes somewhat with regard to the level of beneficial results achieved by Husband's counsel. Therefore, we remand the attorney's fee issue for consideration by the family court as well. *See Srivastava*, 411 S.C. 499 n.6, 769 S.E.2d at 452 n.6

(acknowledging attorney's fees determination may warrant remand if the court's decision will alter the beneficial results obtained).

CONCLUSION

We affirm the family court's denial of Wife's motion for continuance and its finding as to Wife's dissipation of funds. We reverse the family court's finding the goodwill component of the sale of Husband's dental practice was a nonmarital asset and hold it is part of the marital estate. Therefore, we remand this matter to the family court to modify the equitable division as necessary to effectuate the agreed upon 50/50 division of marital property. Additionally, we remand the issues of alimony and attorney's fees in light of our other holdings herein.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEWITT, J., concurs.

HILL, J., concurring in part and dissenting in part:

I concur in the majority opinion except as to the goodwill (Section II) and alimony (Section IV) issues. With respect, I diverge from the majority on these two issues because I would affirm the trial court's finding that Husband's interest in his Ridgeland dental practice was personal goodwill not subject to equitable division. As the majority well states, the dental practice had many of the characteristics of personal goodwill as set forth in *Moore v. Moore*, 414 S.C. 490, 779 S.E.2d 553 (2015). The fact that the practice was sold after the filing of the marital litigation did not alter those characteristics. It bears mentioning the sales contract obligated Husband to continue in the practice for sixty days to assist with the transition. Husband also had to sign a five year covenant not to compete. In fact, the sales contract states Husband was paid $424,140 of the purchase price "as the consideration for the Goodwill and the Restrictive Covenant." We have held covenants not to compete are not marital property, even when they accompany the sale of a marital asset. *Ellerbe v. Ellerbe*, 323 S.C. 283, 292, 473 S.E.2d 881, 886 (Ct. App. 1996). Importantly, the sales contract was structured so as to acknowledge that the goodwill was owned and being sold by Husband individually, whereas the other assets of the practice were owned and sold by his professional association. While the majority is correct that Husband was retiring from practice, that weighs in favor of his claim that the goodwill portion of the

sales amount represented his potential post-divorce future earnings. How the parties treated the proceeds of the earlier sale of Husband's other dental practice location does not change the goodwill analysis. The parties may have had many reasons to treat the sales differently.

Goodwill in professional dental practices like Husband's has always been classified as personal, non-marital property. *See Dickert v. Dickert*, 387 S.C. 1, 6–7, 691 S.E.2d 448, 450–51 (2010); *Donahue v. Donahue*, 299 S.C. 353, 359–60, 384 S.E.2d 741, 744–45 (1989). Like *Moore*, these decisions did not hinge on whether the business was still an ongoing concern at the time of trial.

Like the majority, I would reverse and remand the alimony issue. But I would remand so the trial court could consider Husband's income from the goodwill proceeds in fashioning a fair and equitable alimony award. Although the trial court was correct in ruling Wife had no right to any share of the $424,140 in goodwill and restrictive covenant proceeds Husband realized, the proceeds should have been considered in the alimony analysis.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tyrin S. Young, Sr., Individually, as PR of the Estates of Tyrin Young, Jr. and Micah A. Young and as Legal Guardian of J.Y, a minor under the age of 14, Appellant,

v.

USAA General Indemnity Company, Respondent.

Appellate Case No. 2019-000009

Appeal From Greenville County
Perry H. Gravely, Circuit Court Judge

Opinion No. 5899
Heard November 10, 2021 – Filed March 9, 2022

REVERSED AND REMANDED

Richard K. Allen, III, and Russell F. Guest, both of Guest & Brady, LLC, of Greenville, for Appellant.

Julie Coleman Hunter, of Clawson & Staubes, LLC, of Columbia, and Patrick L. Still, III, of Clawson & Staubes, LLC, of Greenville, both for Respondent.

HEWITT, J.: A South Carolina statute mandates that insurance contracts covering "property, lives, or interests in this State are considered to be made in the State." S.C. Code Ann. § 38-61-10 (2015). This case calls on us to decide whether the

statute applies to a particular California automobile policy. We find it does and reverse the circuit court's decision to the contrary.

The circuit court found the statute did not apply because the policy's principal purpose was to insure a vehicle that had not been to South Carolina for several years. Even though the vehicle had been absent from this State for a long time, the policy also insured lives and interests here—there was more to it than liability coverage for a car. For that reason, we reverse the grant of summary judgment to USAA General Indemnity Company (USAA).

FACTS

The background is somewhat complicated because the policy was issued to a military household that moved several times. This dispute stems out of a tragic wreck that occurred while Kamika Young was driving in South Carolina in 2015. She and her three children were living in South Carolina and had their legal residence here. Two of the children did not survive the wreck. The wreck occurred while Mrs. Young and her children were travelling in a vehicle the family owned.

The vehicle was taxed and titled in South Carolina. The USAA insurance policy noted the vehicle was "principally garaged" in South Carolina. The policy was designated a "South Carolina Auto Policy."

Mr. Young (the plaintiff here) was also a legal resident of South Carolina, but the wreck happened while he was deployed to Guam. He had the Young family's other vehicle with him. That vehicle—though located in Guam—was insured by USAA under a policy listing the vehicle as principally garaged in California. The Young family had lived in California shortly before Mr. Young's deployment. Even so, the vehicle was taxed and titled in South Carolina. Also, the policy's "California Evidence of Financial Responsibility" listed Mrs. Young and her South Carolina address as the name and address of the insured.

Mr. and Mrs. Young are from South Carolina and were married here. The parties stipulated that Mr. Young always considered himself a citizen and resident of South Carolina even though he was stationed in other states while in the Navy. The parties also stipulated that the Youngs paid their income taxes in South Carolina regardless of where they were living and that Mrs. Young and the children were physically residing in South Carolina at the time of the wreck. Mrs. Young and the children moved back to South Carolina from California only a few months before the wreck.

They moved in anticipation of Mr. Young's deployment to Guam. The deployment was slated to last for two years.

The California policy does not contain Underinsured Motorist (UIM) coverage in a form that South Carolina's statutory law would recognize. Our insurance code explains that UIM provides coverage when the insured suffers damages that exceed the liability limits of the at-fault motorist. S.C. Code Ann. § 38-77-160 (2015 & Supp. 2020). The California policy includes a coverage titled "uninsured motorist" coverage that also applies in some *under*insured situations, but not all.

Mrs. Young was at fault in the 2015 wreck, and USAA paid Mr. Young the liability and UIM limits for the vehicle Mrs. Young was driving. Mr. Young claims damages exceeding the funds already paid. USAA has declined to pay the Youngs any benefits under the California policy, citing the policy's language.

The Youngs brought this suit seeking a declaration that the California policy insured property, lives, or interests in South Carolina. The circuit court granted USAA's motion for summary judgment, emphasizing that though the vehicle in Guam had "financial ties" to South Carolina, it was clear the vehicle was not involved in the wreck and had not been to South Carolina for several years.

ANALYSIS

The standard of review for a summary judgment is familiar and need not be repeated here. More importantly, there are no factual disputes in the case as it comes to us. The issue is the purely legal one of whether the circuit court correctly concluded the California policy did not insure property, lives, or interests in South Carolina. We review legal issues de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

We mentioned the key statute at the beginning—section 38-61-10. It says an insurance contract is considered made in South Carolina if the contract insures lives, property, or interests here. Our supreme court has explained the statute reflects the Legislature's policy judgment that insurance contracts meeting the statute should be subject to South Carolina's insurance laws. *Johnston v. Com. Travelers Mut. Acc. Ass'n of Am.*, 242 S.C. 387, 392-93, 131 S.E.2d 91, 94 (1963). Policyholders need not be South Carolina citizens—the court has said the key fact is "where the property, lives, or interests insured are located." *Sangamo Weston, Inc. v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) (statute applied to policy

covering manufacturing facility in South Carolina). Still, the court has emphasized the statute reflects South Carolina's "manifest" interest in protecting the rights of its citizens. *Johnston*, 242 S.C. at 393, 131 S.E.2d at 94.

This case is controlled by the fact that the California policy provided more than just liability coverage for a vehicle that was physically located in Guam. In addition to the car, the California policy insured the Young family. The policy provided uninsured (UM) motorist coverage protecting each of the Youngs, regardless of whether they were occupying the insured vehicle. This coverage allowed the Youngs to recover damages from USAA for bodily injury caused by an uninsured motorist. This tracks a principle that is familiar to South Carolinians experienced with insurance laws: liability coverage follows the vehicle, but UM and UIM follow the insured. *See Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007) (recognizing this general rule).

The Youngs were South Carolina citizens, and four of them—Mrs. Young and the three children—were physically residing in South Carolina at the time of the wreck. There are exclusions in the California policy reducing the availability of UM coverage in various circumstances, but still, the fact that the California policy insured Mrs. Young and her children while they were living in South Carolina means the statute is satisfied. The statute is triggered when an insurance policy covers lives and interests here, and there is no doubt this policy did so.

The circuit court emphasized that the California policy covered a vehicle that was not involved in the wreck and that had not been to South Carolina in several years. USAA focuses on the same thing here.

The point is fair, but we think a hypothetical shows why it does not undercut our ruling. Imagine a case with the same facts, except the vehicle located in Guam is covered by a South Carolina policy rather that a California one. Unless the Youngs validly rejected UIM, they would be able to "stack" until they had exhausted all available coverage or recovered all of their damages. *See Burgess*, 373 S.C. at 41-42, 644 S.E.2d at 42-43 *and S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 444-46, 405 S.E.2d 396, 397-98 (1991) (UIM statute does not allow prohibitions on stacking except in situations not relevant here). The vehicle's location would not defeat the fact that the policy was a South Carolina policy. This points us right back to the statute, which says an insurance policy is a South Carolina policy as long as it insures lives or interests here.

The circuit court also compared this to situations where the vehicle's sole connection to South Carolina was that the wreck occurred here. *See, e.g., Bowman v. Cont'l Ins. Co.*, 229 F.3d 1141 (4th Cir. 2000) (Georgia resident with Georgia policy involved in wreck in South Carolina). The comparison does not hold. This policy insured a vehicle that was registered in South Carolina, taxed in South Carolina, and owned by a South Carolina citizen. More importantly, the policy also covered lives and interests in South Carolina, as described above.

The dissent focuses on the policy's property coverage, but that coverage is not in play here, and the statute does not ask us to look at which of several coverages may have been the "main" one the policy insured. The statute applies to policies covering property, lives, or interests in South Carolina. We must give meaning to all of those terms, not just some of them. And while we appreciate that some federal decisions have endeavored to apply this statute to complicated facts, those decisions do not bind us, and none of them are fairly comparable to the situation here. *See, e.g., Russell v. McGrath*, 135 F. Supp. 3d 427, 432 (D.S.C. 2015) (explaining the court would not "convert the automobile insurance policy of every out-of-state student at each of our in-state universities" even though doing so would potentially protect South Carolina citizens).

Finally, it bears repeating that this case is light years different from the cases where a "subject" of the insurance contract—the lives, property, or interests—just happened to be in South Carolina when the incident triggering coverage occurred. We will grant that this policy said it covered a vehicle garaged in California (even though it was to be in Guam for two years), but it was a South Carolina vehicle, owned by South Carolina residents, and several of them were *in fact* living here when they were injured. If the key question is whether South Carolina has a substantial connection to this policy, we think the answer is plainly "yes."

CONCLUSION

We reverse the summary judgment granted to USAA. The case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

HILL, J., concurs.

KONDUROS, J., dissenting: While recognizing the tragic circumstances of this case, my analysis of the applicable statute and relevant case law leads me to the

conclusion section 38-61-10 does not apply to the California policy covering the vehicle in Guam, a Kia Spectra (the Kia policy). Therefore I respectfully dissent.

As explained by the majority, Tyrin Young was an active member of the United States Navy. He and his wife, Kamika, had three young children. While stationed in California, Tyrin secured a California USAA insurance policy on a 2006 Kia Spectra and a California USAA insurance policy on a 2002 Ford Expedition. In mid-2014, Kamika and the children returned to Greenville where the couple was originally from to be close to family. While in Greenville, Kamika drove the family's Expedition, and the Youngs changed the Expedition policy to a South Carolina USAA insurance policy. Tyrin remained in California for a few months pending his upcoming transfer to Guam. He took the Kia with him to Guam and did not change its insurance policy. The accident involving the Expedition occurred in August of 2015.

USAA tendered the insurance proceeds under the South Carolina policy covering the Expedition. Tyrin then filed a declaratory judgment action seeking a ruling the Kia policy should be subject to South Carolina law pursuant to section 38-61-10. Under South Carolina law, the Kia policy would be reformed to include UIM coverage[1] and would permit that UIM coverage to be stacked even though California law prohibits stacking.[2]

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[1] South Carolina law requires all insurers to make a meaningful offer of UIM coverage. If such offer was not made, the policy will be reformed to provide UIM coverage. *See Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 349, 608 S.E.2d 569, 571 (2005) ("If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." (quoting *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996)).

[2] California statute states:

> Regardless of the number of vehicles involved[,] whether insured or not, persons covered, claims made, premiums paid or the number of premiums shown on the policy, in no event shall the limit of liability for two or more motor vehicles or two or more policies be added together,

The Kia was purchased, titled, and taxed in South Carolina. The Kia was originally insured under a South Carolina policy. Once the parties moved to Virginia in 2008, the Kia was not physically present in South Carolina again, and Tyrin sold it after the accident while still stationed in Guam. Both Tyrin and Kamika were born in and graduated from high school in South Carolina and held South Carolina driver's licenses. They only left South Carolina as a result of Tyrin's service in the military, and both considered South Carolina to be their permanent residence.

Tyrin argued the Kia had sufficient contacts with South Carolina to bring the Kia policy within the confines of the statute or in the alternative, the Kia policy insured lives and interests in South Carolina. The circuit court determined the Kia did not constitute "property, lives, or interests in this State" because the Kia had not physically been present in the state since 2008 or 2009. The circuit court further concluded any additional analysis regarding the contacts with South Carolina was unnecessary. Tyrin appealed that ruling to this court.

The majority asserts the Kia policy falls within the parameters of section 38-61-10 because it insures lives and interests in South Carolina. While I appreciate the majority's viewpoint, I struggle to reconcile this position with what I view as the plain language of the statute. The statute applies to "contracts of insurance *on* property, lives, *or* interests in this [s]tate." S.C. Code Ann. §38-61-10 (emphases added). The disjunctive "or" as used in the statute is important in analyzing this case. The word "or" indicates we should evaluate the statute's application to property, lives, or interests separately. *See Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) ("The word 'or' used in a statute, is a disjunctive particle that marks an alternative. The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both." (citations omitted)). While an automobile policy incidentally benefits the lives of drivers and passengers in automobiles, to construe it as "a contract of

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> combined, or stacked to determine the limit of insurance coverage available to injured persons.

Cal. Civ. Code § 11580.2(q).

insurance *on . . . lives*," is strained.[3] *See Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (noting the words of a statute "must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand its operation").

The majority's interpretation of the statute essentially ignores the property component of the Kia policy. The seminal case interpreting and discussing the application of section 38-61-10 is *Sangamo Weston, Inc. v. Nat'l Sur. Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992). That case involved an insurance policy on a manufacturing facility in South Carolina. *Id*. at 146, 307 S.E.2d at 129. When the court stated "insuring property, lives *and* interests in South Carolina constitutes a significant contact with this state," it had already recognized the subject property was located in South Carolina and therefore the property policy touched lives and interests in the state as well. *Id*. at 149, 307 S.E.2d at 131. As *Sangamo Weston* indirectly acknowledged, a property policy may be viewed as covering more than just property. However, to evaluate the Kia policy as one *on lives* while ignoring the status of the property that gave rise to the contract is, in my opinion, ill-conceived. I do not believe the General Assembly intended to interfere to that degree with another state's management of its insurance scheme in the interest of protecting South Carolina citizens.[4] Therefore, I believe the only reasonable

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[3] In *Heslin-Kim v. CIGNA Group Insurance*, 377 F. Supp. 2d 527, 532 (D.S.C. 2005), the court concluded section 38-61-10 governed a Georgia *life insurance policy* when the insured was a seven-year resident of South Carolina, died in South Carolina and lived and paid premiums in South Carolina for seven years prior to his death, and his estate was probated in South Carolina.

[4] *Johnston v. Commercial Travelers Mutual Accident Ass'n of America*, 242 S.C. 387, 393, 131 S.E.2d 91, 94 (1963), suggests the burgeoning mail order insurance business was the impetus for such legislation to prevent South Carolina citizens from securing insurance on their property, lives, or interests, only to have another state's law apply solely because the contract was formed outside the state. The opinion noted "[i]n recent years there has been a tremendous growth in mail order insurance business. Many companies doing business in this manner maintain an office and own property only in the state where they are incorporated but insure risks on a nationwide basis." *Id*. (quoting *Ross v. Am. Income Life Ins. Co.*, 232 S.C. 433, 436, 102 S.E.2d 743, 744 (1958)).

interpretation of section 38-61-10 is that the Kia policy is a policy on property that indirectly insures lives and interests in the limited context of automobile accidents.

Because I view the Kia policy as one on property, I would examine the issue from that perspective to see if section 38-61-10 might yet apply. In other words, is the Kia policy a contract on property *in this state*? As already mentioned, the seminal case interpreting and discussing the application of section 38-61-10 is *Sangamo Weston*. Sangamo Weston owned a manufacturing facility located in South Carolina. *Id.* at 146, 414 S.E.2d at 129. The insurance policy covering the facility was formed outside South Carolina and none of the parties were South Carolina citizens. *Id.* at 147, 414 S.E.2d at 129. The court determined section 38-61-10 applied concluding, "under [38-61-10] it is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. *What is solely relevant is where the property, lives, or interests insured are located*." *Id*. at 149, 414 S.E.2d at 130 (emphasis added). Then, the court addressed the constitutionality of the statute and noted the pertinent inquiry is whether "a significant contact or significant aggregation of contacts" with South Carolina exists. *Id*. at 149, 414 S.E.2d at 131.

Tyrin argues the contacts with South Carolina in this case are so numerous section 38-61-10 should apply. I agree with the contention that the cases analyzing section 38-61-10 in the context of an automobile policy focus heavily on contacts. For example, *Russell v. McGrath*, 135 F. Supp. 3d 427 (D.S.C. 2015), involved an automobile accident in South Carolina. The driver was a University of South Carolina student, Brian. *Id*. at 428-29. Brian was a Connecticut citizen, driving a car tagged, taxed, and insured in Florida and owned by his parents who owned a home in Florida. *Id*. at 429. The court, referencing *Sangamo Weston*, noted, "A Florida vehicle driven by a Connecticut citizen is fundamentally different than a South Carolina manufacturing facility or the life of a South Carolina citizen." *Id*. at 432. In declining to reform the Florida policy, the court explained,

> In late 2008, during Brian's sophomore year, his parents purchased a second home in Florida. At the time, they also purchased the Dodge sedan for Brian. They purchased the vehicle in Florida from a Florida dealer. The vehicle was registered in the state of Florida with a Florida license plate. Evelyn [Brian's mother] paid taxes on the vehicle in the state of Florida. The Liberty policy

> was sold to Evelyn, the named insured, through a Florida sales office for a vehicle primarily garaged in Florida. Liberty mailed the policy to Evelyn at her residence in Connecticut.
>
> At the time of his death, Brian was a citizen of the state of Connecticut. His estate was probated there in the Fairfield Probate District. Brian's voter registration card was issued in the state of Connecticut. Brian was licensed to drive by the state of Connecticut. His parents paid out of state tuition to the University of South Carolina every semester he was there. Brian never owned property, paid taxes, nor was employed in the state of South Carolina. According to Evelyn, he planned to return home to Connecticut following the completion of his education.

Id. at 429.

The *Russell* court did not discuss at length the physical location of the vehicle. However, the automobile had a regular and significant physical presence in South Carolina even though that presence was not sufficient in and of itself to warrant reformation of the policy. *See id*. at 432 (recognizing the vehicle in question was in South Carolina when Brian attended classes during the fall and spring semesters and at the time of the accident).

The *Russell* opinion relied in large part on a prior unpublished opinion considering an automobile policy, *Yeager v. Allstate Ins. Co.*, No. 9:09-860-MBS, 2010 WL 680429 (D.S.C. Feb. 23, 2010). In *Yeager*, the policy involved was a Georgia policy issued to a Georgia resident who resided part-time in South Carolina at her boyfriend's residence, worked as a bookkeeper for clients in South Carolina, and filed South Carolina income taxes. *Id*. at *1. She was driving from a client's business in Beaufort County, South Carolina, to her boyfriend's home, when the accident occurred. *Id*. Again, the court focused heavily on contacts with South Carolina. *Id*. at *5. Just as in *Russell*, the car was physically located in South Carolina at the time of the accident and had a significant physical presence in South Carolina overall. Again, the court concluded section 38-61-10 did not apply.

After examining these and other cases, I am not persuaded the Kia constitutes property in South Carolina. Mere physical presence of a vehicle in South Carolina at the time of the accident is insufficient to trigger section 38-61-10.[5] Under *Russell* and *Yeager v. Allstate*, part-time physical presence is also insufficient in the absence of substantial other contacts. In the present case, contacts with South Carolina are significant. However, the complete and total absence of the Kia in South Carolina is not immaterial. The focus on contacts is a part of the overall analysis in determining whether 38-61-10 applies and whether its application runs afoul of the Constitution. *See Sangamo Weston*, 307 S.C. at 149, 414 S.E.2d at 131 (discussing the need for contacts to be significant in order for the application of a state's choice of law provisions to be neither arbitrary nor fundamentally unfair). However, a contacts analysis cannot completely displace the location requirement as would be the case here.

As the majority notes, the legislature's intent with section 38-61-10 is to protect the rights of South Carolina citizens, which would include the Young family. *See Heslin-Kim*, 377 F. Supp. 2d at 531-32 ("The South Carolina Supreme Court has emphasized that South Carolina's statutory choice-of-law provision applicable to contracts of insurance on property, lives, and interests located within the state was intended to further South Carolina's interest in protecting the rights of its citizens." (quoting *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 135 F.3d 750, 754 (11th Cir. 1998))). However, the desire to protect the interests of citizens cannot supplant the plain language of the statute as written or the case law interpreting it. *See Russell*, 135 F. Supp. 3d at 432-33 ("While not unsympathetic to the fact that [converting a Florida policy to a South Carolina policy] may serve to protect the interests of South Carolina citizens—such as the three passengers killed in [the accident]—this [c]ourt must nevertheless defer that decision to the South Carolina General Assembly.").

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[5] *See Unisun Ins. Co. v. Hertz Rental Corp*., 312 S.C. 549, 552 n.1, 436 S.E.2d 182, 184 n.1 (Ct. App. 1993) (indicating section 38-61-10 would not be triggered with respect to a policy formed in New York, covering a New York rental car, and driven by a New York citizen even though the accident at issue occurred in South Carolina); *Yeager v. Md. Cas. Co.*, 868 F. Supp. 141, 144 (D.S.C. 1994) ("The mere fact that the accident and resulting lawsuit occurred here is insufficient to trigger the application of South Carolina law to [the p]laintiff's bad faith claim.").

I note this case involves a military family. According to the record, the only reason the Kia was *not* physically present in South Carolina was because of Tyrin's military assignments. However, the statute as written does not allow for an exception on that basis. Based on all of the foregoing, I would affirm the circuit court's grant of summary judgment in favor of USAA.[6]

[6] I decline to address Tyrin's second issue regarding the prematurity of summary judgment as my proposed disposition of the prior issue would be dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).