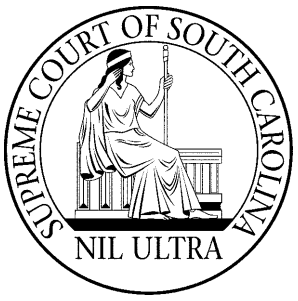

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
January 25, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

None

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5951 – State v. Xzariera O. Gray	Pending	
5954 – State v. Rashawn Carter	Pending	
5955 – State v. Philip Guderyon	Pending	
5956 – Trident Medical v. SCDHEC (Medical University)	Pending	
5957 – SCDSS v. Brian Frank	Pending	
5960 – State v. Kenneth Lamont Robinson, Jr.	Pending	
2022-UP-402 – Todd Olds v. Berkeley County	Pending	
2022-UP-417 – Jeane Whitfield v. Dennis K. Schimpf, M.D.	Denied	01/20/2023
2022-UP-422 – Paula Russell v. Wal-Mart Stores, Inc.	Pending	
2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour	Pending	
2022-UP-432 – State v. Shi H. R. Price	Denied	01/19/2023
2022-UP-436 – Cynthia Holmes v. James Holmes	Pending	
2022-UP-437 – Nicholas Thompson v. Bluffton Township Fire District	Pending	
2022-UP-439 – Jerry Powers v. Rizan Properties, LLC	Denied	01/20/2023
2022-UP-440 – Jerry Powers v. Rizan Properties, LLC (2)	Denied	01/20/2023
2022-UP-442 – Hardy Lanier #381975 v. SCDC	Pending	
2022-UP-444 – State v. James H. Baldwin	Pending	
2022-UP-449 – State v. Michael L. Williams	Denied	01/20/2023
2022-UP-450 – State v. Melvin J. White	Denied	01/20/2023

2022-UP-451 – State v. Brian N. White Denied 01/20/2023

2022-UP-452 – In the Matter of Kevin Wright Denied 01/20/2023

2022-UP-455 – In the Matter of the Estate of Herbert Franklin Dickson, Jr. Pending

2022-UP-462 – Karrie Gurwood and Howard Gurwood v. GCA Services, Inc. Pending

2023-UP-005 – David Abdo v. City of Charleston Pending

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5824 – State v. Robert Lee Miller, III Pending

5826 – Charleston Development v. Younesse Alami Pending

5832 – State v. Adam Rowell Pending

5834 – Vanessa Williams v. Bradford Jeffcoat Pending

5839 – In the Matter of Thomas Griffin Pending

5843 – Quincy Allen #6019 v. SCDC Pending

5846 – State v. Demontay M. Payne Pending

5849 – SC Property and Casualty Guaranty Fund v. Second Injury Fund Pending

5855 – SC Department of Consumer Affairs v. Cash Central Pending

5856 – Town of Sullivan's Island v. Michael Murray Pending

5858 – Beverly Jolly v. General Electric Company Pending

5860 – Kelaher, Connell & Conner, PC v. SCWCC Pending

5871 – Encore Technology Group, LLC v. Keone Trask and Clear Touch	Pending
5877 – Travis Hines v. State	Pending
5882 – Donald Stanley v. Southern State Police	Pending
5892 – State v. Thomas Acker	Pending
5898 – Josie Bostick v. Earl Bostick, Sr.	Pending
5900 – Donald Simmons v. Benson Hyundai, LLC	Pending
5903 – State v. Phillip W. Lowery	Pending
5905 – State v. Richard K. Galloway	Pending
5907 – State v. Sherwin A. Green	Pending
5912 – State v. Lance Antonio Brewton	Pending
5914 – State v. Tammy D. Brown	Pending
5915 – State v. Sylvester Ferguson, III	Pending
5921 – Cynthia Wright v. SCDOT	Pending
5922 – State v. Olandio R. Workman	Pending
5923 – Susan Ball Dover v. Nell Ball	Pending
5925 – Patricia Pate v. College of Charleston	Pending
5926 – Theodore Wills v. State	Pending
5930 – State v. Kyle M. Robinson	Pending
5931 – Stephen R. Edwards v. Scapa Waycross, Inc.	Pending
5932 – Basildes Cruz v. City of Columbia	Pending

5934 – Nicole Lampo v. Amedisys Holding, LLC	Pending
5935 – The Gulfstream Café v. Palmetto Industrial	Pending
5943 – State v. Nicholas B. Chhith-Berry	Pending
2021-UP-230 – John Tomsic v. Angel Tomsic	Pending
2021-UP-242 – G. Allen Rutter v. City of Columbia	Pending
2021-UP-252 – Betty Jean Perkins v. SCDOT	Pending
2022-UP-274 – SCDSS v. Dominique G. Burns	Pending
2021-UP-277 – State v. Dana L. Morton	Pending
2021-UP-280 – Carpenter Braselton, LLC v. Ashley Roberts	Pending
2021-UP-281 – In the Matter of the Estate of Harriet Kathleen Henry Tims	Pending
2021-UP-288 – Gabriel Barnhill v. J. Floyd Swilley	Pending
2021-UP-396 – State v. Matthew J. Bryant	Pending
2021-UP-418 – Jami Powell (Encore) v. Clear Touch Interactive	Pending
2022-UP-028 – Demetrius Mack v. Leon Lott (2)	Pending
2022-UP-033 – E.G. and J.J. v. SCDSS	Pending
2022-UP-051 – Ronald I. Paul v. SCDOT (2)	Pending
2022-UP-081 – Gena Davis v. SCDC	Pending
2022-UP-085 – Richard Ciampanella v. City of Myrtle Beach	Pending
2022-UP-089 – Elizabeth Lofton v. Berkeley Electric Coop. Inc.	Pending

2022-UP-095 – Samuel Paulino v. Diversified Coatings, Inc.	Pending
2022-UP-097 – State v. Brandon K. Moore	Pending
2022-UP-113 – Jennifer McFarland v. Thomas Morris	Pending
2022-UP-114 – State v. Mutekis J. Williams	Pending
2022-UP-118 – State v. Donald R. Richburg	Pending
2022-UP-119 – Merilee Landano v. Norman Landano	Pending
2022-UP-161 –Denis Yeo v. Lexington Cty. Assessor	Pending
2022-UP-163 – Debi Brookshire v. Community First Bank	Pending
2022-UP-170 – Tony Young v. Greenwood Cty. Sheriff's Office	Pending
2022-UP-175 – Brown Contractors, LLC v. Andrew McMarlin	Pending
2022-UP-180 – Berkley T. Feagin v. Cambria C. Feagin	Pending
2022-UP-183 – Raymond A. Wedlake v. Scott Bashor	Pending
2022-UP-184 – Raymond Wedlake v. Woodington Homeowners Assoc.	Pending
2022-UP-189 – State v. Jordan M. Hodge	Pending
2022-UP-192 – Nivens v. JB&E Heating & Cooling, Inc.	Pending
2022-UP-197 – State v. Kenneth W. Carlisle	Pending
2022-UP-230 – Estate of Patricia Royston v. Hunt Valley Holdings	Pending
2022-UP-205 – Katkams Ventures, LLC v. No Limit, LLC	Pending
2022-UP-207 – Floyd Hargrove v. Anthony Griffis, Sr.	Pending

2022-UP-209 – The State v. Dustin L. Hooper Pending

2022-UP-213 – Dr. Gregory May v. Advanced Cardiology Pending

2022-UP-214 – Alison Meyers v. Shiram Hospitality, LLC Pending

2022-UP-228 – State v. Rickey D. Tate Pending

2022-UP-229 – Adele Pope v. Estate of James Brown (3) Pending

2022-UP-236 – David J. Mattox v. Lisa Jo Bare Mattox Pending

2022-UP-239 – State v. James D. Busby Pending

2022-UP-243 – In the Matter of Almeter B. Robinson (2) Pending

2022-UP-245 – State v. John Steen d/b/a John Steen Bail Bonding Pending

2022-UP-251 – Lady Beaufort, LLC v. Hird Island Investments Pending

2022-UP-252 – Lady Beaufort, LLC v. Hird Island Investments (2) Pending

2022-UP-253 – Mathes Auto Sales v. Dixon Automotive Pending

2022-UP-255 – Frances K. Chestnut v. Florence Keese Pending

2022-UP-256 – Sterling Hills v. Elliot Hayes Pending

2022-UP-269 – Steven M. Bernard v. 3 Chisolm Street Pending

2022-UP-270 – Latarsha Docena-Guerrero v. Government Employees Insurance Pending

2022-UP-274 – SCDSS v. Dominique G. Burns Pending

2022-UP-276 – Isiah James, #096883 v. SCDC (2) Pending

2022-UP-282 – Roger Herrington, II v. Roger Dale Herrington Pending

2022-UP-294 – Bernard Bagley #175851 v. SCDPPPS (2) Pending

2022-UP-296 – SCDOR v. Study Hall, LLC Pending

2022-UP-298 – State v. Gregory Sanders Pending

2022-UP-303 – Daisy Frederick v. Daniel McDowell Pending

2022-UP-305 – Terri L. Johnson v. State Farm Pending

2022-UP-307 – Frieda H. Dortch v. City of Columbia Pending

2022-UP-308 – Ditech Financial, LLC v. Kevin Snyder Pending

2022-UP-309 – State v. Derrick T. Mills Pending

2022-UP-312 – Guardian ad Litem, James Seeger v. Richland School Dt. Pending

2022-UP-314 – Ronald L. Jones v. Rogers Townsend & Thomas, P.C. Pending

2022-UP-316 – Barry Adickes v. Phillips Healthcare (2) Pending

2022-UP-319 – State v. Tyler J. Evans Pending

2022-UP-320 – State v. Christopher Huggins Pending

2022-UP-321 – Stephen Franklin II v. Kelly Franklin Pending

2022-UP-331 – Ex parte: Donald Smith (In re: Battersby v. Kirkman) Pending

2022-UP-333 – Ex Parte: Beaullah and James Belin Pending

2022-UP-334 – Anthony Whitfield v. David Swanson Pending

2022-UP-337 – U.S. Bank, N.A. v. Rhonda Lewis Meisner (3) Pending

2022-UP-354 – Chicora Life Center v. Fetter Health Care Network Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Misty A. Morris, Claimant,

v.

BB&T Corporation, d/b/a BB&T Bank, Employer, and Hartford Accident & Indemnity Co., Carrier,

IN RE: Attorney's Fee Petition of David Proffitt, Petitioner,

v.

South Carolina Workers' Compensation Commission, Respondent.

Appellate Case No. 2020-001494

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 28131
Heard February 2, 2022 – Filed January 25, 2023

REVERSED AND REMANDED

Robert David Proffitt, of Proffitt & Cox, LLP, of Columbia, Petitioner.

Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA; James Keith Roberts, both of Columbia, for Respondent.

JUSTICE FEW: The workers' compensation commission dismissed an appeal to its appellate panel because the attorney filing the appeal missed a deadline for his brief. The commission refused to reinstate the appeal even after the attorney explained he made an innocent calendaring mistake, and then the commission refused to reconsider its decision. In all three instances, the commission gave no explanation of its decision; it simply issued a form order with blanks checked indicating the commission's action. We reverse the commission's decision refusing to reinstate the appeal and remand to the appellate panel for consideration of the appeal on the merits.

Attorney David Proffitt represented Misty A. Morris in her 2016 workers' compensation claim against BB&T Corporation. After settling her claim, Proffitt filed a Form 61—"Attorney Fee Petition"—with the commission seeking approval of his contingent attorney's fee in the amount of $36,633.33, along with costs in the amount of $5,134.10. Commissioner Susan S. Barden approved attorney's fees in the amount of $24,641.04 and all of the costs, but denied attorney's fees for the amount the settlement agreement allocated to future medical expenses. Proffitt filed a Form 30—"Request for Commission Review"—appealing Commissioner Barden's order to an appellate panel.

A member of the commission's staff issued a Form 31—"Briefing Schedule and Appellate Hearing"—setting the due date for Proffitt's brief as January 16, 2018.[1] After Proffitt failed to file his brief by January 16, the "judicial director" of the commission dismissed the appeal by administrative order pursuant to regulation 67-705(H)(3) of the South Carolina Code of Regulations (2012). Proffitt then filed a "Motion to Reinstate" the appeal arguing his calendaring mistake constituted "good cause." *See* S.C. Code Ann. Regs. 67-705(H)(4) ("An appeal administratively dismissed . . . may be reinstated for a good cause . . . ."). In the motion, Proffitt

[1] The Form 31 listed the filing date for Proffitt's brief as January 14, 2018. However, January 14 was a Sunday and January 15 was a holiday. Therefore, the actual filing deadline was January 16, 2018.

admitted he had not calendared the deadline correctly and explained he thus wrongly believed the due date for filing his brief was January 31. He apologized to the commission for the delay. A commissioner denied Proffitt's motion without explanation. The same commissioner later denied Proffitt's "Motion for Rehearing," again without any explanation.

The court of appeals affirmed in an unpublished opinion. *Morris v. BB&T Corp.*, Op. No. 2020-UP-235 (S.C. Ct. App. *withdrawn, substituted, and refiled* Nov. 4, 2020). We granted Proffitt's petition for a writ of certiorari to review the court of appeals' decision. We reverse.

We cannot better explain our reasoning for reversal than the court of appeals itself explained in a different case, decided approximately a year after it decided this case. *See Jordan v. Hartford Fin. Grp., Inc.*, 435 S.C. 501, 868 S.E.2d 400 (Ct. App. 2021) (explaining "the commission's summary denial of [a] motion to reinstate without rational analysis of the good cause standard was arbitrary and an abuse of discretion," 435 S.C. at 507, 868 S.E.2d at 403, and reinstating the appeal). At oral argument before this Court, Justices questioned counsel for the commission as to how *Jordan* does not resolve the question before us here. Counsel responded by arguing the commission made a discretionary decision and this Court should defer to the commission's decision. We publish this decision to clarify that no court is entitled to the deference associated with the discretion standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law.

Appellate courts apply the "discretion" standard to review decisions trial courts make on procedural questions such as the one at issue in this case, decisions to admit or exclude evidence, and other decisions. *See, e.g.*, *Trotter v. Trane Coil Facility*, 393 S.C. 637, 645, 650, 714 S.E.2d 289, 293, 295 (2011) (applying the "discretion" standard in reviewing the workers' compensation commission's procedural decisions); *State v. Gibbs*, Op. No. 28215 (S.C. Sup. Ct. filed Jan. 4, 2023) (Howard Adv. Sh. No. 1 at 12, 18-20) (explaining the type of thorough trial court analysis that warrants our applying the "discretion" standard to evidentiary rulings); *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018) (reiterating the "discretion" standard is applied when reviewing procedural or evidentiary rulings by a family court); *Kovach v. Whitley*, 437 S.C. 261, 263, 878 S.E.2d 863, 864 (2022) (applying the "discretion" standard when reviewing a trial court's imposition of sanctions). When the commission actually exercises discretion in making a

procedural decision such as this one, the Administrative Procedures Act requires we defer to that exercise of discretion. *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2022) ("The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . (f) . . . characterized by abuse of discretion or clearly unwarranted exercise of discretion."). The law requires we defer to the exercise of discretion by any trial-level tribunal when making a procedural decision. *See* 5 C.J.S. *Appeal and Error* § 924 (2019) ("The disposition of procedural matters is reviewed for abuse of discretion."). We disagree the commission is entitled to any deference in this case, however, because there is no indication the commission actually exercised its discretion. *See State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion." (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997))); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

The exercise of discretion is not to simply make a decision. The *exercise* of discretion requires first that the trial court recognize it has the responsibility of discretion. *See Jordan*, 435 S.C. at 505, 868 S.E.2d at 402 ("We cannot determine if the commission recognized it had the discretion . . . ."); *Lunneborg v. My Fun Life*, 421 P.3d 187, 194 (Id. 2018) (stating one of the "essential" considerations for reviewing a discretionary decision is "[w]hether the trial court . . . correctly perceived the issue as one of discretion"); *Johnson v. United States*, 398 A.2d 354, 367 (D.C.1979) ("[R]eversal should follow if . . . the trial court did not recognize its capacity to exercise discretion . . . .").[2] The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances. *See* 435 S.C. at 505, 868 S.E.2d at 402 ("The American tradition of rule of law has recognized from its earliest days that a 'motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" (citation omitted)). The

[2] *See also* 5 C.J.S. *Appeal and Error* § 826 (2022) ("The grounds for appellate review include the lower court's . . . erroneous belief that no such discretion exists, [or] not recognizing its capacity to exercise discretion . . . .").

trial court's recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process. Thus, when a trial court's—or the commission's—thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion, even when the judges on the appellate court might have made the decision differently.

In this case, the commission's initial decision to dismiss the appeal required no explanation. The Form 31 set a clear due date for Proffitt's brief, and Proffitt clearly failed to file the brief in time. Regulation 67-705(H)(3) specifically permits the commission in that circumstance to "issu[e] an administrative order dismissing the appeal." The commission's decision first to refuse to reinstate the appeal, however, and then its decision to deny reconsideration, are different. Regulation 67-705(H)(4) requires the commission to soundly apply the principle of "good cause" to the facts and circumstances before it. This "thought process" requires analysis, and the "discretion" standard we employ for reviewing the commission's analysis requires the analysis be explained.

Because the commission offered no explanation for its decision, we find the commission did not act within its discretion in refusing to reinstate Proffitt's appeal. The failure to accurately calendar a filing deadline will not constitute good cause for reinstating an appeal in every instance. We have reviewed the record in this case, however, and we find Proffitt demonstrated good cause. We reverse the commission's decision refusing to reinstate the appeal and remand to the appellate panel for consideration of the appeal on the merits.

REVERSED AND REMANDED.

KITTREDGE, Acting Chief Justice, HEARN, J., and Acting Justices James E. Lockemy and Aphrodite K. Konduros, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shirley Whitfield, Individually and as personal representative of the Estate of William Whitfield, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2019-001748

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

Opinion No. 5962
Heard November 16, 2022 – Filed January 25, 2023

AFFIRMED

Douglas M. Muller, Paul M. Lynch, and Trudy Hartzog Robertson, all of Moore & Van Allen, PLLC, of Charleston, for Appellant.

Adam J. Neil and Elisabeth W. Shields, both of the South Carolina Department of Revenue, of Columbia, for Respondent.

WILLIAMS, C.J.: In this appeal from the administrative law court (the ALC), Shirley Whitfield, individually and as the personal representative for the estate of William Whitfield, argues the ALC erred in granting the South Carolina

Department of Revenue's (the Department) motion to dismiss Whitfield's request for a contested case hearing due to Whitfield's alleged failure to exhaust her administrative remedies. We affirm.

FACTS/PROCEDURAL HISTORY

On August 11, 2017, Whitfield filed her 2012 income tax return (the 2012 Return) with the Department, claiming a refund on her paid income taxes.[1] On February 14, 2018, the Department issued a letter denying Whitfield's request for a refund (the 2012 Denial), stating Whitfield's claim for a refund was untimely pursuant to sections 12-54-85 and 12-60-470 of the South Carolina Code (2014). The 2012 Denial stated:

> The Department is in receipt of your Individual Income Tax return . . . for the tax year 2012. . . .
>
> The request for refund is denied. The claim was not made within the time required by law as outlined in SC Code Sections 12-54-85(F)(1), 12-54-85(D)(2)(3), and 12-60-470. If you feel our determination is in error, you may appeal. If you choose to appeal, you have 90 days from the date of this letter to submit a protest in writing. . . . It must state all the reasons you disagree with the Department's denial of your refund . . . .

Whitfield did not file a protest within the ninety-day period.

On August 13, 2018, Whitfield filed her 2013 income tax return (the 2013 Return) with the Department, claiming a refund on her paid income taxes.[2] On August 16, 2018, the Department issued a letter denying Whitfield's claim for a refund (the 2013 Denial), again stating Whitfield failed to timely file her request for a refund.

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[1] In the 2012 Return, Whitfield requested the $114,644 be credited towards her 2013 taxes.

[2] In the 2013 Return, Whitfield requested the $168,440 be credited towards her 2014 taxes.

The 2013 Denial contained identical language to the 2012 Denial. Whitfield did not file a protest within the ninety-day period.[3]

On February 27, 2019, Whitfield submitted a protest to the Department, challenging the 2012 and 2013 Denials.[4] On March 27, 2019, the Department issued two letters, one for each tax year, informing Whitfield that she failed to timely protest the denials within the stated ninety-day period.

On April 25, 2019, Whitfield filed a request for a contested case hearing with the ALC. The Department subsequently filed a motion to dismiss Whitfield's action, alleging she failed to exhaust her administrative remedies before seeking review by the ALC. The ALC issued an order granting the Department's motion. This appeal followed.

LAW/ANALYSIS

Whitfield argues the ALC erred in dismissing her request for a contested case hearing. Specifically, Whitfield asserts the ALC erred in finding she failed to exhaust her prehearing administrative remedies before seeking review by the ALC. Whitfield additionally contends the ALC erred in finding it lacked subject matter jurisdiction to hear her case. We disagree.

Whitfield's main contention is that her February 27, 2019 protest was timely under the provisions of the South Carolina Revenue Procedures Act (the RPA). The Department found Whitfield failed to effectively protest its 2012 and 2013 Denials because she failed to file her protest within ninety days of each denial as required by section 12-60-450. *See* S.C. Code Ann. § 12-60-450(A) (2014) ("A taxpayer can appeal a division decision or a proposed assessment by filing a written protest with the department *within ninety days* of the date of the division decision or the proposed assessment." (emphasis added)). The ALC affirmed this finding of the Department and therefore found Whitfield failed to exhaust her administrative remedies before seeking further review.

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[3] There is no evidence in the record showing Whitfield did not receive the 2012 and 2013 Denials, and Whitfield does not make such an assertion.

[4] Whitfield's protest is not included within the record on appeal, but it is referenced in the Department's March 27, 2019 letters.

To preserve her appellate rights, Whitfield should have filed her protests for the 2012 and 2013 Denials no later than May 15, 2018, and November 14, 2018, respectively. Because she failed to do so and nothing in the record indicates she requested an extension, Whitfield failed to exhaust her prehearing administrative remedies before seeking review by the ALC. *See* § 12-60-450(A) ("The department *may extend the time for filing a protest* at any time *before* the period *has expired*." (emphases added)); S.C. Code Ann. § 12-60-510(A) (2014) ("Before a taxpayer may seek a contested case hearing before the Administrative Law Court, [s]he shall exhaust the prehearing remedy."); S.C. Code Ann. § 12-60-30(15) (2014) ("'Exhaustion of the taxpayer's prehearing remedy' means that the taxpayer: (a) filed a written protest as required by this chapter; . . . ."); *see also Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) ("Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof." (quoting *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994))); *id.* ("The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." (quoting *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583)). "A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act." *Id.* (quoting *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010)). This is not the case here. Therefore, the ALC properly dismissed Whitfield's action. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 73–74, 716 S.E.2d 877, 880–81 (2011) ("Tax appeals to the ALC are subject to the Administrative Procedures Act (APA). Accordingly, we review the decision of the ALC for errors of law.").

Whitfield additionally asserts the ALC erred in finding it did not have subject matter jurisdiction to hear her case. *See Ward v. State*, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000) ("[T]he failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction."). Whitfield conflates subject matter jurisdiction and appellate jurisdiction. In its order, the ALC stated, "Because Petitioner failed to exhaust her prehearing remedy, the matter is not properly before this Court on the merits of the case (whether the request for refunds were timely filed)." Accordingly, the ALC properly dismissed Whitfield's action because she failed to exhaust her administrative remedies.

AFFIRMED.

THOMAS, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Estate of Mary Solesbee, by her personal representative, Connie Bayne, Respondent,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman; Inpatient Consultants of North Carolina, P.C.; and Angela Brown, ACNP, Defendants,

Of which Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman are the Appellants.

Appellate Case No. 2019-001731

Appeal From Spartanburg County
Grace Gilchrist Knie, Circuit Court Judge

Opinion No. 5963
Submitted October 3, 2022 – Filed January 25, 2023

AFFIRMED

Stephen Lynwood Brown, Russell Grainger Hines, Donald Jay Davis, Jr., and Gaillard Townsend Dotterer,

III, all of Clement Rivers, LLP, of Charleston, for Appellants.

Warren H. Christian, Jr., and Matthew W. Christian, both of Christian & Christian, LLC, of Greenville, and Jordan Christopher Calloway, of McGowan Hood Felder & Phillips, of Rock Hill, all for Respondent.

THOMAS, J.: In this wrongful death and survival action alleging nursing home negligence, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman[1] (collectively, Appellants) appeal the trial court's denial of Magnolia's motion to compel arbitration. Appellants argue the trial court erred in (1) denying Magnolia's motion to compel arbitration and (2) denying Fundamental's[2] motions to stay this lawsuit pending arbitration of the claims against Magnolia. We affirm.

FACTS

Magnolia operates a nursing facility located in Spartanburg County. Mary Solesbee became a resident at Magnolia on June 27, 2016. She was admitted to Magnolia by her son, Allen Dover, who executed the paperwork for her admission.[3] Among the contracts Dover entered into on behalf of Solesbee were an admission agreement (Admission Agreement) and an arbitration agreement (Arbitration Agreement). Solesbee was not present when Dover signed the documents.

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[1] Appellant THI of South Carolina at Magnolia Manor-Inman, LLC, d/b/a Magnolia Manor-Inman (Magnolia) is a skilled nursing facility in Spartanburg County.

[2] Appellants Fundamental Clinical and Operational Services, LLC and Fundamental Administrative Services, LLC (collectively, Fundamental) are "affiliated and/or parent and/or subsidiary entities" to Magnolia.

[3] Solesbee had given Dover a general power of attorney. However, Solesbee revoked the power of attorney a few months later, which was more than two years before her admission to Magnolia.

The Admission Agreement governs the type of care Solesbee was to receive at Magnolia and Solesbee's financial obligation to pay for those services. On the Admission Agreement's final page, there is an "Entire Agreement" section indicating the twelve pages of the Agreement constitute "the entire agreement and understanding between the parties" concerning Solesbee's admission to Magnolia. The Admission Agreement does not mention the Arbitration Agreement. Dover signed the Admission Agreement on the "Signature of Representative" line. Magnolia's representative did not ask Dover for proof of authority to act on Solesbee's behalf.[4]

The separate one-page Arbitration Agreement states:

> It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The Arbitration Agreement further states that "[b]y his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative." Dover signed the Arbitration Agreement on the line labeled "Resident/Representative Signature."

On July 14, 2016, two weeks after her admission, Solesbee was transported to a hospital and died on August 1, 2016. Connie Bayne, as the personal representative

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[4] In its brief, Magnolia acknowledges it was unable to establish agency, either actual or apparent, on the part of Dover because there was no power of attorney or any other documents.

for Solesbee's estate,[5] filed a wrongful death and survival action against Appellants alleging nursing home negligence.[6] The complaint alleged Solesbee's death was "a direct and proximate result of . . . sepsis resulting from [an] improperly treated leg wound and infection" that was not properly recognized and treated while she was a resident of Magnolia. It sought judgment against Appellants for actual and punitive damages.

Based on the Arbitration Agreement Dover signed for Solesbee, Magnolia filed a motion to dismiss Bayne's complaint, compel arbitration, and stay proceedings pending the outcome of arbitration. Fundamental filed motions to stay any requirement to file further responsive pleadings, as well as any requirement to respond to any motions or discovery filed or served by Bayne, until such time as this court made a final decision on the validity of the arbitration agreement. Magnolia filed a memorandum in support of its motion.

After a hearing, the court denied Magnolia's motion to compel arbitration. In its order, the court found Dover did not have the actual or apparent authority to sign the Arbitration Agreement on behalf of Solesbee. The court stated this case was very similar to *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018); and *Thompson v. Pruitt Corporation*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016). The court noted that in these cases, our appellate courts found: (1) the arbitration agreements to be unenforceable when a family member signed an arbitration agreement near the time of admission to a skilled nursing facility for the decedent and did not have any actual authority; (2) that no implied authority existed; and (3) no estoppel applied. As the *Thompson* and *Hodge* courts noted, there was no evidence the resident being admitted to the nursing home took any action to create an agency relationship with the person who signed the arbitration agreement. *See Thompson*, 416 S.C. at 55, 784 S.E.2d at 686 ("[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial."); *Hodge*, 422 S.C. at 572, 813 S.E.2d at 307 (quoting *Thompson*). The court stated this case was nearly identical to those cases.

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[5] Bayne is Solesbee's daughter.

[6] Bayne filed an amended complaint on January 3, 2019, and a second amended complaint on February 27, 2019.

Therefore, the court held there was no valid Arbitration Agreement in this case. The court also held that even if the Arbitration Agreement was generally valid, it could not be enforced for the wrongful death claim brought for the benefit of Solesbee's statutory beneficiaries. Further, the court rejected Magnolia's request for leave to conduct discovery before the court ruled on its motion, finding it had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration. This appeal followed.

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). An "[a]ppeal from the denial of a motion to compel arbitration is subject to de novo review." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). Also, "[w]hether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). Under this standard of review, "a [trial] court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.*

LAW/ANALYSIS

I. Motion to Compel Arbitration

Appellants argue the trial court erred in denying Magnolia's motion to compel arbitration. We disagree.

South Carolina's policy is to favor arbitration of disputes. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. "Unless a court can say with positive assurance that an arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Gissel v. Hart*, 382 S.C. 235, 240-41, 676

S.E.2d 320, 323 (2009). "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)).

"However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173 (emphasis omitted) (quoting *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 496 (Tex. App. 2011)). "[B]ecause arbitration, while favored, exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." *Id.* at 337-38, 827 S.E.2d at 173 (emphasis omitted). Nevertheless, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)).

"Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law." *Wilson*, 426 S.C. at 338, 827 S.E.2d at 173-74. "South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Id.* at 338, 827 S.E.2d at 174. This court has held the theory of equitable estoppel precludes parties from asserting their nonsignatory status, compelling them to submit their claims to arbitration. *Id.* at 339, 827 S.E.2d at 174. Under this theory, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper*, 206 F.3d at 418). "In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other

provisions of the same contract should be enforced to benefit him." *Id.* (emphasis omitted) (quoting *Int'l Paper*, 206 F.3d at 418).

Magnolia argues the trial court should have found the Arbitration Agreement merged with the Admission Agreement because merger is presumed when the instruments in question are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction.

In *Coleman v. Mariner Health Care, Inc.*, our supreme court held:

> In South Carolina, "[t]he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract."

407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). The *Coleman* court found the documents in that case were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction; thus, unless there was a contrary intention, there was a merger. *Id.* However, the court determined that "[b]y their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.* And, even if a clause in the contract created an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter. *Id.* at 355-56, 755 S.E.2d at 455. Thus, there was no merger in that case, and the appellants' equitable estoppel argument was properly denied. *Id.* at 356, 755 S.E.2d at 455.

Also, in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, this court held the admission agreement and arbitration agreement did not merge because: (1) the admission agreement indicated it was governed by South Carolina law, whereas the arbitration agreement stated it was governed by federal law; (2) like in *Coleman*, the arbitration agreement recognized the two documents were separate, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement"; (3) the

arbitration agreement stated it could be revoked within thirty days, whereas the admission agreement contained no such indication and instead provided the admission agreement could only be amended; (4) each document was separately paginated and had its own signature page; and (5) the arbitration agreement stated signing it was not a precondition to admission. 422 S.C. at 562-63, 813 S.E.2d at 302.

Here, the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law. The Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement "shall survive any termination or breach of this Agreement or the Admission Agreement." The Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, "Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility." The Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages. Magnolia's attorney admitted at the hearing that "[i]t's perfectly true that [Dover] did not have to sign the arbitration agreement to move forward with [Solesbee] being admitted. It was voluntary . . . ." Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and Magnolia's equitable estoppel argument was properly denied.

The *Coleman* court also considered whether the Adult Health Care Consent Act (Act)[7] gave a family member authority to execute an arbitration agreement on behalf of another. The court held:

> The scope of Sister's authority [under the Act] to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should

[7] S.C. Code Ann. § 44-66-30 (Supp. 2022) (providing that when a patient is unable to consent, decisions concerning their health care may be made by other persons, as specified in the statute).

> issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

407 S.C. at 353-54, 755 S.E.2d at 454. In *Thompson v. Pruitt Corporation*, this court also held the admission agreement did not merge with the arbitration agreement and the son's authority under the Act to execute the admission agreement did not cover the terms of the arbitration agreement. 416 S.C. at 52-53, 784 S.E.2d at 684-85.

A limited general agreement power of attorney was executed on September 2, 2014, by Solesbee, giving Dover power of attorney for certain limited acts and alternatively giving power of attorney to Bayne. However, Solesbee revoked the power of attorney on September 12, 2014, which was almost two years before Dover signed the Agreements in this case. Thus, according to Bayne, Dover had no authority to sign the Arbitration Agreement on Solesbee's behalf. However, Bayne asserted Dover did have the authority to sign the Admission Agreement under the Act. Bayne argues the Act is limited to "health care" decisions and provides no authority for separate contracts like the Arbitration Agreement. She asserts the Act was never meant to affect anything other than health care decisions and the Arbitration Agreement was not a health care decision because Solesbee could get the health care services covered in the Admission Agreement without agreeing to arbitrate. We agree and find Dover did not have any authority to sign the Arbitration Agreement for Solesbee via the Act or a power of attorney.

Magnolia further asserts that because Solesbee was bound by the Arbitration Agreement at the time of her death, her wrongful death beneficiaries are bound by the Arbitration Agreement as well. However, we previously found the Arbitration Agreement is not enforceable against Solesbee because she did not sign it or authorize Dover to sign it for her; thus, Solesbee's cause of action was not barred at the time of her death.

Finally, Magnolia asserts the trial court erred in denying its request to conduct discovery on the issue of arbitrability. The trial court held "[Magnolia] had the opportunity to use the South Carolina Rules of Civil Procedure to conduct

discovery related to arbitration." Magnolia cites no authority for how it claims the court erred, and the record does not contain any discovery requests Bayne ignored or any subpoenas to which she objected. Magnolia states the discovery it seeks is whether an agency relationship exists (or whether the facts to support estoppel or ratification exist) and whether Solesbee was competent at the time of her admission. It also asserts there was ambiguity as to whether Solesbee gave consent for Dover to act as her agent, given the inconsistency between Dover's representation of authority in the Arbitration Agreement and his disavowal of such authority in his affidavit.

In *Hodge*, this court addressed a similar argument and affirmed the trial court's refusal to compel the husband's deposition that would add nothing probative to a potential agency analysis, noting this court has held "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." 422 S.C. at 579, 813 S.E.2d at 311 (quoting *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686). Because we find the trial court correctly held there was no merger of the Agreements and Magnolia's equitable estoppel argument was properly denied, we also find the court did not err in denying its request for further discovery when it would not have changed the result.

II. Motions to Stay

Appellants argue the trial court erred in denying Fundamental's motions to stay the lawsuit pending arbitration of the claims against Magnolia. Because we find the trial court did not err in denying Magnolia's motion to compel arbitration, Fundamental's motions are moot and we need not address 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 decision of the trial court is

AFFIRMED.[8]

[8] We decide this case without oral argument pursuant to Rule 215, SCACR.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Aracelis Santos, Appellant,

v.

Harris Investment Holdings, LLC, City of Hanahan, City of Hanahan Police Department, John Doe #1 and John Doe #2, employees of the City of Hanahan Police Department, Defendants,

of which

Harris Investment Holdings, LLC is the Respondent.

Appellate Case No. 2021-000768

Appeal From Berkeley County
Bentley Price, Circuit Court Judge

Opinion No. 5964
Heard December 6, 2022 – Filed January 25, 2023

AFFIRMED

Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, PA, of Charleston, for Appellant.

Merritt Gordon Abney and Olesya Vaskevich Bracey, both of Nelson Mullins Riley & Scarborough, LLP; and Stafford John McQuillin, III, of Haynsworth Sinkler Boyd, PA, all of Charleston, all for Respondent.

WILLIAMS, C.J.: In this appeal, Aracelis Santos argues the circuit court erred in granting Harris Investment Holdings, LLC's (HIH) motion to dismiss Santos's complaint pursuant to Rule 12(b)(6), SCRCP. We affirm.

FACTS/PROCEDURAL HISTORY

In this landlord-tenant dispute, Santos rented a commercial space (the Property) from HIH. Pursuant to the lease agreement between the parties, the lease term began on December 1, 2015, and terminated on November 30, 2018. The lease agreement contained no option for renewal and included the following provisions.

> Tenant *shall surrender* to Landlord, *at the end of the term of this lease* or upon cancellation of this lease, said Premises broom clean and in as good condition as the Premises were at the beginning of the term of this lease, ... If Tenant remains in possession of the Premises or any part thereof after the expiration of the Agreement, such holdover places the Tenant in default and the Monthly Base Rental shall be increased to one hundred fifty percent (150%) . . . .

(emphases added).

> *It is understood and agreed that any merchandise, fixtures, furniture, or equipment left in the Premises* when Tenant vacates shall be deemed to have been *abandoned by Tenant* and by such abandonment, Tenant *relinquishes any right or interest therein and Landlord is authorized to sell, dispose of or destroy [the] same*.

(emphases added).

> If Tenant fails to pay Monthly Base Rental including Additional Rent . . . this Agreement shall be in default. . . . In the event of any such default or breach of performance, the Landlord without any further notice or demand of any kind to the Tenant, may terminate this

> lease and *re-enter and forthwith repossess the entire Premises and without being liable for trespass or damage . . . .*

(emphasis added).

Santos operated a nightclub on the Property called "El Alamo." In November 2016, HIH filed an action seeking the ejectment of Santos from the Property after receiving reports of criminal activity at El Alamo. The magistrate granted the application for ejectment and awarded HIH attorney's fees. Santos subsequently appealed to the circuit court, which issued a bond order staying the appeal of the ejectment action. Santos posted bond and continued to occupy the premises.

While the ejectment appeal was still pending before the circuit court, the lease term expired. A month prior to the expiration of the lease, on October 16, 2018, HIH sent Santos a notice directing her to vacate the Property. It stated:

> Please be advised the lease for El Alamo expires according to its terms at midnight on November 30, 2018. You are hereby directed to vacate the premises with all of your belongings before midnight on November 30, 2018, or else we will take further legal action against you and your belongings may be removed from the premises.

Santos did not vacate the premises and continued to occupy the Property in violation of the lease agreement. On February 26, 2019, HIH again sent a letter to Santos instructing her to vacate the Property. It stated:

> As you are aware, the lease for El Alamo expired according to its terms on November 30, 2018, and I have previously directed your client to vacate the premises by that date. Your client has refused to vacate in violation of the terms of the Lease and is trespassing on my client's property by remaining beyond the Lease term.
>
> The purpose of this letter is to notify you that engineers recently identified asbestos in the premises, and [DHEC] is requiring that the building be cleared in connection

> with the mandatory remediation process. Remediation of the premises will begin on or about March 1, 2019. Your client is hereby directed to vacate and remove all of her personal property from the premises by that date. Once the remediation process begins, no access will be permitted to the premises for any reason.

After Santos failed to vacate the premises, HIH retook possession of the Property. HIH subsequently demolished the Property on March 22, 2019. Police officers of the City of Hanahan were present at the time of demolition.

On June 6, 2019, the circuit court affirmed the magistrate's order of ejectment. Santos appealed to this court; however, she only appealed the magistrate's award of attorney's fees to HIH.

On March 21, 2021, Santos filed this action, asserting HIH wrongfully repossessed and destroyed the Property and conspired with the City of Hanahan in doing so. HIH filed a motion to dismiss the action pursuant to Rule 12(b)(6), SCRCP. Following a hearing, the circuit court granted HIH's motion to dismiss via Form 4 order. Santos filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court denied. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in granting HIH's motion to dismiss Santos's complaint pursuant to Rule 12(b)(6), SCRCP?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Hager v. McCabe, Trotter & Beverly, P.C.*, 435 S.C. 740, 746, 869 S.E.2d 886, 889 (Ct. App. 2022) (quoting *Morris*, 381 S.C. at 646, 675 S.E.2d at 433). "If the facts and inferences would

entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.*

LAW/ANALYSIS

We find the circuit court properly acted within its discretion when granting HIH's motion to dismiss via a Form 4 order, and Santos's assertions to the contrary are unpersuasive. "Under Rule 12(b)(6), SCRCP, a defendant may move for dismissal based on a failure to state facts sufficient to constitute a cause of action." *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 277, 648 S.E.2d 295, 298 (Ct. App. 2007). Rule 52(a), SCRCP provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. *Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12* or 56 or any other motion except as provided in Rule 41(b).

Rule 52(a) (emphasis added). Thus, the circuit court was not required to include specific findings of fact and conclusions of law in its order granting HIH's 12(b)(6) motion. *See Kinghorn as Tr. for the Mildred Ann Kinghorn Tr. dated 28 Apr. 2004 v. Sakakini*, 426 S.C. 147, 151, 825 S.E.2d 748, 750 (Ct. App. 2019) (finding Rule 52(a), SCRCP does not require the circuit court "to state its findings of fact and conclusions of law in decisions on motions to dismiss, summary judgment motions, or any other motion except those dealing with involuntary dismissal"); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014) ("Rule 52, SCRCP, provides that '[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . . .' Thus, such findings and conclusions are not required for appellate review." (alteration in original) (quoting Rule 52(a), SCRCP)); *Borg Warner Acceptance Corp. v. Darby*, 296 S.C. 275, 279, 372 S.E.2d 99, 101–02 (Ct. App. 1988) (holding Rule 52(a)'s requirement that a court in an action tried without a jury "find the facts specially and state separately its conclusions of law thereon" was "merely directory and provide[d] no basis for invalidating a judgment"). Although Santos contends the

court infringed upon her procedural due process rights by failing to delineate its findings in the order, this argument lacks merit as the parties provided an ample record allowing this court to conduct meaningful appellate review. *See Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the [circuit] court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal"); *Easterling v. Burger King Corp.*, 416 S.C. 437, 453, 786 S.E.2d 443, 452 (Ct. App. 2016) (disagreeing with the argument that the appellate court was "'unable to ascertain the basis behind the circuit court's order' because the circuit court ruled upon the motion for summary judgment via Form 4 order" and finding "the parties provided an ample record for [the appellate] court to conduct meaningful appellate review").

Further, contrary to Santos's assertions, the circuit court applied the appropriate standard of review when ruling on HIH's 12(b)(6) motion. *See Hager*, 435 S.C. at 746, 869 S.E.2d at 889 (providing that when considering a Rule 12(b)(6) motion, the circuit court must "construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case'" (quoting *Rydde*, 381 S.C. at 646, 675 S.E.2d at 433)). Here, Santos's complaint solely challenged HIH's actions following the expiration of their commercial lease agreement. Specifically, Santos argues HIH wrongfully repossessed and destroyed the commercial premises she was previously renting.

Therefore, on its face, Santos's complaint fails to state a cognizable claim as she had no legal right to continue to occupy the premises.[1,2] Although Santos contends

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[1] The circuit court properly considered the language of the lease agreement when making its determination. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (providing that when considering a Rule 12(b)(6) motion, a court may consider documents referenced in or attached to the complaint); *id.* ("In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.").

[2] HIH sent multiple letters instructing Santos to vacate the Property and remove any possessions, and she failed to do so. Thus, she assumed the risk of damage to her property by failing to remove it from the premises more than four months after the expiration of the lease.

the order staying the appeal of HIH's ejectment action allowed her to continue to occupy the premises, this argument is without merit. Once the lease term expired, the ejectment action became moot.

As to Santos's assertion that it was improper for the circuit court to dismiss the case with prejudice without allowing her the opportunity to amend her complaint, we find any amendment by Santos would have been futile as the entire premise for her complaint does not warrant relief and she failed to allege additional facts in her Rule 59(e), SCRCP, motion to support the allegations in her pleading. *See Ashley River Props.*, 374 S.C. at 278, 648 S.E.2d at 298 ("In deciding whether the [circuit] court properly granted the motion to dismiss, [the appellate] court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief."); *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 185, 192, 826 S.E.2d 585, 590, 594 (2019) (providing a circuit court does not err in granting a Rule 12(b)(6) motion without granting leave to amend the complaint if such an amendment would be futile). Moreover, Santos never moved to amend her complaint pursuant to Rule 15, SCRCP; she merely stated she would be ready to amend her complaint upon the court's request or finding that the complaint was deficient. Even assuming arguendo the circuit court erred in dismissing Santos's complaint, this court can still affirm the dismissal. *See Spence v. Spence*, 368 S.C. 106, 130–31, 628 S.E.2d 869, 882 (2006) ("On the other hand, when a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice."). Accordingly, we affirm the circuit court's dismissal of Santos's action with prejudice.

AFFIRMED.

THOMAS, J., and LOCKEMY, A.J., concur.