# The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus Emergency (As Amended April 22, 2020)[1]

Appellate Case No. 2020-000447

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ORDER

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**(a) Purpose.** The purpose of this order is to provide guidance on the continued operation of the trial courts during the current coronavirus (COVID-19) emergency. The measures contained in this order are intended to allow essential operations to continue while minimizing the risk to the public, litigants, lawyers and court employees.

In the past, the South Carolina Judicial Branch has shown great resilience in responding to hurricanes, floods, and other major disasters, and this Court is confident that the same will be true in this emergency. This emergency, however, differs from these prior emergencies in many aspects. The current emergency will significantly impact every community in South Carolina while the prior emergencies, although potentially horrific for the individuals and communities directly impacted, did not. The impact of the prior emergencies could be minimized or avoided by traveling away from the site of the disaster; this is not the case for the current emergency. Further, in the prior emergencies, the circumstances giving rise to the emergency involved a single event with a beginning and a predictable end. This is not the case for the coronavirus, and even conservative estimates indicate the direct impacts of this pandemic will continue for many months.

[1] This order was initially filed on April 3, 2020, and has been amended twice. On April 14, 2020, changes were made to sections (c)(5) and (c)(8). On April 22, 2020, section (c)(17) was added.

In light of the extraordinary challenges presented by the current emergency, this Court finds it necessary to supplement and, in some situations, to alter significantly, the current practices regarding the operation of the trial courts. In the event of a conflict between this order and the South Carolina Rules of Civil Procedure (SCRCP), the South Carolina Rules of Criminal Procedure (SCRCrimP), the South Carolina Rules of Family Court (SCRFC), the South Carolina Rules of Probate Court (SCRPC), the South Carolina Rules of Magistrates Court (SCRMC), the South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR), South Carolina Rules of Evidence (SCRE) or any other rule or administrative order regarding the operation of a trial court, this order shall control.

**(b) Terminology**. The following terminology is used in this order.

**(1) Judge:** a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

**(2) Remote Communication Technology:** technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time.

**(3) Summary Court:** the magistrate and municipal courts.

**(4) Trial Court:** the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

**(c) General Guidance.** This section provides general guidance applicable to all trial courts or to several court types, and later sections will provide guidance that is limited to one court type. While this order remains in effect, the following general guidance shall apply:

**(1) Jury Trials.** All jury selections and jury trials in all criminal and civil cases are continued until further notice.

**(2) Non-Jury Trials.** The appropriate Chief Judge for Administrative Purposes, or in the case of any court that does not have a Chief Judge for Administrative Purposes, the appropriate judge responsible for scheduling matters, may authorize a non-jury trial to occur if the parties consent, or the

matter involves an emergency or other circumstance warranting immediate resolution. To proceed, the Chief Judge or the appropriate judge responsible for scheduling matters must find that the trial can be conducted in a manner to minimize the risk such as limiting the persons present to the parties, counsel and necessary witnesses, or that the trial may be conducted using remote communication technology to avoid the need for a physical appearance of all or some of the parties, counsel or witnesses. If an in-person non-jury trial is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. Hearings must be staggered to minimize the number of people appearing at the same time.

**(3) Hearings**. A hearing on a motion or other matter may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel. Only if a judge determines that the hearing cannot be conducted adequately using remote communication technology and the matter involves an emergency or other circumstance warranting immediate determination, will an in-person hearing be conducted. If an in-person hearing is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. The total number of participants should not exceed ten (10) people. Hearings must be staggered to minimize the number of people appearing at the same time.

**(4) Minimizing Hearings on Motions.** While the practice has been to conduct hearings on virtually all motions, this will not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above. Consent motions should be decided without a hearing; in the event a party believes that the order issued exceeds the scope of the consent, the party must serve and file a motion raising that issue within ten (10) days of receiving written notice of entry of the order.

**(5) Determination of Probable Cause Following Warrantless Arrest.** When a warrantless arrest has occurred, the arresting officer shall provide the appropriate judge with an affidavit or a written statement with the certification provided by section (c)(16) below setting forth the facts on which the warrantless arrest was made within eight (8) hours of the arrest. The judge shall consider this affidavit or written statement with the certification and, if appropriate, may have the officer or others supplement the affidavit or written statement with the certification with sworn testimony given over the telephone or other remote communication technology. The judge may administer any necessary oath using the telephone or other remote communication technology. If the judge finds a lack of probable cause for the arrest, the defendant shall be released. The goal is to have this determination of probable cause be made within twenty-four (24) hours of the arrest. Only in the most extraordinary and exceptional circumstances should this determination not be made within forty-eight (48) hours of the arrest. If this determination is not made within forty-eight (48) hours after arrest, the judge making the determination shall explain in writing the facts and circumstances giving rise to this delay, and a copy of this explanation shall be provided to the Office of Court Administration.

**(6) Preliminary Hearings in Criminal Cases.** Until further order of this Court, preliminary hearings will not be conducted.

**(7) Remote Administration of Oaths.** Where this order authorizes a hearing, trial or other matter to be conducted using remote communication technology, any oath necessary during that hearing, trial or other matter may be administered by the same remote communication technology. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing remote communication technology in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order.

**(8) Scheduling Orders.** All deadlines under all existing scheduling orders are hereby stayed, retroactive to March 13, 2020. Forty-five (45) days

following the date on which the Governor lifts or rescinds the emergency orders relating to the coronavirus emergency, this stay shall end. While a judge may issue a new or amended scheduling order which will not be subject to this stay, both the decision to issue such an order and the terms of that order must consider the impact the emergency has on the ability of the parties and counsel to proceed. Judges are encouraged to seek input from the parties and counsel before issuing a new or amended scheduling order.

**(9) Extensions of Time and Forgiveness of Procedural Defaults.**

**(A) Extensions of Time.** This crisis will increase the need for extensions to be granted. While this order remains in effect, no filing fee will be required for a motion for an extension for any motion filed on or after the date of this order. Further, since it is important for lawyers and self-represented litigants appearing before the trial courts to have time to take actions to protect themselves and their families, the due dates for all trial court filings due on or after the effective date of this order are hereby extended for thirty (30) days.

**(B) Forgiveness of Procedural Defaults Since March 13, 2020.** In the event a party to a case or other matter pending before a trial court was required to take certain action on or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order. If a dismissal or other adverse action has been taken, that adverse action shall be rescinded.

**(C) Extensions by Consent.** The provision in Rule 6(b), SCRCP, which permits the granting of only one extension of time by agreement of counsel, is suspended. Counsel may agree to further extensions of time without seeking permission from the court, and parties are strongly encouraged to do so upon request.

**(D) Limitation.** The provisions of (A) thru (C) above shall not extend or otherwise affect the time for taking action under Rules 50(b), 52(b), 59, and 60(b), SCRCP, or Rule 29, SCRCrimP. Further, these provisions do not extend or otherwise affect the time for the serving of a notice of appeal under the South Carolina Appellate

Court Rules, or the time to appeal from a lower court to the circuit court.

**(10) Alternatives to Court Reporters and Digital Courtrooms.** A trial or hearing in the court of common pleas (including the master-in-equity court), the court of general sessions or the family court is usually attended by a court reporter (before the master-in-equity this is usually a private court reporter) or is scheduled in one of the digital courtrooms with a court reporter or court monitor. While every effort will be made to continue these practices, this may not be possible as this emergency progresses. In the event such resources are not reasonably available, a trial or hearing authorized under this order may proceed if a recording (preferably both audio and video) is made. The judge shall conduct the proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

**(11) Courthouses.**

**(A) Filings.** To the extent possible, courthouses should remain open to accept filings and payments, and to report criminal information to the South Carolina Law Enforcement Division and the National Crime Information Center. For the acceptance of documents or payments submitted by delivery to the courthouse, this may be accomplished by providing access to a portion of the courthouse even if the rest of the courthouse is closed to the public; providing an alternate location where the documents or payments may be delivered; or by providing a drop box where filings may be deposited. Adequate signage should be provided at the courthouse to alert persons about how to make filings by delivery, and this information should also be posted to the court's website, if available.

**(B) Closure.** In the event of the closure of a courthouse, information about the closure shall be provided by signage at the courthouse, and on the court's website if available.

**(C) Quarantine of Incoming Paper Documents.** To protect the safety of the staff of the trial courts, incoming paper documents, whether delivered or mailed to the trial court, may be quarantined for a period of up to forty-eight (48) hours once the documents are physically received by the trial court.[2] Once the quarantine period has ended, these documents will be file stamped with the date on which they were received, and court staff will then process the documents.

**(12) Statute of Limitations, Repose and Other Similar Statutes.** This Court is aware this emergency has already affected the ability of litigants to commence legal actions and this adverse impact will most likely increase significantly as this pandemic progresses. The Judicial Branch has raised this concern to the leadership of the General Assembly as this issue relates to the statute of limitations, statutes of repose and similar statutes such as S.C. Code Ann. § 15-36-100. While this Court has recognized the existence of judicial authority to toll a statute of limitations in other situations, it would be inappropriate for this Court to consider at this time what relief, if any, may be afforded to a litigant who is unable to file a civil action or take other actions under these statutory provisions due to this emergency.

**(13) Service Using AIS Email Address.** A lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS).[3] For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if

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[2] One scientific study has reported that the coronavirus can live for up to 24 hours on cardboard. https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf.

[3] The email addresses for lawyers admitted in South Carolina can be accessed utilizing the Attorney Information Search at: https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm.

appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by email, a copy of the sent email shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. This method of service may not be used for the service of a summons and complaint, subpoena, or any other pleading or document required to be personally served under Rule 4 of the South Carolina Rules of Civil Procedure, or for any document subject to mandatory e-filing under Section 2 of the South Carolina Electronic Filing Policies and Guidelines. In addition, the following shall apply:

**(A)** Documents served by email must be sent as an attachment in PDF or a similar format unless otherwise agreed by the parties.

**(B)** Service by email is complete upon transmission of the email. If the serving party learns the email did not reach the person to be served, the party shall immediately serve the pleading or paper by another form of service in Rule 5(b)(1), SCRCP, or other similar rule, together with evidence of the prior attempt at service by email.

**(C)** In those actions governed by the South Carolina Rules of Civil Procedure, Rule 6(e), SCRCP, which adds five days to the time a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, shall also apply when service is made by email under this provision.

**(D)** Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.

**(14) Signatures of Lawyers on Documents.** A lawyer may sign documents using "s/[typed name of lawyer]," a signature stamp, or a scanned or other electronic version of the lawyer's signature. Regardless of form, the signature shall still act as a certificate under Rule 11, SCRCP, that the lawyer has read the document; that to the best of the lawyer's knowledge,

information, and belief there is good ground to support it; and that the document is not interposed for delay.

**(15) Optional Filing Methods.** During this emergency, clerks of the trial courts may, at their option, permit documents to be filed by electronic methods such as fax and email. If the clerk elects to do so, the clerk will post detailed information on the court's website regarding the procedure to be followed, including any appropriate restrictions, such as size limitations, which may apply. Documents filed by one of these optional filing methods shall be treated as being filed when received by the clerk of court and a document received on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. These optional filing methods shall not be used for any document that can be e-filed under the South Carolina Electronic Filing Policies and Guidelines. If a trial court does not have a clerk of court, the court shall determine whether to allow the optional filing methods provided by this provision.

**(16) Certification in Lieu of Affidavit.** If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker stating, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt."

**(17) Arrest and Search Warrants.** Due to this emergency, it may not be possible for an officer seeking an arrest warrant or a search warrant to appear before the judge to be sworn and sign the warrant. Therefore, a judge may use the procedures provided in section (c)(7) above to remotely administer the oath to the officer and, if appropriate, the judge may take sworn testimony using remote communication technology to supplement the allegations in the warrant. The judge shall make a notation on the warrant indicating the oath was administered remotely and the officer was not available to sign the warrant in the presence of the judge. If probable cause is found, the judge shall sign the warrant and return the warrant to the officer for execution. While the officer may sign the warrant when it is returned, the failure to do so shall not affect the validity of the warrant. The warrant may be transmitted to the judge and returned to the officer by e-mail, fax or other electronic means. For the purpose of this section, the term "search

warrant" shall also include applications under South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145.

**(d) Court of General Sessions.** The following additional guidance is provided regarding the Court of General Sessions:

**(1) Rule 3(c), SCRCrimP.** Based on this emergency, the ninety (90) day period provided by Rule 3(c), SCRCrimP, is hereby increased to one-hundred and twenty (120) days.

**(2) County Grand Juries.** While a physical meeting of the members of the county grand jury shall not be held, the Solicitor or the Attorney General is hereby authorized to present an indictment to the grand jury using remote communication technology such as video conferencing and teleconferencing, and any necessary oath may be administered using this same remote communication technology pursuant to (c)(7) above.

**(3) Guilty Pleas.** If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held subject to the standards specified in (c)(3) above. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

**(e) Court of Commons Pleas.** The following additional guidance is provided regarding the Court of Common Pleas, including the Master-in-Equity Courts:

**(1) Isolation and Quarantine Orders.** As this pandemic continues, it is possible the provisions of the South Carolina Emergency Health Powers Act, S.C. Code Ann. §§ 44-4-100 to 44-4-570, may be triggered as it relates to

isolation and quarantine orders. Therefore, the Chief Judges for Administrative Purposes for Common Pleas should familiarize themselves with the procedures for judicial review and petitions under that Act, most notably section 44-5-540, and begin to formulate a strategy to meet the timelines specified in that statute for judicial action.

**(2) Procedural Guidance Regarding Filing.** While the trial court case management system does not have a case type and subtype for these matters, the clerks of court should use "Nature of Action Code 699 (Special/Complex Other)" for these matters, and these matters will be exempt from any ADR requirement. Detailed instructions for attorneys to Electronically File in these cases are available at https://www.sccourts.org/efiling/ARGs/ARG-26%20Quarantine%20Petitions.pdf. It is also anticipated that all of these hearings will be conducted using remote communication technology. In coordination with the Pro Bono Program of the South Carolina Bar, a list of lawyers willing to serve as counsel for individuals or groups of individuals who are or are about to be isolated and quarantined under section 44-5-540(F), has been compiled.

**(f) Family Court.** The following additional guidance is provided regarding the Family Court:

**(1) Granting of Uncontested Divorces.** The Family Court may grant an uncontested divorce without holding a hearing where:

**(A)** The parties submit written testimony in the form of affidavits or certifications of the parties and corroborating witnesses that address jurisdiction and venue questions, date of marriage, date of separation, the impossibility of reconciliation and the alleged divorce grounds.

**(B)** The written testimony must include copies of the parties' and witnesses' state-issued photo identifications.

**(C)** Any decree submitted by any attorney shall be accompanied by a statement, as an officer of the court, that all counsel approve the decree and that all waiting periods have been satisfied.

**(D)** Should either party request a name change in connection with a request for divorce agreement approval, that party shall submit written testimony to the Family Court in the form of an affidavit or certification addressing the appropriate questions for name change and the name which he or she wishes to resume. This relief shall be included in any proposed Order submitted to the Court for approval at the time of the submission of the documents related to the relief requested.

**(2) Approval of Settlement Agreements and Consent Orders without a Hearing.**

**(A) General Orders.** Consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without the necessity of holding a hearing. Examples include consent orders resolving motions to compel, discovery disputes, motions to be relieved as counsel, or consent Orders appointing a Guardian ad Litem or addressing Guardian ad Litem fee caps. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

**(B) Temporary Orders.** Temporary consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed, and may be submitted and issued without the necessity of filing supporting affidavits, financial declarations or written testimony.

**(C) Final Orders.** Final consent orders approving final agreements in all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. These final consent orders include marital settlement agreements, custody and visitation settlement agreements and enforcement agreements. Any proposed order or agreement must

be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

These Consent Orders shall be submitted together with all of the following:

**(i)** The final agreement, such as a marital settlement agreement, signed by the attorneys and the parties.

**(ii)** Updated signed Financial Declarations for each party.

**(iii)** An affidavit or certification from the Guardian ad Litem, if one has been appointed, addressing the best interests of the children.

**(iv)** Written testimony of all parties in the form of affidavit or certification addressing and answering all questions the Family Court would normally ask the parties on the record, including but not limited to affirmations from the parties that:

**a.** The party has entered into the Agreement freely and voluntarily, understands the Agreement, and desires for the Agreement to be approved by the Court, without the necessity of a hearing.

**b.** Setting forth the education level obtained by the party, the employment status of the party and the health of the party.

**c.** There are no additional agreements, and neither party has been promised anything further than that set out in the Agreement.

**d.** The party fully understands the financial situation of each of the parties, the underlying facts, terms and effect of the Agreement.

**e.** The party has given and received full financial disclosure.

**f.** The party has had the benefit of an experienced family law attorney.

**g.** The party has had the opportunity to ask any questions relating to procedures and the effect of the Agreement.

**h.** The party is not acting under coercion or duress, and the party is not under the influence of any alcohol or drug.

**i.** That the Agreement is fair and equitable, it was reached by the parties through arms-length negotiations by competent attorneys and the agreement represents some sacrifices and compromises by each party.

**j.** The Agreement is in the best interests of the children, if there are any.

**k.** That the parties have entered into a marital settlement agreement in full and final settlement of all issues arising from the marriage which have been raised or which could have been raised in the proceeding, other than issues relating to grounds for divorce.

**l.** The party is aware of the applicable contempt sanctions associated with non-compliance.

**(D) Consent Orders under S.C. Code Ann. § 63-7-1700(D).** Where all the parties consent and the Family Court determines a child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal, and the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the Family

Court may order the child returned to the child's parent without holding a hearing.

**(3) Hearings Generally.** With respect to all contested hearings in family court, including agency matters and private actions, both temporary and permanent, all hearings should be conducted in accordance with section (c)(3) of this order.

**(g) Probate Court.** The following additional guidance is provided:

**Certification in Lieu of Affidavit.** In the probate court, the certificate in section (c)(16) may also be used for a marriage license application under S.C. Code Ann.§ 20-1-230, including any application which may be submitted electronically, or for any of the probate court forms available at www.sccourts.org/forms which are either an affidavit or require an oath or affirmation to be administered.

**(h) Summary Court.** The following additional guidance is provided regarding the Summary Courts:

**(1) Bond Hearings in Criminal Cases.** Bond hearings, which shall be conducted in the manner specified by (c)(3) above, should be held at least once a day. In addition to the normal factors for determining whether the defendant will be required to post a bond or will be released on a personal recognizance, the judge should consider the need to minimize the detention center population during this emergency. Further, judges should consider home detention or other options to help reduce detention center population. The summary court shall uphold victims' rights in accordance with the South Carolina Constitution, including seeking to ensure that a victim advocate/notifier is available for all bond hearings, subject to the rights of the defendant under the United States Constitution and the South Carolina Constitution.

**(2) Transmission of Warrants for General Sessions Offenses.** Warrants for general sessions offenses shall continue to be forwarded to the clerk of the court of general sessions as provided for Rule 3, SCRCrimP. As to an arrest warrant for a defendant who is already in the custody of the South Carolina Department of Corrections, or a detention center or jail in

South Carolina, this Court hereby authorizes these defendants to be served with the warrant by mail. Therefore, if it is determined that the defendant is already in custody, the judge shall annotate the warrant to reflect that a copy has been mailed to the defendant, mail a copy of the annotated warrant to the defendant, and immediately forward the annotated warrant and any allied documents to the clerk of the court of general sessions for processing under Rule 3, SCRCrimP.

**(3) Guilty Pleas.** If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held by the summary court. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

**(i) Effective Date and Revocation of Prior Order and Memoranda.** This order is effective immediately. It shall remain in effect until modified or rescinded by this Court. This order replaces the following order and memoranda previously issued.

**(1)** Memoranda of the Chief Justice dated March 16, 2020, which are labeled as "Trial Courts Coronavirus Memo," and "Summary Courts Coronavirus Memo."

**(2)** Order dated March 18, 2020, and labeled "Statewide Family Court Order."

s/ Donald W. Beatty C.J.

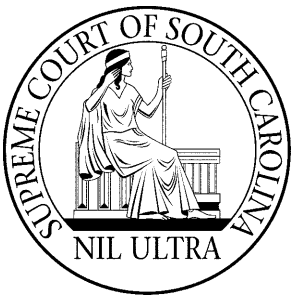
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
April 3, 2020
As Amended April 22, 2020




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 17**
**April 29, 2020**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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| 2019-UP-318-State v. Ronald Yates Hyatt | Denied 04/24/20 |
| 2019-UP-331-Rajinder Parmar v. Balbir S. Minhas | Pending |
| 2019-UP-336-Christopher Maddaloni v. Jacqueline Pidanick | Pending |
| 2019-UP-337-Christopher Maddaloni v. Jacqueline Pidanick | Pending |
| 2019-UP-381-SCDSS v. Andrea Benjamin | Pending |
| 2019-UP-386-John Willie Mack, Sr. v. State of South Carolina | Pending |
| 2019-UP-391-State v. Brian Everett Pringle | Pending |
| 2019-UP-399-Tracy Pracht v. Gregory Pracht (2) | Pending |
| 2019-UP-401-Stow Away Storage v. George W. Sisson (2) | Pending |
| 2019-UP-415-David Deen v. Deborah Deen | Pending |
| 2020-UP-001-State v. Guadalupe G. Morales | Pending |
| 2020-UP-003-State v. Shane Alexander Washington | Pending |
| 2020-UP-017-State v. Emory Warren Roberts | Pending |

# The Supreme Court of South Carolina

Danny B. Crane, Petitioner,

v.

Raber's Discount Tire Rack, Employer, and South Carolina Uninsured Employers Fund, Carrier, Respondents.

Appellate Case No. 2018-000959

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ORDER

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The petition for rehearing is denied. The attached opinion is substituted for the previous opinion, which is withdrawn.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
April 29, 2020

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Danny B. Crane, Petitioner,

v.

Raber's Discount Tire Rack, Employer, and South Carolina Uninsured Employers' Fund, Respondents.

Appellate Case No. 2018-000959

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from the Workers' Compensation Commission

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Opinion No. 27951
Heard October 16, 2019 – Filed March 11, 2020
Re-Filed April 29, 2020

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**REVERSED AND REMANDED**

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Stephen Benjamin Samuels, Samuels Law Firm, LLC, of Columbia, for Petitioner.

Matthew Joseph Story, Daniel Paul Ranaldo, and Lisa C. Glover, Clawson & Staubes, LLC, of Charleston, for Respondent South Carolina Uninsured Employers' Fund.

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**JUSTICE FEW:** Danny Crane sought workers' compensation benefits for hearing loss and brain injuries he alleged he suffered in a work-related accident. The workers' compensation commission denied most of Crane's claims, finding he was not entitled to benefits for temporary total disability, permanent impairment, or future medical care. The primary basis for denying these three claims was the commissioner who initially heard the case found Crane was not credible. The court of appeals reversed the commission's denial of temporary total disability benefits, but otherwise affirmed. We now reverse the commission's denial of permanent impairment and future medical care benefits. We remand to the commission for a new hearing on all three claims.

Our courts have frequently held that when the commission makes a credibility determination based on substantial evidence, the credibility finding itself is substantial evidence, and factual findings properly based on the credibility finding are binding on the courts. *See, e.g.*, *Lee v. Bondex, Inc.*, 406 S.C. 97, 101, 749 S.E.2d 155, 157 (Ct. App. 2013) (holding the commission's finding that "four doctors' opinions were 'more persuasive on the issue of causation' than other medical evidence" was a "credibility determination" that "if supported by substantial evidence, is binding on the court," and affirming the commission's factual finding of compensability based on that credibility determination (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2019))). The commission may not, however, give artificial importance to a credibility determination when credibility is not a reasonable and meaningful basis on which to decide a question of fact. In this case, Crane's lack of credibility was not a reasonable and meaningful basis on which to ignore objective medical evidence. Therefore, the commissioner and the appellate panel improperly based the factual determination to deny Crane's claims on the commissioner's credibility finding.

## I. Facts and Medical History

On February 19, 2014, Danny Crane was working as a mechanic at Raber's Discount Tire Rack in Barnwell, South Carolina. Crane heard a hissing noise coming from an air-powered tire changer. He and a coworker were investigating the cause of the noise when an air hose attached to the tire changer suddenly separated from its fitting, causing an explosion-like sound. Surveillance video shows Crane stepped away from the tire changer and covered his ears with his hands. Crane testified that immediately after the incident, his ears were ringing, he was in pain, and he could

not hear. He texted his wife and asked her to pick him up to take him to the emergency room.

Crane's wife drove him to Barnwell County Hospital, where Crane complained of difficulty hearing in both ears and assessed his ear pain as an 8 out of 10. The emergency room doctor diagnosed Crane with conductive hearing loss and referred him to an ear, nose, and throat specialist.

The next morning, Crane saw Dr. John Ansley, an otolaryngologist at Carolina Ear Nose and Throat Clinic in Orangeburg. In his physical examination, Dr. Ansley observed both of Crane's eardrums had "perforations." Dr. Ansley conducted a hearing test, and the resulting audiogram[1] showed Crane had severe sensorineural hearing loss in both ears. Dr. Ansley wrote in his report, "Hopefully his thresholds will improve." At a follow-up appointment on March 6, however, Dr. Ansley conducted another hearing test that indicated Crane "actually had a shift downward" in his hearing. The March 6 test showed "profound hearing acuity loss in both ears." Because Crane's hearing loss had not improved, Dr. Ansley referred Crane to the Medical University of South Carolina for an auditory brainstem response test. However, Crane's medical insurance did not cover the test, the Uninsured Employers' Fund denied the entire claim and thus refused to pay for it,[2] and the commission did not require it. To this date, Crane has not received the test.

On May 19, 2014, Dr. David Rogers—a medical expert Crane retained—examined him. Dr. Rogers found both of Crane's eardrums were ruptured. He described a 60% tear in the right eardrum and an 80% tear in the left. Dr. Rogers diagnosed Crane with permanent and profound bilateral sensorineural hearing loss and concluded his hearing could not be restored by natural means.

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[1] An audiogram is, "The graphic record drawn from the results of hearing tests with an audiometer, which charts the threshold of hearing at various frequencies against sound intensity in decibels." *Audiogram*, STEDMAN'S MEDICAL DICTIONARY (28th ed. 2006).

[2] Raber's was not insured, and for that reason the Uninsured Employers' Fund is responsible for Crane's claim. *See* S.C. Code Ann. § 42-1-415(A) (2015) ("The Uninsured Employers' Fund shall assume responsibility for claims within thirty days of a determination of responsibility made by the commission.").

Crane saw other doctors after his accident for problems such as dizziness, headaches, a fall resulting in a broken rib, and continuing pain from the broken rib. On February 25, 2014, Crane had a CT scan that showed normal results. After the initial hearing but before the commissioner issued a written order, the commissioner permitted Crane to supplement the record with the results of a third hearing test, conducted August 19, 2014, at Carolina Ear Nose and Throat. The audiogram from that test showed Crane suffers from "profound hearing loss" in the right ear and "profound to severe hearing loss" in the left ear. The otolaryngologist who saw him that day noted Crane "reads lips," and wrote, "He should be considered disabled because of this."

## II. Proceedings at the Commission

Crane filed a Form 50 alleging "head injury and hearing loss" from being hit in the head by an object and from the explosion-like sound. In his pre-hearing brief, Crane alleged he "suffered head/brain injuries, severe hearing loss, and psychological overlay." As to the alleged brain injury, Crane argued he was not at maximum medical improvement, and thus "a determination of physical brain damage is premature and not before the Commission at this hearing." The employer and the Uninsured Employers' Fund each filed a separate Form 51 denying all claims.

Commissioner Susan Barden promptly held the initial hearing on June 26, 2014. The medical evidence described above was included in the record, and Crane was the only witness. In her April 30, 2015 order, the commissioner focused almost exclusively on Crane's credibility. She wrote, "Claimant's conduct/presentation at the hearing (including prior to opening the record) was more revealing than the substance of his actual testimony." She added, "Claimant's 'display' and evasiveness at the hearing . . . make me seriously question whether or not there was an actual injury" and "if Claimant had legitimate, causally-related hearing loss he would have felt no need to 'perform' at the hearing." She stated Crane's ability to hear or not hear questions was "selective" and "had no modicum of consistency." She again referred to Crane's testimony as an "inconsistent performance," and stated his acting was "very poor." She mentioned "other problematic issues," which she did not name. However, referring to the surveillance video of the incident as though this evidence obligated her to find some injury, the commissioner found Crane did "sustain[] an injury to his ears."

Based primarily on the finding Crane's testimony was not credible, the commissioner denied Crane's claims for temporary total disability, permanent impairment, and future medical care. The appellate panel affirmed. The court of appeals affirmed the appellate panel as to permanent impairment and future medical care, but reversed as to temporary total disability. *Crane v. Raber's Discount Tire Rack*, Op. No. 2018-UP-085 (S.C. Ct. App. filed Feb. 14, 2018). We granted Crane's petition for a writ of certiorari.

## III. Analysis

Our review of the decisions of the workers' compensation commission is governed by the Administrative Procedures Act. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 502 (2012); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). The Act provides, "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2019). As to questions of fact, "The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the . . . findings . . . are . . . (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Id.* When the commission makes a finding of fact that is properly supported by substantial evidence, the courts must uphold it. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

The commission often makes findings of fact based on credibility determinations. In numerous cases, our courts have upheld factual findings the commission made based on its credibility determination. *See, e.g.*, *Langdale v. Carpets*, 395 S.C. 194, 203, 717 S.E.2d 80, 84-85 (Ct. App. 2011) (upholding the determination that insurance coverage exists based on the commissioner's decision to believe one witness over another, "which we defer to on appeal"); *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009) (upholding the commission's findings regarding the extent of injury because the commission determined the claimant "was not credible"); *McGriff v. Worsley Cos., Inc.*, 376 S.C. 103, 113-14, 654 S.E.2d 856, 861-62 (Ct. App. 2007) (upholding the finding that an injury was compensable based in part on the commission's credibility determination).

The reason we consistently affirm these findings derives from a principle that applies beyond credibility to all factual determinations of the commission: "an award must be founded on evidence of sufficient substance to afford a reasonable basis for it."

*Hutson*, 399 S.C. at 387, 732 S.E.2d at 503 (quoting *Wynn v. Peoples Nat. Gas Co. of S.C.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961)). When the commission's factual determination is "founded on evidence of sufficient substance," and the evidence "afford[s] a reasonable basis" for the commission's decision in the case, the evidence meets the "substantial evidence" standard and we are bound by the decision. This point is illustrated in the hundreds of cases in which our appellate courts have affirmed factual determinations by the commission.

The counterpoint is illustrated by *Hutson*, in which we reversed a factual determination by the commission. In *Hutson*, the claimant sustained an injury that prevented him from "continuing in his life's occupation as a crane operator." 399 S.C. at 387, 732 S.E.2d at 503. He sought to prove disability through wage loss under section 42-9-20 of the South Carolina Code (2015). 399 S.C. at 385, 732 S.E.2d at 502. Thus, we stated, "The sole question before us . . . [was] whether his injury will also prevent him from earning the same wages in another job." 399 S.C. at 387-88, 732 S.E.2d at 503.

The commission found the claimant failed to prove he suffered a wage loss that qualified him for disability under section 42-9-20. 399 S.C. at 385, 732 S.E.2d at 502. The evidentiary basis for this factual determination was the claimant's testimony he believed he could make money running a restaurant. 399 S.C. at 385, 388, 732 S.E.2d at 501-02, 503. The commissioner who conducted the initial hearing "concluded that because Hutson could not testify as to how much he would make as a restaurateur, there was no way to determine if he would suffer any loss of earning capacity." 399 S.C. at 385, 732 S.E.2d at 502. The commissioner specifically stated that but for this testimony by the claimant, he would have found the claimant disabled. *Id.* The court of appeals in *Hutson* affirmed, ruling substantial evidence supported the commission's factual finding that the claimant failed to prove his wage-loss claim. *Hutson v. State Ports Auth.*, 390 S.C. 108, 114, 700 S.E.2d 462, 466 (Ct. App. 2010).

This Court reversed. 399 S.C. at 390, 732 S.E.2d at 504. The Court explained two reasons the claimant's testimony did not qualify as "substantial evidence" under the Administrative Procedures Act. First, we stated "despite [the claimant]'s confidence in his own abilities, the record is clear that [he] had no experience running a restaurant or an understanding of what doing so entails." 399 S.C. at 388, 732 S.E.2d at 503. We found it "is abundantly clear from [the claimant]'s testimony . . . that he never worked in a restaurant in his life, much less operated one, and he clearly had

no idea what income he might realize from such a venture." 399 S.C. at 390, 732 S.E.2d at 504. We criticized the commission's "use [of the claimant's] unsupported and wildly optimistic goals" as evidence to support the denial of his wage loss claim. 399 S.C. at 388, 732 S.E.2d at 503.

Second, we considered the context of the testimony. We explained the testimony was not offered to prove he could make the same money running a restaurant that he made operating a crane, which was "approximately $90,000 per year." 399 S.C. at 385, 732 S.E.2d at 501. Rather, "the sole purpose for [the claimant's] testimony was to support [his] request that his award be paid to him in a lump sum." 399 S.C. at 388, 732 S.E.2d at 503. The claimant "desire[d] to continue to have a productive work life," and he made a "commendable" request that the commission give him the best chance to do so by awarding benefits in a lump sum. 399 S.C. at 390, 732 S.E.2d at 504. "In sum," we held, "the full commission's conclusion is based on rank speculation and cannot now be used as the basis for denying [the] claim for lost wages." 399 S.C. at 389-90, 732 S.E.2d at 504. Under *Hutson*, when the commission's factual finding is not "founded on evidence of sufficient substance to afford a reasonable basis" for the finding, we will not uphold it.

In cases in which we affirmed factual findings of the commission based on its credibility determination, we did so because it made sense for the commission to use credibility as the dispositive factor in deciding the particular issue. In *Langdale*, for example, the resolution of the insurance coverage question before the commission depended on whether the manager of an employment management agency's client told the agency that a particular employee was to be covered for workers' compensation. 395 S.C. at 202, 717 S.E.2d at 84. The evidence on the point was disputed, 395 S.C. at 203, 717 S.E.2d at 84-85, but the commission's determination to believe the manager's testimony logically resolved the factual dispute. Thus, the commission's credibility determination was a reasonable and meaningful basis for its decision.

*Lee v. Bondex, Inc.*—referenced above—also illustrates the important role credibility findings play when credibility reasonably and meaningfully relates to factual disputes to be decided by the commission. In *Lee*, the claimant was installing a large metal hood at his employer's plant when the hood fell on him. 406 S.C. at 99, 749 S.E.2d at 156. The claimant testified a sharp edge landed on his shoulder, resulting in immediate pain and difficulty working. 406 S.C. at 99-100, 749 S.E.2d at 156. The compensability of his injuries depended on "whether they were caused

by the hood falling on his shoulder." 406 S.C. at 100, 749 S.E.2d at 156. The commissioner denied the claim, finding he did not prove he suffered a compensable injury. *Id.*

The appellate panel found the injury was compensable and reversed. *Id.* "[T]he appellate panel specifically relied on four doctors who examined [the claimant], each of whom gave the opinion that the accident caused his injuries. The appellate panel specifically found the four doctors' opinions were 'more persuasive on the issue of causation' than other medical evidence indicating the injury was not work-related." 406 S.C. at 101, 749 S.E.2d at 156-57. The court of appeals affirmed because the appellate panel's reliance on the credibility of the four doctors made sense. The commission's credibility determination was a reasonable and meaningful basis on which to decide the dispositive factual question of whether the injury was work-related, and thus compensable. The court held, "This credibility determination by the appellate panel," which the court found was supported by substantial evidence, "is binding on the court." 406 S.C. at 101, 749 S.E.2d at 157.

In cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact. This case illustrates that point. Even if Crane was untruthful in his testimony at the hearing, his claims for future medical care, temporary total disability, and permanent impairment caused by hearing loss are based on objective medical evidence. The opinions of his treating physicians that he suffers from severe to profound hearing loss as a result of his work-related accident are similarly based on objective medical evidence. There is little in Crane's medical records—or anywhere in the record before us—that indicates Crane's credibility reasonably and meaningfully relates to whether he actually suffered hearing loss on February 19, 2014.

To make a proper review of a factual determination by the commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reasons the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision. In most cases, this is obvious from context. In *Langdale*, for example, it required no explanation from the commission for the reviewing court to understand that the credibility determination—the manager did tell the agency a particular employee was to be covered—resolved the disputed factual question of insurance coverage.

In other cases—like this one—more explanation is required. In cases like this, the commission may not simply recite its finding that a witness is not credible, but must explain the basis for its credibility finding.[3] Then, the commission must explain how the credibility determination is important to making the particular factual finding. *See generally Pack v. State Dep't of Transp.*, 381 S.C. 526, 535, 673 S.E.2d 461, 466 (Ct. App. 2009) (reversing the commission because of "its failure to explain exactly why it denied Pack's claim"). Here, neither Commissioner Barden nor the appellate panel gave any explanation how Crane's lack of credibility can justify ignoring the medical evidence, or how his credibility even relates to whether he suffered hearing loss. Four physicians diagnosed Crane with severe to profound hearing loss. Those diagnoses appear to have been based on at least two objective observations by the physicians. First, Crane's eardrums were ruptured, with one doctor describing a 60% tear in the right eardrum and an 80% tear in the left. Second, Crane had at least three hearing tests that showed severe to profound hearing loss in both ears.

We can discern no basis—either from context or from the commission's orders—on which the commission could find Crane lied to make his eardrums appear ruptured. Similarly, neither the context of the commission's decision nor any explanation in the commission's orders give us any meaningful basis on which to understand that Crane's lack of credibility justifies ignoring the results of three different hearing tests—conducted by two different ear, nose, and throat specialists—each of which showed severe to profound hearing loss. As we required in *Hutson*, the

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[3] To some extent, Commissioner Barden did explain the basis for her credibility finding. Her explanation, however, reads as though she decided to find Crane not believable and then searched for reasons to justify her preconception. For example, the commissioner found Crane's testimony he cannot work because it is too loud to be inconsistent with his testimony he has to turn up the radio in the car to hear it. It is true he testified to those things, but the commissioner's conclusion he lacked credibility does not flow from the testimony. Crane testified he has almost been run over at work several times because he cannot hear cars and other vehicles. To hear these vehicles and avoid being run over, he must turn up his hearing aids so loud that the background noise gives him headaches. He also testified he must set the car radio volume very high or he cannot hear it. Those statements are clearly not inconsistent with each other. They are consistent with his claim of hearing loss. The commissioner relied on several other alleged inconsistencies that do not seem all that significant when taken in context. Nevertheless, there is some evidence to support the commissioner's finding Crane lacked credibility.

commission's factual determinations "must be founded on evidence of sufficient substance to afford a reasonable basis for it." 399 S.C. at 387, 732 S.E.2d at 503.

## IV. Conclusion

Credibility can be important in resolving factual disputes before the commission. When credibility is a reasonable and meaningful basis on which to make a factual determination, and when there is evidence of sufficient substance to afford a reasonable basis for the credibility finding, we will uphold the commission's factual determinations on the basis of credibility. However, that was not the case here. The commission erred in denying Crane's claims for hearing loss based on credibility without explaining any basis on which credibility could justify ignoring objective medical evidence. We remand to a different commissioner for a new hearing. The commissioner must reconsider the date of maximum medical improvement and make de novo findings on Crane's claims for temporary total disability, permanent impairment, and future medical care based on his alleged hearing loss and psychological overlay.

**BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur.**

# The Supreme Court of South Carolina

In the Matter of James B. O'Connor, Respondent.

Appellate Case Nos. 2020-000637, 2020-000639

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ORDER

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The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition also seeks appointment of the Receiver to protect the interests of Respondent's clients and assume responsibility over Respondent's law practice bank accounts pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, has been duly

appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin 's office.

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

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

Columbia, South Carolina

April 23, 2020

# The Supreme Court of South Carolina

Re: Rule Amendments

Appellate Case Nos. 2019-001492 and 2019-001828

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ORDER

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On January 30, 2020, the following orders were submitted to the General Assembly pursuant to Article V, § 4A of the South Carolina Constitution:

(1) An order amending Rule 45 of the South Carolina Rules of Civil Procedure.

(2) An order amending Rule 221 of the South Carolina Appellate Court Rules.

Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
April 29, 2020

# The Supreme Court of South Carolina

Re: Amendments to Rule 45, South Carolina Rules of Civil Procedure

Appellate Case No. 2019-001492

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ORDER

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Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 45 of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 30, 2020

Rule 45, South Carolina Rules of Civil Procedure, is amended to delete the last sentence of paragraph (b)(1) and add new paragraph (a)(4), which provides:

> **(4)** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a copy of the subpoena must be served on each party in the manner prescribed by Rule 5(b) at least ten days before the time specified for compliance.

Paragraph (e) of Rule 45, South Carolina Rules of Civil Procedure, is amended to provide:

> **(e) Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend a deposition, permit an inspection, or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A); or if served without an adequate time to respond; or if service is made upon an individual under Rule 4(d)(1) and the individual did not receive or acknowledge the subpoena.

The following Note is added to Rule 45, South Carolina Rules of Civil Procedure:

**Note to 2020 Amendment:**

> The amendment incorporates a version of the 2013 amendment to the Federal Rule by transferring the last sentence in paragraph (b)(1) to new paragraph (a)(4) and amending the sentence to require the issuing party serve a copy of the subpoena on each party before it is served on the person to whom it is directed. The language has also been modified, consistent with the corresponding Federal Rule and prior amendments to the South Carolina Rules of Civil Procedure involving electronic discovery, to include a reference to electronically stored information.
>
> Paragraph (e) has been amended to delete the specific reference to former paragraph (b)(1)—now paragraph (a)(4)—with regard to an

adequate time to respond. This provision controls the time to serve a subpoena on each party, and not the time to serve the subpoena on the person to whom the subpoena is directed.

# The Supreme Court of South Carolina

Re: Amendments to Rule 221, South Carolina Appellate Court Rules

Appellate Case No. 2019-001828

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ORDER

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Pursuant to Article V, § 4 of the South Carolina Constitution, the last sentence of Rule 221(a), South Carolina Appellate Court Rules, is amended to provide:

> "No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR, or declining to entertain a matter under Rule 245, SCACR."

The amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 30, 2020

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Appellant,

v.

Jason Skyler Israel Pogue, Respondent.

Appellate Case No. 2017-000890

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Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

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Opinion No. 5720
Submitted March 2, 2020 – Filed April 29, 2020

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**REVERSED AND REMANDED**

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Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, for Appellant.

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

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**THOMAS, J.:** The State appealed Jason Skylar Israel Pogue's sentence following his guilty plea to four counts of third degree sexual exploitation of a minor and one

count of second degree exploitation of a minor.[1] We reverse and remand for resentencing.

## FACTS

In 2015, Pogue was downloading and sharing child pornography. After an investigation and a forensic examination of his computer, investigators found fifty sexually-explicit videos and dozens of still photos, including videos and photographs of female children as young as four years old being orally and vaginally raped.

At the time of sentencing, Pogue was thirty-three years old, had no prior record, and had suffered health issues for twelve years. On April 6, 2017, the circuit court sentenced Pogue to ten years' imprisonment, suspended to four years of home detention and five years of probation, and inpatient treatment at Overcomers, a treatment facility at Miracle Hill Ministries. The State objected, arguing the home detention program was not valid for a conviction of second-degree exploitation of a minor. The court overruled the objection. This appeal follows.

## STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). A sentence will not be overturned absent an abuse of discretion; an abuse of discretion occurs "when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

## LAW/ANALYSIS

The State argues the circuit court erred in sentencing Pogue to home detention. We agree.

Pogue pled guilty to one count of sexual exploitation of a minor in the second degree under section 16-15-405 of the South Carolina Code. Section 16-15-405 mandates in part:

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[1] The only conviction relevant to this appeal is the one count of second degree exploitation of a minor.

> (D) A person who violates the provisions of this section is guilty of a felony and, upon conviction, *must be imprisoned not less than two years* nor more than ten years. *No part of the minimum sentence may be suspended* nor is the individual convicted eligible for parole until he has served the minimum sentence.

S.C. Code Ann. § 16-15-405 (2015) (emphasis added). Under South Carolina Code Section 16-1-60, second degree sexual exploitation of a minor is classified as a violent crime. S.C. Code Ann. § 16-1-60 (Supp. 2019). As to home detention, South Carolina Code Section 24-13-1530 states in relevant part: "*Notwithstanding another provision of law which requires mandatory incarceration*, electronic and nonelectronic home detention programs may be used as an alternative to incarceration for low risk, *nonviolent* adult and juvenile offenders as selected by the court if there is a home detention program available in the jurisdiction." S.C. Code Ann. § 24-13-1530(A) (2007) (emphasis added). In *State v. Simpson*, 429 S.C. 83, 91-92, 837 S.E.2d 669, 673 (Ct. App. 2020), this court reversed the home detention sentence of a defendant who pled guilty to four counts of second degree sexual exploitation of a minor, finding the statutory scheme did not authorize home detention for offenses classified as "violent."[2]

Under *Simpson* and the statutory scheme, we find the home detention program applies only to nonviolent offenders and second degree sexual exploitation of a minor is defined as a violent crime by statute. *Compare* § 16-1-60 (defining violent crimes) *with* § 16-1-70 (2015) (defining nonviolent crimes as "all offenses not specifically enumerated in Section 16-1-60"). Accordingly, we reverse and remand for a new sentencing hearing.

**REVERSED AND REMANDED.**[3]

**HUFF and MCDONALD, JJ., concur.**

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[2] Unlike in *Simpson*, Pogue has not yet completed the home detention portion of his sentence; thus, we need not address mootness. *Simpson*, 429 S.C. at 89, 837 S.E.2d at 672 (finding "the question of Simpson's own sentence moot due to his completion of the determinate home detention portion of the sentence").

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Books-A-Million, Inc., Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2017-001519

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

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Opinion No. Op. 5721
Heard March 9, 2020 – Filed April 29, 2020

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**AFFIRMED**

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

Sean Gordon Ryan and Adam J. Neil, of Columbia, for Respondent.

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**THOMAS, J.:** In this case arising from a sales tax audit by the South Carolina Department of Revenue (SCDOR), Books-A-Million, Inc. (BAM) appeals from the order of the Administrative Law Court (ALC) that upheld SCDOR's assessment of taxes, penalties, and interest against BAM for BAM's failure to include sales of the Millionaire's Club Memberships (Club Memberships) in BAM's gross proceeds of sales. BAM argues the ALC erred in finding (1) the amounts collected by BAM

for Club Memberships are subject to sales tax; (2) renewals of Club Memberships are subject to sales tax; and (3) the statutes are not ambiguous. We affirm.

**FACTS**

BAM operates a discount book retail business headquartered in Birmingham, Alabama. BAM sells books, magazines, collectible supplies, cards, and other gifts in retail stores throughout the country and online. BAM operates thirteen retail locations in South Carolina. Customers pay a $25 annual fee (Membership Fee) to belong to the Millionaire's Club (the Club). Customers can pay the Membership Fee separately or along with other store purchases. Club Memberships expire one year from the date of payment of the Membership Fee, unless the membership is automatically renewed. Club Memberships automatically renew each year for a one-year period unless customers affirmatively opt out of the automatic renewal or the Club Membership is otherwise cancelled or terminated. If customers do not opt out, BAM bills the annual Membership Fee to the credit or debit card provided when the customer initially enrolled in the Club. BAM does not charge sales tax on the cost of the Membership Fee.

On December 11, 2014, SCDOR informed BAM by letter that its sales and use tax returns for January 1, 2012, to August 31, 2015, were selected for audit. BAM provided SCDOR copies of its income statements for the audited periods. SCDOR's auditor compared BAM's gross proceeds of sales from the income statements to the gross proceeds of sales reported on BAM's sales and use tax returns.

During the audit, SCDOR discovered BAM was not charging sales tax on the cost of Membership Fees. Thus, on September 16, 2015, SCDOR issued a Proposed Notice of Assessment (PNOA) to BAM in the amount of $242,076.97, due for sales tax on the cost of Membership Fees for the audited periods (including $15,703.13 in interest and $63.14 in penalties). The amounts listed in the PNOA resulted from adjustments caused by applying sales tax to the cost of Membership Fees. BAM timely objected to the PNOA by letter dated December 14, 2015, and SCDOR issued its determination on the matter on March 15, 2016.

BAM requested a contested case hearing before the ALC, challenging SCDOR's final determination. The sole issue before the ALC was whether the proceeds from BAM's South Carolina sales of Club Memberships were subject to sales taxes and

should have been included in BAM's gross proceeds of sales. Both parties filed motions for summary judgment, agreeing there were no material facts in dispute but disagreeing as to the application of the law to the undisputed facts. Prior to the hearing before the ALC, the parties filed stipulations of fact.

A hearing was held before the ALC on May 9, 2017. The ALC issued its order on June 1, 2017; however, on June 6, 2017, the ALC issued an order vacating its June 1 order and amending its order granting SCDOR's motion for summary judgment. BAM filed a motion for reconsideration, which was denied. This appeal follows.

**STANDARD OF REVIEW**

The Administrative Procedures Act provides our standard of review in an appeal from the ALC. *Schwiers v. S.C. Dep't of Health & Envtl. Control*, 429 S.C. 43, 48, 837 S.E.2d 730, 733 (Ct. App. 2019). Section § 1-23-610(B) of the South Carolina Code provides this court must confine our analysis to the record, and we may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2019). "In determining whether the decision of the ALC was supported by substantial evidence, a reviewing court 'need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC.'" *Schwiers*, 429 S.C. at 49, 837 S.E.2d at 733 (quoting *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl.*

*Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014)). "However, the [c]ourt may reverse the decision of ALC where it is in violation of a statutory provision or it is affected by an error of law." *Kiawah Dev. Partners, II*, 411 S.C. at 28, 766 S.E.2d at 715.

## LAW/ANALYSIS

### I. Club Membership Sales

BAM argues the ALC erred in finding the amounts collected by BAM for Club Memberships are subject to sales tax. We disagree.

Under South Carolina law, "[a] sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A) (2014).[1] For sales and use tax purposes, the term "person" "includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality." S.C. Code Ann. § 12-36-30 (2014). "Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale . . . of tangible personal property." S.C. Code Ann. § 12-36-90 (2014). "Tangible personal property" is defined as "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles . . . the sale or use of which is subject to tax under this chapter . . . ." S.C. Code Ann. § 12-36-60 (2014). "It is presumed that all gross proceeds are subject to the tax until the contrary is established. The burden of proof that the sale of tangible personal property is not a sale at retail is on the seller." S.C. Code Ann. § 12-36-950 (2014).

When "an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons." *Kiawah Dev. Partners, II*, 411 S.C. at 34, 766 S.E.2d at 718. This court defers to an agency's interpretation of a statute

[1] Section 12-36-1110 imposed an additional one percent sales tax as of June 1, 2007. S.C. Code Ann. § 12-36-1110 (2014).

"unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 34-35, 766 S.E.2d at 718 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

At the hearing before the ALC, SCDOR argued a plain reading of the statute demonstrated that all persons engaged in the sale of tangible personal property at retail are liable for sales tax on their gross proceeds of sales. BAM argued sections 12-36-910(A) and 12-36-90 only imposed a sales tax on the gross proceeds of the sale of tangible personal property.

The ALC found BAM's argument failed to apply the plain meaning rule. Instead, the ALC found BAM's reading of the statute required the deletion of the words "persons engaged in the business of." Also, it found BAM's reading required deleting the phrase "proceeding or accruing" from the statute. The ALC stated, "A reading of a statute that requires eliminating words within the statute is not reasonable and does not comport with the plain meaning rule." The ALC further stated:

> If [BAM] . . . were to stop selling tangible personal property, its [Club Membership] would not be able to survive as the [Club Membership] only exists as a means to provide discounts on BAM's sales of tangible personal property. *Because the [Club Membership] cannot exist without [BAM] offering tangible personal property for sale, I conclude [BAM's Club Membership] and sales of tangible personal property are inseparable*. Thus, I conclude [BAM] is in the business of selling tangible personal property at retail, and [BAM's] business is subject to South Carolina sales tax. (Emphasis added.).

The ALC continued:

> When applying the plain meaning rule to the words in the statute, it is clear that *the statute is broad and encompasses the total value of a sale, not simply the amount paid for tangible personal property*. Moreover, a review of the case law demonstrates that gross proceeds of sales can include the value of services and intangibles

> that are derived from the sale of tangible personal property. . . . Therefore, I agree with [SCDOR] and conclude that gross proceeds of sales includes all value that comes from or is direct result of the sale, lease, or rental of tangible personal property, including proceeds from fees related to incidental services, intangibles, or other benefits. (Emphasis added.).

The ALC considered two South Carolina cases in making its decision. In *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 97, 705 S.E.2d 28, 32 (2011), Travelscape contended it was not required to pay sales tax on the service and facilitation fees it retained from online hotel reservations because such fees were "derived from" the services it provided, not from the rental charge for the hotel room. Our supreme court found the fees charged by Travelscape for its services were subject to sales tax under the plain language of section 12-36-920(A) as gross proceeds because the service was merely incidental to the purchase of the accommodations and the cost of services is specifically included in the definition of gross proceeds of sales. *Id.* at 98, 705 S.E.2d at 33.

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985), the issue was whether a layaway fee was part of the gross proceeds of sales. The court reasoned that "[b]ut for the lay away [sic] sales, Meyers Arnold would not receive the lay away [sic] fees. The fees are obviously charged for the service rendered in making lay away [sic] sales." *Id.* Thus, this court held the layaway fees were part of the gross proceeds of sales and subject to the sales tax. *Id.*

The ALC also considered two Administrative Law Court cases in making its decision. In *Textile Restoration Services, Inc. v. South Carolina Department of Revenue*, 2015 WL 7443800, at *4 (S.C. Admin. Law Ct. Nov. 12, 2015), the court found SCDOR properly included charges for repairing, altering, storing, pick-up, and delivery of items incident to the dry cleaning service in the taxpayer's gross proceeds of sales. In *Tronco's Catering, Inc. v. South Carolina Department of Revenue*, 2010 WL 5781622, at *3 (S.C. Admin. Law Ct. Apr. 12, 2010), the court held "the value of the sale of catered meals includes service, labor, and room charges [because] [s]uch charges are incidental to and merely enhance the value of the sale of catered meals." "The statute further expressly states that the value of the sale must include costs for materials, labor, service, transportation, or for any

other expense." *Id.* "When the terms of a statute are clear and unambiguous, as they are here, there is no room for construction and the terms must be given their literal meaning." *Id.*

The ALC in this case concluded, "South Carolina case law demonstrates that gross proceeds of sales includes all value that comes from or is a direct result of the sale, lease, or rental of tangible personal property." Its order stated:

> Customers pay the Membership Fee to obtain discounts and free shipping on their purchases of tangible personal property. Thus, the Membership Fee is a direct result of the sale of tangible personal property. But for [BAM's] sale of tangible personal property, [BAM] would not be able to sell [Club Memberships] and, therefore, would not collect Membership Fees. The Membership Fees are payment for services or benefits that are incident to the sale of tangible personal property. Moreover, the Membership Fees are inextricably linked to, and incapable of being separated from, the sale of tangible personal property.

Thus, the ALC held BAM's Club Membership Fees are includable in BAM's gross proceeds of sales and are subject to sales tax.

On appeal, BAM argues under the plain meaning of section 12-36-910, the Membership Fees collected by BAM are not subject to sales tax because Club Memberships are not tangible personal property under section 12-36-60, and therefore the Membership Fees cannot constitute gross proceeds of sales under section 12-36-90. BAM argues this case is distinguishable from *Meyers Arnold* and *Travelscape*:

> The facts in *Meyers Arnold* and *Travelscape* . . . both involve the imposition of sales tax on fees charged by a retailer providing a service where the fees were inextricably intertwined with the sale of specific tangible personal property or accommodations. In *Meyers Arnold*, the customer could not purchase the lay away [sic] merchandise without paying the subject fee.

> Likewise, in *Travelscape*, the customer could not purchase the accommodation without paying the fee. The charge for layaway/service fee in each case occurs only after the purchase of the underlying tangible personal property. In addition, neither customer would only pay the fee—presumably, neither taxpayer could charge only the fee, since that fee is so inextricably linked to the underlying purchase of tangible personal property or services.

BAM also cites to other states' cases interpreting their tax statutes in support of its argument. One of these cases is *Barnes & Noble Superstores, Inc. v. Huddleston*, 1996 WL 596955 (Tenn. Ct. App. Oct. 18, 1996). In that case, the Tennessee Commissioner of Revenue appealed from the trial court's grant of summary judgment in favor of Barnes & Noble. *Id.* at *1. The primary issue on appeal was whether Barnes & Noble's sale of $10 annual membership cards, entitling the members to merchandise discounts, was subject to Tennessee sales tax. *Id.* The Commissioner's position was that the cards themselves were tangible personal property subject to sales tax, and payment of the $10 fee constituted prepayment for merchandise because Barnes & Noble customers were in effect applying $10 towards the later purchase of inventory. *Id.* At that time, Tennessee statute section 67-6-102(28) (1994) defined "tangible personal property" as personal property that "may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses." *Id.* at *2. The court looked to the "language of the statute in order to ascertain and effectuate the intent of the General Assembly," and noted "[i]t is a general rule of construction that sales and use taxes will not be extended by implication beyond the clear import of the language used and will not be enlarged to embrace matters not specifically named." *Id.* The court then held the membership sales were not subject to taxation because the "true object of the subject transactions between [Barnes & Noble] and its customers is to bestow upon club members the intangible right to receive a discount on merchandise." *Id.* Further, "[t]he membership card is merely an indicia of that intangible right and incidentally aids in the exercise of that right." *Id.*

However, this court does not have to follow other states' interpretations of their tax laws in interpreting our own tax laws. *See State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019) ("When there

is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions."); *S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 366, 175 S.E.2d 391, 395 (1970) ("The decisions of courts from other jurisdictions are, of course, only persuasive authority."); *cf. Widenhouse v. Colson*, 405 S.C. 55, 59 n.2, 747 S.E.2d 188, 191 n.2 (2013) (noting a state is not "required to defer to another state's judgment regarding 'the disposition or devolution of realty' in the forum state" (quoting *Williams v. State of North Carolina*, 317 U.S. 287, 294 n.5 (1942)), or required "to apply the law of another state in an action in its own courts" (citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436-37 (1943))).

BAM also argues its Club Membership is similar to the purchase of gift cards and membership-only warehouses, which are not subject to sales tax in South Carolina. BAM points out SCDOR has determined the sale of prepaid telephone cards are not subject to sales tax at the time of sale if they are for use with a landline; however, they are subject to sales tax at the time of sale if they are for use with a mobile phone. S.C. Rev. Rul. 04-4. In a 2004 ruling, the SCDOR held:

> The sale or recharge at retail of a *prepaid telephone calling card* . . . for use in making local, long distance, or international telephone calls, that can be used to make a call from a *land-based phone*, is not subject to sales tax since this transaction is not a sale of tangible personal property. The transaction is merely the exchange of money for an intangible evidence of debt—a future right to telephone service. *The taxable transaction takes place when the telephone calling card is used.* . . . The provider of the local telephone call is liable for the 5% sales tax on local calls made with the calling card.
>
> . . .
>
> The sale or recharge at retail of a *prepaid telephone calling card* for use in making local, long distance, or international telephone calls . . . that can only be used with a *wireless phone* or other wireless device, *is subject to South Carolina sales tax at the time of purchase*.

S.C. Rev. Rul. 04-4 (emphasis added). That ruling further states: "Other similar nontaxable transactions include the sale of gift certificates or traveler's checks. The taxable transaction occurs at the time the gift certificate or traveler's check is redeemed." BAM cites to SCDOR's South Carolina Sales and Use Tax Manual (2017 Ed.), chapter 6, page 9, which provides that "[m]embership fees charged by a membership-only warehouse offering a selection of brand-name merchandise to business owners and others where all membership types receive the same benefits" are not subject to the sales tax or use tax. The manual states in a footnote to the membership-only warehouse exemption that

> A membership fee would be includable in gross proceeds and subject to the tax if the membership fee is the sales price for the tangible personal property. For example, if a direct mail movie rental company charged an annual or month[ly] fee to receive movies for short term use of movies and no other charges are paid by the customers to receive the movies, then the annual or monthly fee is the sales price of the tangible personal property and subject to the tax.

After reviewing the record, we find the decision of the ALC was supported by substantial evidence. South Carolina case law provides that gross proceeds of sales includes all value that comes from or is a direct result of the sale of tangible personal property. The Membership Fee is a direct result of the sale of tangible personal property because BAM would not be able to sell Club Memberships but for BAM's sale of tangible personal property. Thus, the ALC did not err in finding the amounts collected by BAM for Club Memberships are subject to sales tax.

## II. Club Membership Renewals

BAM argues the ALC erred in finding renewals of Club Memberships are subject to sales tax. We disagree.

Because we find the ALC correctly determined sales of Club Memberships are subject to sales tax, we also find the ALC correctly determined renewals of Club Memberships are also subject to sales tax. *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).

## III. Ambiguous Statutes

BAM argues the ALC erred in finding the statutes are not ambiguous. We disagree.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). Courts "must give the words found in the statute their 'plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *Sloan*, 371 S.C. at 499, 640 S.E.2d at 459). "Thus if the words are unambiguous, we must apply their literal meaning." *Id.* at 74, 716 S.E.2d at 459; *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1966) ("The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein."). "The interpretation of a statute is a question of law reviewed de novo." *S.C. Dep't of Transp. v. Powell*, 424 S.C. 206, 210, 818 S.E.2d 433, 435 (2018).

At the hearing before the ALC, BAM argued sections 12-36-910(A) and 12-36-90 were ambiguous and should be construed in favor of the taxpayer. The ALC found BAM failed to point to any ambiguity in either section. Thus, the ALC concluded sections 12-36-910(A) and 12-36-90 were unambiguous, and the plain meaning rule applied. The ALC found the application of the plain meaning rule to the terms in the statutes at issue demonstrated the Membership Fees were includable in BAM's gross proceeds of sales and subject to sales tax.

On appeal, BAM again argues the statutes are ambiguous regarding whether optional membership fees are included in the sales tax base, and such ambiguity must be resolved in favor of the taxpayer.

S.C. Code Ann. § 12-36-910(A) (2014) states "[a] sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-90 (2014) provides "[g]ross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property."

Based on our review, we find the language of the statutes is not ambiguous, and the ALC's reading of the statutes was correct and consistent with the intent of the legislature. Thus, the ALC did not err in finding the statutes are not ambiguous.

**CONCLUSION**

Accordingly, the decision of the ALC is

**AFFIRMED.**

**HUFF and MCDONALD, JJ., concur.**