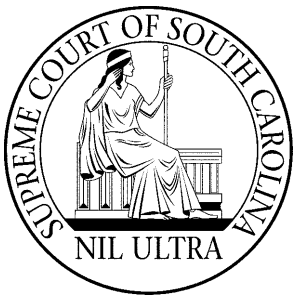

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
August 10, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

David Matthew Carter, Petitioner.

Appellate Case No. 2021-000632

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
Steven H. John, Circuit Court Judge

Opinion No. 28104
Heard June 8, 2022 – Filed August 10, 2022

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan Wilson, Senior Assistant Attorney General David Spencer, both of Columbia; and Solicitor Randy E. Newman Jr., of Lancaster, all for Respondent.

PER CURIAM: We granted a petition for a writ of certiorari to review the court of appeals' decision in *State v. Carter*, 433 S.C. 352, 857 S.E.2d 910 (Ct. App. 2021). We now dismiss the writ as improvidently granted.[1]

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, KITTREDGE, HEARN, FEW and Acting Justice William H. Seals, Jr., concur.

[1] We note that during oral argument, Petitioner's primary focus was on whether the procedure employed by the trial court violated his right to confront his accuser. *See generally* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). Previously, Petitioner's argument on appeal was one of statutory interpretation, specifically, the meaning of the phrase "very young" in section 16-3-1550(E) of the South Carolina Code (2015) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate."). Our disposition of this case should in no manner be viewed as a comment one way or the other on the merits of Petitioner's Confrontation Clause argument.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sullivan Management, LLC, Plaintiff,

v.

Fireman's Fund Insurance Company, and Allianz GLOBAL Risks, US Insurance Company, Defendants.

Appellate Case No. 2021-001209

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Mary G. Lewis, United States District Judge

Opinion No. 28105
Heard June 8, 2022 – Filed August 10, 2022

CERTIFIED QUESTION ANSWERED

Justin O'Toole Lucey, Anna McCann, Sohayla R. Townes and Amanda Nicole Funai, all of Justin O'Toole Lucey, P.A., of Mt. Pleasant, for Plaintiff.

D. Larry Kristinik, A. Mattison Bogan, and Blake Terence Williams, all of Nelson Mullins Riley & Scarborough, of Columbia; Brett Ingerman, of Baltimore, MD, and Brett

Solberg, of Houston, TX, both of DLA Piper LLP (US), all for Defendants.

Harmon L. Cooper, of Crowell & Moring LLP, of Washington, D.C., for Amicus Curiae American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, and South Carolina Insurance Association.

G. Murrell Smith, Jr., Jonathan M. Robinson, and Shanon N. Peake, of Smith Robinson Holler Dubose & Morgan, LLC, of Columbia; Amy Mason Saharia and Kaitlin J. Beach, of Williams & Connolly, LLP, of Washington, D.C., all for Amicus Curiae Selective Insurance Company of America.

Mark Billion, of Billion Law, of Bluffton; Rhonda D. Orin, Marshall Gilinsky, and Jason E. Kosek, of Anderson Kill P.C., of New York, NY, all for Amicus Curiae United Policyholders.

JUSTICE HEARN: Sullivan Management, LLC operates restaurants in South Carolina and filed suit to recover for business interruption losses during COVID-19 under a commercial property insurance policy issued by Fireman's Fund and Allianz Global Risks US Insurance Company (Fireman's). This Court accepted five questions from the federal district court stemming from the litigation but we elect to answer only the following question:

> Does the presence of COVID-19 in or near Sullivan's properties, and/or related governmental orders, which allegedly hinder or destroy the fitness, habitability or functionality of property, constitute "direct physical loss or damage" or does "direct physical loss or damage" require some permanent dispossession of the property or physical alteration to the property?

The answer to this question is no because the presence of COVID-19 and corresponding government orders prohibiting indoor dining do not fall within the policy's trigger language of "direct physical loss or damage."

FACTS/PROCEDURAL BACKGROUND

On March 17, 2020, Governor Henry McMaster issued an executive order prohibiting on-site consumption of food and beverages at restaurants. This order followed the governor's declaration of a public health emergency and coincided with the issuance of "stay-at-home" orders by many localities across the state. Sullivan, which operates several Carolina Ale House establishments in South Carolina, sought coverage from its property insurance carrier for the loss of income as a result of both the presence of the coronavirus in its restaurants and the government-ordered prohibition of indoor dining. Fireman's denied the claim for failure to trigger coverage, and Sullivan filed suit in state court. Fireman's subsequently removed the case to federal court and then filed a motion to dismiss. After the parties submitted briefs on the motion to dismiss, the court certified five questions, which this Court accepted.

STANDARD OF REVIEW

Our standard of review when answering a certified question depends on the context of the case. Typically, when a novel issue of law is raised, we are "free to decide the question based on [our] assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Thomerson v. DeVito*, 430 S.C. 246, 249, 844 S.E.2d 378, 380 (2020). However, this question derives from contract interpretation, limiting our review to ascertaining the intent of the parties based on the language used in the policy.

DISCUSSION

Sullivan contends the presence of COVID-19 and associated government orders prohibiting indoor dining constitute "direct physical loss or damage." It asserts the definitions of "physical", "loss", and "damage" warrant coverage here, either by the plain language of those terms or alternatively, because the terms are ambiguous and the Court must construe them in favor of the insured. Additionally, Sullivan argues other provisions in the policy, including the communicable disease coverage extension, demonstrate the phrase has a broad interpretation and is not

limited to situations involving permanent dispossession of property. Further, Sullivan contends pre-COVID-19 jurisprudence supports its interpretation of the phrase as well as several decisions from other jurisdictions.

Conversely, Fireman's asserts neither the presence of the coronavirus nor the government shut-down orders constitute "direct physical loss or damage" because that phrase requires "actual" or "discernable" physical damage. In other words, in order to trigger coverage, the loss or damage must be more than mere loss of use or economic loss; instead there must be a "physical alteration, destruction, or permanent dispossession of property." Fireman's supports its interpretation by highlighting the policy provision affording coverage during the "period of restoration", which is the time it takes to repair, replace, or rebuild the property. Fireman's, noting the significant majority of decisions from state and federal courts in its favor, contends the restoration provision would be mere surplusage if the phrase in question were construed as broadly as Sullivan requests. We agree with Fireman's.

The policy does not expressly define "direct physical loss or damage"; therefore, those terms must be interpreted under their common meaning. *See Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994) ("We must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning. We should not torture the meaning of policy language to extend or defeat coverage that was never intended by the parties."). Physical is defined as "(a) having material existence: perceptible especially through the senses and subject to the laws of nature; (b) of or relating to material things." *See Physical*, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical (last visited Jul. 13, 2022). Loss means "destruction; ruin" and can also be "the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way." *Loss*, Black's Law Dictionary (8th ed. 2004). Another definition for loss is "deprivation, the failure to keep possession, and a "decrease in amount, magnitude, value, or degree." *Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited Jul. 13, 2022). Finally, damage means "loss or harm resulting from injury to person, property, or reputation." *Damage*, Merriam-Webster, https://www.merriam-webster.com/dictionary/damage (last visited Aug. 9, 2022).

Unsurprisingly, many courts across the country have been asked to answer similar questions concerning whether losses due to the presence of the coronavirus and/or resulting government closure orders are covered under commercial property

insurance policies. While it is helpful for the Court to be aware of the tidal wave of litigation, we rely on South Carolina law to answer this question. In other words, the vast amount of persuasive authority is just that, merely persuasive. Nevertheless, we agree that the alleged losses here do not constitute "direct physical loss or damage."

The triggering language for coverage under an all-risks policy—direct physical loss or damage—is the "North Star" of a property insurance policy. *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021) (noting the triggering language is the "North Star" of the policy in ascertaining what is covered and concluding "[i]t pays little heed to these omnipresent words in the policy, if not erases them, to construe them to cover business losses generated by a statewide shut-down order. All in all, the cause of the suspension of operations—the prohibition on in-person dining—did not arise from a physical loss of property or physical damage to it.").[1] The contention that a government shut-down order caused direct physical loss or damage is meritless. While the order prohibiting indoor dining certainly affected Sullivan's financial well-being, the order itself was not directly physical. *See, e.g.*, *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695, 700 (6th Cir. 2022) (concluding that "COVID-19 and the government shutdown orders caused only . . . intangible or economic harms"); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442, 448 (Wis. 2022) (noting that although the governor's order closing indoor dining restricted the use of the property, "loss of use is distinct from physical loss of or damage to property"); *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, 142 N.Y.S.3d 903, 915 (N.Y. Sup. Ct. 2021) ("The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' require a showing of actual, demonstrable physical harm of some form to the insured premises — the forced closure of the premises for reasons exogenous to the premises themselves is insufficient to trigger coverage."). It is clear that mere loss of access to a business is not the same as direct physical loss or damage. Although the government orders affected business operations, these restrictions did not cause any direct physical loss or damage.

Sullivan contends it asserted more by also pleading that the presence of virus particles in its facilities constituted physical loss or damage. In doing so, it contends

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[1] *Santo's Italian Café* concerned only the issue that a government's shut-down order may trigger coverage because the restaurant did not plead that the presence of COVID-19 also constituted direct physical loss or damage. Nevertheless, we find the Sixth Circuit's analysis helpful in this case.

loss and damage cannot mean the same thing, as the policy would be redundant if it did. While Sullivan is correct to note that the terms should not be read as synonymous, we fail to see how that is the case here. Loss connotes destruction, meaning it is broader than the term damage. Stated differently, a property that has suffered physical loss has been damaged, but the converse is not necessarily true because a property can suffer damage without enduring destruction or loss. Overall, while we acknowledge a small number of federal district courts have denied an insurance company's motion to dismiss,[2] the "overwhelming majority of the other courts that have addressed the same issue have concluded[] the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not 'alter the appearance, shape, color, structure, or other material dimension of the property.'" *Colectivo Coffee Roasters*, 974 N.W.2d at 447; *see also Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, 535 F. Supp. 3d 152, 159 (W.D.N.Y. 2021) ("Courts commonly require proof of a change or alteration of the insured structure or property to establish that it suffered damage or loss.").[3] Indeed, as one court has noted, "the

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[2] A slim minority of courts has construed "physical loss or damage" as ambiguous when the policy does not specifically exclude loss of use and denied a motion to dismiss noting that the arguments were better reserved in a motion for summary judgment. *See, e.g.*, *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, 517 F. Supp. 3d 725, 729-30 (E.D. Mich. 2021). Sullivan relies on *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 373 (E.D. Va. 2020), but we do not find that case persuasive, as its reasoning has been rejected by many courts. *See Hamilton Jewelry, LLC v. Twin City Fire Ins. Co., Inc.*, 560 F. Supp. 3d 956, 968 (D. Md. 2021) (noting that *Elegant Massage* and a similar federal district court case from North Carolina represent "clear outliers that do not meaningfully weigh against the overwhelming authority that supports the conclusion that 'direct physical loss or direct physical damage' requires a showing of 'actual or tangible harm to or intrusion on the property itself'") (internal citation omitted).

[3] We refer the reader to the federal district court's decision for a survey of cases across the country concerning contamination caused by substances such as gasoline particles, toxic torts, odors, smoke, and other similar substances versus exposure from the coronavirus. *Kim-Chee LLC*, 535 F. Supp. 3d at 159 ("Because the presence of the virus does not alter the covered property, it is different from radiation, chemical dust and gas, asbestos and other contaminants which may persist and damage the covered property."). We agree that the presence of the coronavirus is different than traditional contamination cases where coverage may exist.

pandemic impacts human health and human behavior, not physical structures." *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 884 (S.D. W. Va. 2020).

Moreover, other policy provisions bolster our contention that "direct physical loss or damage" contemplates a tangible or material component to loss or damage. The policy's restoration period provision limits business interruption coverage *during the period of restoration*, or put differently, the time for the physical loss or damage to be "repaired, rebuilt, or replaced with reasonable speed and like kind and quality." *See, e.g.*, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) ("That this coverage extends only until covered property is repaired, rebuilt, or replaced, or the business moves to a new permanent location suggests the Policy contemplates providing coverage only if there are physical alterations to the property. To interpret the Policy to provide coverage absent physical damage would render the 'period of restoration' clause superfluous."); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 333 (7th Cir. 2021) ("[T]he Policy provides coverage for losses sustained during a 'period of restoration,' which is defined by reference to '[t]he date [by which] the property ... should be *repaired, rebuilt, or replaced*.' (Emphasis added.) Without a physical alteration to property, there would be nothing to repair, rebuild, or replace."). While Sullivan took steps to mitigate the spread, such as increasing cleaning or installing plexiglass, these acts are different than restoring damaged or lost property. In other words, Sullivan had nothing to "repair, replace, or rebuild[,]" thus further demonstrating that direct physical loss or damage requires something material and tangible.

CONCLUSION

Because neither the presence of the coronavirus nor the government order prohibiting indoor dining constitutes "direct physical loss or damage," the policy's triggering language is not met. Regarding the remaining questions,[4] we respectfully

[4] We decline to answer the following questions, most of which turn on whether the insured has suffered a direct physical loss or damage: do the Policy's Business Access and/or Civil Authority coverage require a complete prohibition of all access to Sullivan's properties; has there been a "communicable disease event" as that term is used in the Communicable Disease Coverage Extension; does Sullivan's alleged expenditures to mitigate COVID-19 qualify for Loss Avoidance or Mitigation Coverage; does the Mortality and Disease Exclusion bar all coverage or is it

decline to answer them as they present an issue of contract interpretation that is best reserved for the federal district court.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice Blake A. Hewitt, concur.

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ambiguous and/or is it in conflict with the Communicable Disease Coverage Extension?

The Supreme Court of South Carolina

In the Matter of David Mark Foster, Respondent

Appellate Case Nos. 2021-001130 and 2022-000269

ORDER

On September 7, 2021, this Court granted a consent petition and placed Respondent on interim suspension. *In re Foster*, 434 S.C. 222, 863 S.E.2d 464 (2021). On October 5, 2021, the Office of Disciplinary Counsel (ODC) filed a verified petition for rule to show cause alleging Respondent violated this Court's order of interim suspension and Rule 30, RLDE, Rule 413, SCACR, by making misleading statements to former clients about the status of his practice and his inability to practice law.[1] On December 9, 2021, this Court declined to invoke the extreme measure of contempt at that time. However, in doing so, the Court held the matter in abeyance for future consideration and expressly declined to make any findings as to whether Respondent's conduct constituted professional misconduct. *See, e.g.*, Rule 8.4(d), RPC, Rule 407, SCACR (prohibiting conduct involving dishonesty or misrepresentation).

On March 7, 2022, ODC filed a second verified petition for a rule to show cause alleging Respondent again violated this Court's September 7, 2021 order of interim suspension and Rule 30, RLDE, by willfully engaging in the unauthorized practice

[1] In this petition, ODC presented highly credible evidence that a month after Respondent was suspended, a former client asked Respondent whether it was true that Respondent had been placed on interim suspension and was no longer with his former law firm. Respondent avoided the first question and failed to acknowledge his suspension, replying instead "I'm no[] longer with that firm. I still have my practice going[.] I took a month off for some personal time." In a separate exchange, another former client contacted Respondent about an upcoming court appearance, to which Respondent replied, "I'll be in touch this week when I get back to the office." There is no indication Respondent ever disclosed his interim suspension to either of these former clients.

of law while on interim suspension. On April 7, 2022, we issued an order directing Respondent to show cause why he should not be held in civil and/or criminal contempt for engaging in the unauthorized practice of law while on interim suspension for the conduct alleged in both the October and the March contempt petitions filed by ODC. This Court conducted a hearing in these matters on June 6, 2022. Respondent personally appeared and was accompanied by counsel.

During the hearing, Respondent conceded the facts as alleged by ODC, admitting that despite being placed on interim suspension on September 7, 2021, he thereafter contacted various parties to assist a former client (Client) in addressing a legal problem. Specifically, Client, a resident of North Carolina, retained Respondent to represent her in connection with a speeding ticket she received while visiting the City of Greenville, South Carolina, in September 2020. On April 29, 2021, Respondent told Client her ticket had been dismissed. However, apparently due to a clerical error, the ticket was not marked as dismissed, and Client was subsequently ticketed in North Carolina for driving under suspension on November 27, 2021. Unaware that Respondent had been suspended from the practice of law months earlier, Client contacted Respondent for help rectifying the situation.

Respondent admits he thereafter exchanged numerous text messages and phone calls with Client in his efforts to assist her resolving the outstanding ticket. Respondent further admits contacting the ticketing officer, the City of Greenville Municipal Court, and even meeting in person with a municipal judge on Client's behalf in December 2021 to request issuance of an *Ishmell*[2] order, all while Respondent was on interim suspension.[3] Throughout these actions and communications with Client and municipal court personnel, Respondent never informed Client, or anyone else, that he was suspended from the practice of law and could no longer assist Client with her matter. To the contrary, Respondent

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[2] *Ishmell v. S.C. Highway Dep't*, 264 S.C. 340, 215 S.E.2d 201 (1975) (discussing the procedure regarding motions to reopen traffic cases).

[3] At the hearing, Client testified she ultimately had to hire another lawyer in South Carolina and a lawyer in North Carolina to resolve the situation and have her license reinstated in North Carolina. Client also testified her traveling sales job requires her to be able to drive to sales calls, and as a result of her suspended license, she missed several weeks of work and almost lost her job.

made numerous affirmatively misleading statements, including telling Client he would call her when he was "done with court," reminding Client he was not licensed to practice law in North Carolina (implicitly suggesting he was authorized to practice in South Carolina), referring to himself as Client's attorney, and inviting others to contact him "at his office."[4]

Despite admitting this conduct, Respondent nevertheless argues he did not willfully violate this Court's order placing him on interim suspension because he was simply "communicating" on behalf of his former client, which he did not believe to constitute the practice of law. We reject this argument and find Respondent's actions constituted the practice of law. *See In re Lapham*, 405 S.C. 582, 582–83, 748 S.E.2d 779, 780 (2013) (holding an attorney in criminal and civil contempt for, among other things, violating the order of interim suspension by contacting court personnel on behalf of a former client).

The moment this Court entered an order placing Respondent on interim suspension, he was no longer authorized to take any action on behalf of a client. *See* Rule 410(d), SCACR (providing only persons in good standing may engage in the practice of law); Rule 410(i)(1)(C)(iii) (providing a person on interim suspension is not in good standing). A suspended attorney has an affirmative duty to provide notice of his suspension to current clients, opposing counsel, and the courts, as well as to remove all indicia of the practice of law. Rule 30(a)-(c), (h), RLDE, Rule 413, SCACR. Further, when Respondent communicated with Client regarding further assistance with her legal problem, there arose an affirmative duty for Respondent to inform Client that he was suspended from the practice of law and could not take any actions to address any legal problems on her behalf. *Cf.* Rule 30(a), RLDE, Rule 413, SCACR (providing a lawyer on interim suspension must promptly notify clients of the lawyer's suspension and consequent inability to act as an attorney). By not making this required affirmative disclosure when contacted by Client, Respondent implied to Client that he still represented her and that he was able to continue serving as her lawyer in connection with her traffic ticket.

[4] The telephone number Respondent referred to as his "office" number is listed in this Court's Attorney Information System as Respondent's mobile number. Further, at the hearing before this Court, Respondent testified that since being suspended from the practice of law, he has worked construction.

Exacerbating this failure to disclose his suspension are the numerous misleading statements Respondent made to Client and the Greenville Municipal Court suggesting he was authorized to practice law generally and to represent Client specifically. These deceptive statements, coupled with Respondent's misleading comments set forth in the prior contempt petition, constitute a clear pattern of deception and demonstrate the willful and deliberate nature of Respondent's attempts to mislead others about his interim suspension. We therefore find Respondent has willfully engaged in the unauthorized practice of law while on interim suspension. *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (establishing that an act is considered willful if it is "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done") (citation omitted).

Accordingly, we find Respondent guilty of criminal contempt of the Supreme Court of South Carolina beyond a reasonable doubt. We sentence Respondent to confinement for a period of thirty days. This sentence is suspended upon the condition that Respondent pay $554 in restitution to Client and a $446 fine to this Court within thirty days of the date of this Order.[5] Respondent is warned that a violation of the conditions of suspension may result in his incarceration for the entire thirty days of the sentence.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

James, J., not participating.

[5] Respondent shall pay restitution to Client in certified funds and provide this Court with proof restitution was made within ten days of payment.

Columbia, South Carolina
August 2, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lance Antonio Brewton, Appellant.

Appellate Case No. 2018-001572

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5912
Heard November 10, 2021 – Filed May 25, 2022
Withdrawn, Substituted and Refiled August 10, 2022

AFFIRMED

Appellate Defender Adam Sinclair Ruffin, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Barry J. Barnette, of Spartanburg, all for Respondent.

KONDUROS, J.: Lance Antonio Brewton appeals his convictions for murder and possession of a firearm during the commission of a violent crime. Brewton contends the trial court erred by (1) failing to instruct the jury on the lesser included offense of involuntary manslaughter and the defense of accident; (2) prohibiting his testimony regarding witchcraft and hearing voices in his head; and

(3) allowing the State to impeach him with his 1999 robbery conviction. We affirm.

FACTS

On the morning of September 25, 2017, Brewton arrived at Natalie Niemitalo's house. Brewton and Niemitalo had been in an on-again, off-again relationship for two years. After their friend Kevin Schuerman arrived, the three decided to go purchase cigarettes and drinks. Niemitalo got into the driver's seat of her mother's black, two-door Honda Civic, Brewton got into the back seat on the passenger side, and Schuerman got into the passenger seat.

Once in the car, Niemitalo began putting on makeup. After about five minutes, Brewton exited the car, walked around to the driver's side, and began arguing with Niemitalo because he wanted to drive. Shortly after the argument began, Schuerman heard a gunshot. Schuerman exited the car and ran towards Niemitalo's garage because he thought he had been shot. After Schuerman realized he had not been shot, he returned to the driveway and watched Brewton pull Niemitalo out of the car, get into the driver's seat, and drive away.

Schuerman approached Niemitalo and saw she was gasping for air and in pain. Schuerman called 9-1-1 and held a towel on Niemitalo's wound until first responders arrived. While first responders were treating Niemitalo, Brewton drove by her house in the Honda Civic. Brewton drove by Niemitalo's house a second time, and an officer initiated a traffic stop by turning on his blue lights; however, Brewton continued driving for twenty-three miles. Officers apprehended Brewton after he collided with a vehicle in the driveway of his home.

First responders airlifted Niemitalo to a hospital, but she died from a single gunshot wound. The doctor that performed Niemitalo's autopsy determined she bled to death after a bullet entered her upper-left torso and exited nine-and-a-half inches lower on the right side of her back. Police collected physical evidence associated with the shooting including the Honda Civic, Brewton's gun, a fired bullet, and a spent shell casing. Brewton was indicted for murder, possession of a firearm during the commission of a violent crime, escape, driving under suspension, and failure to stop when signaled by an officer using a blue light.

A forensic psychologist evaluated Brewton and determined he was competent to stand trial for an unrelated federal weapons charge.[1] In a pretrial motions hearing, the State presented Brewton's mental evaluation and moved to prevent him from presenting any evidence regarding mental illness or hearing voices. The State argued any testimony about mental illness or hearing voices would not be relevant because the forensic psychologist concluded Brewton did not have a mental illness and was competent to stand trial. Alternatively, the State contended that if the testimony was relevant, it would be highly prejudicial.

Brewton argued he was not presenting the testimony about hearing voices as a defense for his actions; rather, Brewton argued he should be allowed to present the testimony as an alternative explanation to the State's assertion that he fled due to a guilty mind. Initially, the trial court indicated the testimony would not be relevant and would confuse the jury because Brewton did not suffer from a mental illness; however, the trial court delayed making a final determination until after Brewton proffered the testimony.

Additionally, the State disclosed it planned to introduce Brewton's federal weapons conviction and two common law robbery convictions from 1999 and 2008. Brewton argued the federal weapons conviction was not relevant, but the State maintained it would preclude an accident jury instruction because Brewton was not allowed to possess a weapon. Brewton also moved to prevent the State from using any remote convictions; again, the trial court delayed making a final determination.

Brewton proceeded to trial for murder and possession of a weapon during the commission of a violent crime after he pled guilty to escape, driving under suspension, and failing to stop when signaled by an officer. Schuerman testified that Brewton was "acting erratic" and "on edge" when he got to Niemitalo's house but recalled Brewton's behavior had not concerned him. Schuerman stated the argument between Brewton and Niemitalo was not out of the ordinary and elaborated he had seen Brewton and Niemitalo in worse arguments; however, Schuerman clarified he had never seen any violence during their arguments. Schuerman also testified he did not see Brewton with a gun the morning of Niemitalo's death.

An expert in firearm examination, Chad Smith, testified the gun involved did not have an external safety mechanism, which is typically thought of as a button that

[1] The incident leading to Brewton's federal conviction for "Possession of a Firearm by a Convicted Felon" occurred nine days before Niemitalo's death.

would prevent the gun from firing. Smith explained the gun would fire once five-and-a-half pounds of pressure was applied to its trigger, even if the pressure was applied unintentionally. Smith opined:

> The trigger guard is here . . . to guard that trigger from any kind of unintentional pressure against the trigger. But I suppose . . . something . . . could enter into the trigger guard . . . and if the firearm was pushed against that object and enough pressure . . . [was] exerted on that trigger, then it could fire.

Still, Smith explained the gun would not fire unless its slide had been pulled back while it was loaded with ammunition. Smith testified he performed several tests on the weapon and concluded the recovered bullet and spent shell casing both came from Brewton's gun.

At the conclusion of the State's case-in-chief, Brewton proffered his testimony regarding witchcraft and hearing voices in his head. Brewton testified he believed Niemitalo's mother and her friend Aaron[2] practiced witchcraft and one of them had cast a spell on him that caused him to hear the voices. Brewton admitted Niemitalo's mother denied practicing witchcraft and Niemitalo never told him her mother practiced witchcraft; nevertheless, Brewton believed Niemitalo's mother practiced witchcraft because he believed she had also cast a spell on Aaron and Niemitalo told him she knew about the voices. Brewton estimated he had intermittently been under a spell for eight or ten months.

Brewton described "experiencing paranoia" at Niemitalo's house on the morning of her death because the voices were telling him his family was being murdered. Brewton explained he got in the car's back seat because the voices were telling him people were trying to kill him. Brewton testified that while the group was sitting in the car, he observed a cement truck drive past Niemitalo's house, and the voices told him it was going to bury his family alive.

Brewton recalled he wanted to drive so he could follow the cement truck, and he felt that Niemitalo was not putting on her makeup "fast enough." Brewton stated he left Niemitalo's house to find the cement truck. Brewton explained he did not stop to check on Niemitalo the first time he drove by her house because paramedics were already there and he wanted to keep looking for the cement truck.

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[2] The record does not contain Aaron's surname.

Brewton testified he drove by Niemitalo's house a second time because he could not find the cement truck and the voices had stopped speaking to him. Brewton admitted he did not stop the second time because police officers were there and he had drugs in the car.

The State objected to Brewton's proffer at its conclusion and argued it was filled with hearsay, not relevant, and highly prejudicial if relevant. Brewton responded he had the absolute right to testify, the hearsay would be omitted in front of the jury, and the probative value of his testimony would not be substantially outweighed by unfair prejudice. Brewton insisted he should be allowed to give an alternative reason for leaving the scene other than a guilty mind.

The trial court ruled Brewton could not testify about witchcraft or hearing voices. The trial court found Brewton's proffer was largely based on hearsay and the danger of unfair prejudice substantially outweighed any probative value because it seemed to give rise to an unasserted mental illness defense. Additionally, the trial court determined Brewton's right to testify was not violated because he was not entirely prevented from testifying. The trial court explained Brewton could testify he was fearful and felt like he needed to leave Niemitalo's house.

After Brewton elected to testify,[3] the trial court ruled both of his robbery convictions were admissible because they were part of a "continuous course of conduct." The trial court also ruled that if the convictions were remote, their probative value substantially outweighed any danger of unfair prejudice. Brewton argued his 1999 conviction was remote because it was a separate charge from his 2008 conviction. The trial court reiterated Brewton's convictions were a continuous criminal history because they were similar offenses that all occurred without a passage of ten years. Brewton maintained his 1999 conviction was remote because he finished serving that sentence in 2004 and he would be testifying in 2018. Brewton also asserted the probative value of that conviction was outweighed by unfair prejudice because there was limited value in attacking his credibility.

However, Brewton asked the trial court if his convictions would be referred to as common law robbery convictions or as crimes involving dishonesty. The State

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[3] The record indicates Brewton stated "I will not testify" after the trial court prohibited him from testifying about witchcraft and the voices. However, this appears to be a scrivener's error because Brewton went on to testify and it was not mentioned on appeal.

responded it was willing to refer to the convictions as crimes of dishonesty, and the trial court concluded the convictions would be referred to as crimes of dishonesty. Brewton did not object.

Brewton's testimony was mostly consistent with Schuerman's, but Brewton admitted he was not legally allowed to possess a weapon, he had been on a drug binge that made him unable to sleep for the three days preceding Niemitalo's death, and he had used drugs the morning of Niemitalo's death. Brewton also testified that his gun fell out of his pocket as he got out of the car. Brewton explained he kept the gun in his hand after he picked it up because he assumed Niemitalo was going to let him drive and he preferred to keep it in the car's center console while driving.

Brewton maintained he did not intentionally kill Niemitalo and claimed "the gun went off" when Niemitalo pushed his hand back as he reached into the car to grab its keys. Brewton testified he did not stop when signaled by officers because he had drugs in the car. Brewton explained he drove all the way to his house because he was afraid officers would shoot him. At the end of his direct examination, Brewton admitted he had been convicted of two crimes of dishonesty. The State did not mention crimes of dishonesty during its cross-examination of Brewton.

After the defense rested, Brewton requested the trial court instruct the jury on involuntary manslaughter and accident. The State objected and asserted (1) an involuntary manslaughter instruction was improper because Brewton was not armed in self-defense and (2) an accident instruction was improper because Brewton was not legally able to possess a weapon. Brewton argued that even though his possession of the gun was unlawful, it was not the proximate cause of Niemitalo's death.

The trial court declined to instruct the jury on either involuntary manslaughter or accident. The trial court reasoned Brewton was acting unlawfully by possessing the gun and trying to take the car from Niemitalo. Additionally, the trial court concluded Brewton was not exercising reasonable care in handling the gun. Following jury deliberations, Brewton was convicted of murder and possession of a firearm during the commission of a violent crime. The trial court sentenced Brewton to life in prison without the possibility of parole. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.*

LAW/ANALYSIS

I. Jury Instructions

Brewton argues the trial court erred by failing to give an involuntary manslaughter jury instruction because Brewton testified the shooting was unintentional and the record contained sufficient evidence Brewton acted recklessly in handling the gun. Brewton contends the trial court erred by failing to give an accident jury instruction because he testified the shooting was unintentional and the record contained sufficient evidence he used due care in handling the gun. Brewton maintains his illegal possession of a firearm did not preclude either jury instruction because his illegal possession did not proximately cause Niemitalo's death. We disagree.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (alteration in original) (quoting *State v. Brandt,* 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Brown*, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004) (quoting *State v. Hill,* 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "If there is any evidence to support a jury charge, the trial [court] should grant the request." *Id.* at 262, 607 S.E.2d at 95. "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.*

> Involuntary manslaughter is a lesser-included offense of murder, and "is defined as the unintentional killing of another without malice while engaged in either (1) the

> commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others."

State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (quoting *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014)).

"If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given." *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). "In determining whether to charge the lesser included offense of manslaughter[,] the court must view the evidence in the light most favorable to the defendant." *State v. Gibson*, 390 S.C. 347, 356, 701 S.E.2d 766, 770 (Ct. App. 2010). "Declining to charge the lesser included offense is warranted when it 'very clearly appear[s] that . . . *no evidence whatsoever* [exists] tending to reduce the crime from murder to manslaughter.'" *Id.* (alterations in original) (quoting *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010)).

Additionally, "[f]or a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *Wharton*, 381 S.C. at 216, 672 S.E.2d at 789. "Evidence of an accidental discharge of a gun will support a charge of accident where the defendant lawfully arms himself in self-defense." *Id.*

"[U]nlawful possession of a firearm can . . . constitute an unlawful activity . . . [that] preclude[s] an accident defense if it is the proximate cause of the killing." *State v. Burriss*, 334 S.C. 256, 262 n.5, 513 S.E.2d 104, 107 n.5 (1999). "[I]t would be incongruous not to apply this same reasoning in the context of involuntary manslaughter." *Id.* at 265, 513 S.E.2d at 109. "[T]he State [must] prove beyond a reasonable doubt that the unlawful act in which the [defendant] was engaged was at least the proximate cause of the homicide." *Id.* at 262, 513 S.E.2d at 107 (quoting *State v. Goodson*, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994)).

The issue of whether a defendant is entitled to involuntary manslaughter and accident jury instructions despite unlawfully possessing a firearm was developed in *Goodson* and *Burriss*. In *Goodson*, our supreme court determined the illegally armed defendant was not entitled to an accident jury instruction. 312 S.C. at 281, 440 S.E.2d at 372. In that case, the defendant was drinking while playing pool at a bar and got into an argument with another player over a bet. *Id.* at 279, 440 S.E.2d

at 371. The other player threatened the defendant with a pool stick, and the defendant responded by drawing a gun from his pocket. *Id.* The bar's owner intervened and escorted the defendant outside. *Id.* While outside, the defendant shot and killed the owner. *Id.* at 279, 440 S.E.2d at 371-72. The defendant claimed the gun "just went off" as the owner approached him. *Id.* at 279, 440 S.E.2d at 372.

The *Goodson* court rejected the State's proposition that unlawful possession of a firearm always precluded an accident jury instruction. *Id.* at 280 n.1, 440 S.E.2d at 372 n.1. The *Goodson* court noted the State must prove beyond a reasonable doubt the defendant's unlawful act proximately caused the homicide. *Id.* However, the *Goodson* court reasoned the defendant was not entitled to an accident jury instruction because he did not present any evidence that he was lawfully acting in self-defense. *Id.* at 281, 440 S.E.2d at 372.

In a concurring opinion, Justice Toal stated she would have held the defendant was not entitled to an accident jury instruction because he was not lawfully armed when he shot the victim. *Id.* at 281, 440 S.E.2d at 372-73 (Toal, J., concurring). Justice Toal reasoned any right the defendant had to be armed due to the dispute with the other pool player ended when the owner removed him from that situation. *Id.* at 282, 440 S.E.2d at 373 (Toal, J. concurring). Still, Justice Toal agreed with the majority that the defendant's unlawful possession must have proximately caused the victim's injury to preclude an accident jury instruction. *Id.* (Toal, J., concurring). Justice Toal concluded "where, as here, the defendant unlawfully possesses a firearm, has been drinking heavily all day, and kills the [victim] with the unlawful firearm, the unlawful possession of the firearm is a proximate cause of the injury." *Id.* (Toal, J., concurring).

In *Burriss*, our supreme court held the illegally armed defendant was entitled to involuntary manslaughter and accident jury instructions. 334 S.C. at 264-65, 513 S.E.2d at 109. In that case, two men attempted to rob the defendant. *Id.* at 258, 513 S.E.2d at 106. After the attackers threw the defendant to the ground, the defendant drew a gun from his pocket and fired two shots into the ground. *Id.* at 258-59, 513 S.E.2d 106. The attackers initially backed away, but one of the attackers advanced again as the defendant was getting up. *Id.* at 259, 513 S.E.2d 106. When the defendant picked up his gun, it fired a shot that killed the advancing attacker. *Id.*

The *Burriss* court agreed with Justice Toal's analysis in her *Goodson* concurrence and clarified *Goodson* as holding "unlawful possession of a firearm can . . .

constitute an unlawful activity . . . [that] preclude[s] an accident defense if it is the proximate cause of the killing." *Id.* at 262 n.5, 513 S.E.2d at 107 n.5. The *Burriss* court reasoned "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." *Id.* at 262, 513 S.E.2d at 108. Further, the *Burriss* court determined "it would be incongruous not to apply this same reasoning in the context of involuntary manslaughter." *Id.* at 265, 513 S.E.2d at 109. The *Burriss* court concluded the defendant was entitled to both accident and involuntary manslaughter jury instructions because evidence in the record supported his claim that he was lawfully armed in self-defense when the shooting occurred. *Id.* at 262-63, 265, 513 S.E.2d at 108-09.

Here, the trial court did not err by refusing to give involuntary manslaughter or accident jury instructions. Brewton directs this court to *State v. Slater*[4] and *State v. Williams*[5] as support for his proposition that his illegal possession of a weapon did not preclude involuntary manslaughter or accident jury instructions. However, we find those cases inapplicable because they revolved around whether the defendants were lawfully armed in self-defense. *See Slater*, 373 S.C. at 71, 644 S.E.2d at 53 (noting "where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense"); *Williams*, 427 S.C. at 254 n.4, 830 S.E.2d at 908 n.4 (clarifying "the question is whether [the weapon] is the proximate cause of the 'difficulty' or 'occasion' that led to the killing" in determining whether a defendant is precluded from a self-defense jury instruction).

In stark contrast to the defendants' arguments in *Goodson*, *Burriss*, *Slater*, and *Williams*, Brewton does not argue he was lawfully armed in self-defense. Indeed, this record contains no evidence Brewton was defending himself at the time of the shooting. Brewton and Schuerman both testified Brewton and Niemitalo were arguing but not physically fighting. Further, Brewton testified the gun fired when Niemitalo pushed his hand back as he reached for the car keys; Brewton did not testify that Niemitalo attempted to take or control the gun. Consequently, like the defendant in *Goodson*, Brewton presented no evidence he was lawfully armed in self-defense.

[4] 373 S.C. 66, 644 S.E.2d 50 (2007).
[5] 427 S.C. 246, 830 S.E.2d 904 (2019).

Therefore, the dispositive question of this issue is whether Brewton's illegal possession proximately caused Niemitalo's death; we determine it did. Like the defendant in *Goodson*, Brewton admitted he was unlawfully handling a loaded firearm while intoxicated. Brewton testified he had been on an illegal drug binge that prevented him from sleeping the three days preceding Niemitalo's death; Brewton also admitted he used illegal drugs the morning of Niemitalo's death.[6] Additionally, Brewton testified the gun fell out of his pocket as he got out of the car, he held the gun in his hand while arguing with Niemitalo, and he still held the gun in his hand when he reached into the car to take its keys. Further, Brewton held a gun that would fire once it had five-and-a-half pounds of pressure applied to its trigger, even if that pressure was unintentional. Finally, like the defendant in *Goodson*, Brewton's illegally possessed gun fired the shot that killed Niemitalo. Therefore, Brewton's unlawful possession proximately caused Niemitalo's death. Accordingly, we affirm the trial court's decision to refuse to instruct the jury on involuntary manslaughter and accident.[7]

II. Brewton's Proffered Testimony

Brewton asserts the trial court erred by prohibiting him from testifying about witchcraft and hearing voices. Brewton contends he should have been able to testify the voices caused him to flee the scene after the shooting. Brewton insists his inability to explain the cause of his flight to the jury in his own words violated his fundamental right to testify in his own defense. We disagree.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *State v. Rivera*, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (quoting *Rock v. Arkansas,* 483 U.S. 44, 53 (1987)). "However, the right to present testimony is not without limitation. 'The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."'" *Id.* at 242, 741 S.E.2d at 703 (quoting *Rock*, 483 U.S. at 55). "[W]ell-established rules of evidence permit trial [courts] to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Id.* at 245, 741 S.E.2d at 704 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)).

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[6] The record indicates the shooting also occurred during the morning hours.

[7] Additionally, Brewton was precluded from an accident jury instruction because he was not exercising due care in handling the weapon. *See Wharton*, 381 S.C. at 216, 672 S.E.2d at 789 (stating a defendant must have been exercising due care in handling the weapon for a homicide to be excusable by accident).

"But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 242, 741 S.E.2d at 703 (quoting *Rock*, 483 U.S. at 55-56). "In applying its evidentiary rules[,] a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* (quoting *Rock*, 483 U.S. at 56).

Here, the trial court prohibited Brewton from testifying about witchcraft and hearing voices because it determined that testimony (1) was largely based on hearsay and (2) would result in unfair prejudice by confusing the jury. The trial court also determined prohibiting Brewton from testifying about witchcraft and hearing voices did not violate his right to testify because Brewton was still permitted to testify in his own defense. Brewton relies exclusively on *Rivera* to support his only argument on appeal that he had a right to testify about witchcraft and hearing voices; that reliance is misplaced.

In *Rivera*, our supreme court found the trial court had misapplied the rules of evidence to prevent the defendant from testifying in his own defense *entirely*, despite his repeated indications that he wanted to testify. 402 S.C. at 243-44, 246 741 S.E.2d at 703-05. Our supreme court noted that "there was no basis upon which the trial court could have appropriately found [the defendant's] testimony to be irrelevant and therefore inadmissible." *Id.* at 244, 741 S.E.2d at 704. Consequently, our supreme court ruled the defendant's right to testify had been violated "because the trial court committed an error of law in finding [the defendant's] testimony was irrelevant and unfairly prejudicial, [and] such erroneous application of the [r]ules of [e]vidence cannot serve any legitimate state purpose." *Id.* at 245, 741 S.E.2d at 705. However, the *Rivera* court made clear it did "not suggest that a defendant's testimony is not subject to the rules of evidence." *Id* at 246 n.3, 741 S.E.2d at 705 n.3. Indeed, the *Rivera* court stated its "findings should not be taken as a restriction of the trial court's ability to constrain a defendant's testimony based on a *proper* application of evidentiary rules." *Id.*

Here, unlike the defendant in *Rivera*, Brewton was allowed to testify in his own defense. Also, unlike the defendant in *Rivera*, Brewton does not argue the trial court misapplied our state's rules of evidence; instead, Brewton conflates testifying in his own defense with "testifying in his own words." That argument has no merit. As the *Rivera* court made clear, Brewton's right to testify did not prohibit the trial court from limiting his testimony based on a proper application of our state's evidentiary rules. Accordingly, because Brewton does not argue the trial

court misapplied the rules of evidence, we affirm the trial court's decision to prohibit Brewton from testifying about witchcraft and hearing voices.[8]

III. Impeachment

Brewton asserts the trial court erred by allowing the State to impeach him with his 1999 common law robbery conviction. Brewton contends that conviction was remote because his sentence expired in 2004 and he testified in 2018. Additionally, Brewton argues the trial court did not conduct the required *State v. Colf*[9] analysis. We disagree.

"To preserve an issue for review[,] there must be a contemporaneous objection that is ruled upon by the trial court." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). An appellant is barred from arguing an issue on appeal if trial "counsel acquiesced [to a ruling] . . . and made no other objections regarding [that ruling] . . . ." *State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998); *see also State v. McKinney*, 258 S.C. 570, 190 S.E.2d 30 (1972) (finding the appellant waived his objection to certain testimony by cross-examining a witness regarding that testimony without reserving his previous objection).

Brewton ultimately waived for appellate review his contention the trial court erred by allowing the State to impeach him with his 1999 common law robbery conviction. Brewton initially objected to the trial court's ruling that the State could impeach him with his 1999 conviction and argued it was remote. However, Brewton asked if his convictions would be referred to by their name or as crimes of dishonesty. The State agreed to refer to both convictions as crimes of dishonesty, and the trial court allowed both convictions to be referred to as crimes of dishonesty. Critically, Brewton did not object or reserve his previous objection.

Brewton testified on direct examination he had been convicted of two crimes of dishonesty. Before the parties presented their closing arguments, Brewton renewed all of his objections; however, the record indicates the trial court did not

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[8] Even if Brewton argued the trial court misapplied our state's rules of evidence, unlike the record in *Rivera*, the record here supports the trial court's ruling that Brewton's proffered testimony about witchcraft and hearing voices would be unfairly prejudicial. A forensic psychologist found Brewton did not suffer from any mental illness, yet Brewton proffered testimony that voices in his head made him flee the scene of Niemitalo's shooting.

[9] 337 S.C. 622, 525 S.E.2d 246 (2000).

respond. In its closing argument, the State referred to Brewton's convictions as crimes of dishonesty. Again, Brewton did not object. Consequently, Brewton waived his objection that his 1999 conviction was remote because he acquiesced to referring to it as a crime of dishonesty.

CONCLUSION

In short, the trial court properly refused to instruct the jury on involuntary manslaughter and accident. Additionally, the trial court's decision to prohibit Brewton's proffered testimony about witchcraft and hearing voices did not violate Brewton's right to testify. Finally, Brewton failed to preserve for appellate review the trial court's decision to allow the State to impeach him with his 1999 conviction. Accordingly, Brewton's convictions for murder and possession of a firearm during the commission of a violent crime are

AFFIRMED.

HILL and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Cliff Eubanks, Appellant.

Appellate Case No. 2018-001684

Appeal from Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5933
Heard April 13, 2021 – Filed August 10, 2022

AFFIRMED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood; all for Respondent.

MCDONALD, J.: Michael Cliff Eubanks appeals his convictions for first-degree, second-degree, and third-degree criminal sexual conduct (CSC) with a minor. Eubanks raises several evidentiary errors; he further argues the circuit court erred in denying him a continuance, failing to discharge a juror, and declining to charge second-degree assault and battery as a lesser included offense of CSC with a

minor. Finally, Eubanks asserts he is entitled to a new trial due to highly prejudicial statements in the State's closing argument and under the cumulative error doctrine. We affirm.

Facts and Procedural History

The minor's mother (Mother) married Josh Lyons in 2000. Together, they had two children—a son (Brother) and two years later, a daughter (Child). Lyons left the family when Mother was seven months pregnant with Child, and he has not been involved in his children's lives. Mother met Eubanks in 2009, married him in 2010, and moved with her children into Eubanks's home. Eubanks has two daughters from a previous marriage, and Mother and Eubanks have one child together, B.E.

Eubanks began inappropriately touching Child when she was six years old; the abuse lasted until she disclosed it at age twelve. Child first realized Eubanks's behavior was inappropriate when she was eight years old. She recalled Eubanks took her to the couch, pulled down both their pants, and touched his genitals to hers while she was half asleep. Brother recalled that when Child was eight years old, he saw Eubanks go into the bathroom with her, and he stayed in the bathroom with her for twenty minutes. Child testified Eubanks often touched her chest, buttocks, and genitals with his hands and mouth, and he made her touch his genitals. The abuse eventually progressed to vaginal and anal intercourse.

Child, Mother, Brother, and A.E. (Eubanks's biological daughter) all testified Eubanks gave Child more attention than the other children, which resulted in family arguments. Eubanks's preferential treatment included giving Child lunch money even though school lunch was free, taking her places with him, and discussing his marital problems with her. Brother and A.E. also testified about Eubanks's "weird" touching of Child. Brother described this touching as mainly "grabs on the butt." A.E. saw Eubanks "touching her butt" and "would see them up under the covers [of a bunk bed] with each other."

In November 2013, Mother was involved in a serious car accident; she broke her neck in multiple places and severed nerves on the left side of her body. Mother had a difficult time after her subsequent spinal and neck surgery—she was unable to work, and she and Eubanks began to argue.

From November 2014 to April 2015, Child attended counseling sessions because she was having anger issues and had stopped bathing and eating. She also suffered lower grades, nightmares, and an inability to focus. Child explained she believed Eubanks would stop touching her if she was "nasty" or if he could not look at her in the bathroom. During this time, she almost disclosed the abuse to a counselor but was afraid because she did not know the counselor very well.

In April 2016, Mother, Eubanks, Child, Brother, and B.E. moved in with Mother's parents due to financial issues. Eubanks resumed the abuse about a week after the family's move. Child testified Eubanks abused her in a bedroom and in the barn. Child and Eubanks spent a lot of time together in the barn, and he rarely invited Brother or his daughters to join him there. A.E. thought it was strange that Eubanks often took Child to the barn with him but did not generally invite the other children to the barn. Child described how Eubanks would block the barn door with a piece of wood and take their pants off. Eubanks would then pull her onto his lap in a chair behind a dollhouse and "wiggle" her on his lap. At times, he ejaculated on the chair and the floor. Child stated he "used his boy part" on her in the barn "quite a few times." After Child disclosed the abuse, she and her family destroyed the chair with a hammer and burned it in a bonfire.

In May 2017, Brother attended a counseling session with Dr. Kimberly Little at Gilchrist Consultation Center. During this session, Brother discussed the family dynamic, including Child's role as a "peacekeeper" between Mother and Eubanks. Dr. Little was concerned about Child's wellbeing and asked Mother to bring her in for a session. During her session with Dr. Little, Child disclosed the sexual abuse. Dr. Little then notified law enforcement and the South Carolina Department of Social Services (DSS). Child testified she disclosed the abuse to Dr. Little because she believed she could trust her because Brother trusted her.

Deputy Ronald Richey of the Laurens County Sheriff's Office (LCSO) received Dr. Little's report. After Deputy Richey spoke with Child, he notified DSS and the LCSO investigations department. While Deputy Richey was at the Gilchrist Center taking a report in Child's case, Eubanks unexpectedly showed up with his mother and attempted to enter the building.[1]

[1] The circuit court sustained the defense's objections to much of Deputy Richey's testimony about Eubanks's tracking of Mother's car to the Gilchrist Center;

On May 17, 2017, LCSO Investigator Jared Hunnicutt was assigned to the case. After reviewing Deputy Richey's report, Investigator Hunnicutt met with Child and Mother; he then met with Eubanks to discuss the allegations. According to Investigator Hunnicutt, Eubanks claimed he was unsure if anything had happened, and if anything had occurred, it happened while he and Child were asleep in a bed together. During the meeting, Eubanks provided a written statement in which he wrote, "I have no clue what goes on when I sleep. I'm not saying that I did or didn't while I was asleep."

After his meeting with Eubanks, Investigator Hunnicutt contacted Mother to advise her of the investigation's progress. Mother reported that she told Eubanks there was a "nanny cam" in the home or barn area, even though there really was no hidden camera. Investigator Hunnicutt then met with Eubanks again. At this meeting, Hunnicutt "advised him that his stepdaughter said that inside the barn property was where this—these allegations occurred. I slipped the DVD across the table to him and insinuated that I had footage of the act." Eubanks then responded that he and Child were in the barn tearing apart pallets when she sat on his lap in a chair and "started grinding her buttocks into his leg and penis and that it lasted for a few minutes and—until he ejaculated into his pants." Eubanks said he knew this was wrong, and he tried to push her off, but he was scared and panicked and did not know what to do or say. He claimed this was the only time this ever happened. Following Eubanks's completion of a written statement, Investigator Hunnicutt charged him with third-degree CSC with a minor.[2]

Child participated in a forensic interview and medical evaluation. Dr. Lyle Pritchard observed she was underweight and recommended she see another physician for evaluation of a possible eating disorder.

A jury found Eubanks guilty of first-degree, second-degree, and third-degree CSC with a minor. The circuit court sentenced Eubanks to twenty-five years for first-

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however, Richey explained Eubanks "was wanting to go inside. I told him it's best to sit in the parking lot right now."

[2] The grand jury ultimately indicted Eubanks for first-degree, second-degree, and third-degree CSC with a minor.

degree CSC with a minor and fifteen years for third-degree CSC with a minor, to be served concurrently. Eubanks received fifteen years for second-degree CSC with a minor, suspended on time served, and five years' probation, to run consecutively to his first-degree sentence. The circuit court also ordered Eubanks to register as a sex offender upon his release. The circuit court denied Eubanks's motion for a new trial.

Standard of Review

"The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021) (quoting *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* (quoting *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006)).

Law and Analysis

I. Therapy and Post-Traumatic Stress Disorder

Eubanks objected to the admission of therapist Samantha Black's testimony regarding her treatment of Minor, including the type of therapy she provided and the goals of her treatment, and the admission of psychiatrist Eman Sharawy's diagnosis of post-traumatic stress disorder (PTSD). Eubanks argues the circuit court erred in admitting the testimony of these witnesses because their opinions that Child suffered a significant traumatic event and required treatment for "the psychological ramifications of the abuse" improperly vouched for the victim's credibility. Eubanks further contends this testimony should have been excluded under Rule 403, SCRE.

Black testified she worked as a therapist at Beyond Abuse, where she performed assessments and therapy with children who have been abused. Black first met with Child on June 14, 2017, and "got her background, history, family, abuse allegations, symptoms, and then we did assessment measures." Based on her assessment, Black provided Child with trauma focused cognitive behavioral therapy. Black explained the goals of such therapy are to learn coping skills, change thought distortions, and complete a trauma narrative. In the trauma narrative, the patient identifies three incidents: the first, the worst, and the last.

The purpose of the trauma narrative is to "focus on their thoughts . . . what are they thinking as a result of the trauma to get rid of any distortions that they have [like] thinking that it's their fault." The circuit court admitted into evidence a redacted version of Child's trauma narrative.

Dr. Sharawy, medical director of the Beckman Center, was qualified without objection as an expert in child and adolescent psychiatry. Dr. Sharawy described her duties at the mental health center as meeting with patients, performing diagnostic assessments, prescribing medication, and supervising treatment teams, including therapists. Dr. Sharawy defined and explained common symptoms of PTSD. She noted seventy to eighty percent of patients at the Beckman Center have experienced some sort of trauma and a large percentage of those are diagnosed with PTSD.

Dr. Sharawy met with Child on August 31, 2017, and diagnosed her with PTSD based on this session and her review of Black's therapy notes. She testified Child exhibited typical symptoms of PTSD, such as anxiety, avoidance, nightmares, "intrusive thoughts and recollections of the traumatic events," depressive symptoms, low mood, erratic appetite, poor sleep, and poor concentration. Dr. Sharawy prescribed medication and recommended Child continue participating in trauma focused cognitive behavioral therapy. In their testimonies before the jury, neither Black nor Dr. Sharawy connected Child's PTSD to sexual abuse.

A. Vouching

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017). "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter." *State v. Kromah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013). A witness should avoid statements:

- expressing "a direct opinion as to a child's veracity or tendency to tell the truth;"

> • indirectly vouching for the child's believability, such as a statement that "the interviewer has made a 'compelling finding' of abuse;"
>
> • indicating "to a jury that the interviewer believes the child's allegations in the current matter; or"
>
> • providing "an opinion that the child's behavior indicated the child was telling the truth."

Id. at 360, 737 S.E.2d at 500.

In *Makins*, our supreme court held the testimony of Kristin Rich, the minor victim's therapist, did not improperly bolster the victim's testimony. 433 S.C. at 505, 860 S.E.2d at 672. The court noted:

> Rich never testified she advised Minor about the importance of being truthful, never testified directly as to Minor's truthfulness, and never opined Minor's behavior indicated truthfulness. While Rich was allowed to confirm she treated Minor, she was not allowed to explain why she was treating Minor, detail her treatment of Minor, or testify as to her diagnosis of Minor. Rich only addressed the circumstances of Minor's disclosure of abuse and the drawing Minor produced in therapy.

Id. at 503, 860 S.E.2d at 671.

Based on *Makins*, we find the circuit court acted within its discretion in finding Black's testimony did not improperly vouch for Child's credibility. Although she testified she provided Child with trauma focused cognitive behavioral therapy, she specifically noted a trauma narrative is "not investigative at all. It's purely therapeutic and it's just to help them move on with their life to get past the trauma." Black did not testify that she believed Child, nor did she testify that she told Child to be truthful. Even though Black testified she provides therapy for children who have been abused, she made no statements regarding whether Child's trauma was

the result of abuse nor did she reference sexual abuse or the specific characteristics and behaviors of sexual abuse victims.[3]

Dr. Sharawy's testimony did not reference sexual abuse, and she did not vouch for Child's credibility or otherwise violate *Kromah*. She testified she diagnosed Child with PTSD based on her one-hour session with Child and her review of Black's notes, and she described behaviors consistent with a diagnosis of PTSD. Dr. Sharawy explained PTSD was the result of a "significant traumatic event" and not simply stress in an individual's life. However, she did not testify as to any specific traumatic event as precipitating Child's PTSD. Nor did she testify as to the full diagnosis reflected in her notes, which was "post-traumatic disorder secondary to child abuse." Accordingly, we find Dr. Sharawy's testimony that she diagnosed Child with PTSD, without more, did not constitute improper vouching.

B. Rule 403

"A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Brooks*, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct. App. 2019) (quoting *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014)). "The appellate court reviews the circuit court's Rule 403 ruling 'pursuant to the abuse of discretion standard and [is] obligated to give great deference to the [circuit] court's judgment.'" *Id.* (alterations in original) (quoting *Collins*, 409 S.C. at 534, 763 S.E.2d at 28).

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." *State v. White*, 361 S.C. 407, 414–15, 605 S.E.2d 540, 544 (2004) (finding no error in

[3] The State presented a separate "blind witness" as its expert in child abuse dynamics. This witness testified about the ways children disclose abuse, delayed disclosure, grooming, and typical characteristics and behaviors of child victims of sexual abuse.

circuit court's allowing testimony of psychotherapist who counseled victim and was qualified as an expert in PTSD and assessment and treatment of sexual abuse; the court noted the "purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred").

"'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.'" *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)). "[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

We find the circuit court acted within its discretion in finding the probative value of the testimony of these witnesses was not substantially outweighed by the danger of unfair prejudice under Rule 403. The testimony of each was probative to show Child suffered some trauma and to refute Eubanks's contention that nothing happened, or that if anything inappropriate happened, it happened while both were asleep. *See White*, 361 S.C. at 415, 605 S.E.2d at 544 (holding treating therapist's testimony that victim's symptoms were consistent with suffering a recent trauma was probative to refute the defendant's contention that the sex was consensual and to prove a sexual assault occurred). As discussed above, neither Black nor Sharawy testified about the specific trauma that caused Child's PTSD or precipitated her need for therapy. Based on the record as a whole, we find the circuit court did not err in evaluating the relative probative value and prejudicial effect of this evidence. *See Stokes*, 381 S.C. at 404, 673 S.E.2d at 441 ("[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.").

II. References to Pornography

Eubanks argues the circuit court erred in allowing the State to question Child on redirect about Eubanks's "enormous tub of pornography" after he cross-examined her about the titles of two iPhone internet searches. Eubanks contends the testimony was irrelevant under Rule 401, SCRE; inadmissible character evidence under Rule 404, SCRE; and violative of Rule 403, SCRE, as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

"A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction." *State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 595 (2019). "Testimony in response must be 'proportional and confined to the topics to which counsel had opened the door.'" *Id.* at 637, 828 S.E.2d at 595 (quoting *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)). "A trial court's determination that a party has opened the door to the introduction of otherwise inadmissible evidence is within the sound discretion of the trial judge and is reviewed for abuse." *Id.* at 636, 828 S.E.2d at 594.

Pretrial, the State indicated it would not seek to introduce evidence of Eubanks's pornography collection, including evidence related to pornography found on his cell phone. Yet, Eubanks asked Child on cross-examination if she mentioned in her forensic interview that she had seen a pornographic video on Eubanks's phone. Child responded that she had seen the search terms "Birthday Sex" on Eubanks's iPhone in his YouTube video search history. She clarified she did not see this video itself, only the YouTube search for it. However, Child admitted she had watched a pornographic movie and films on Eubanks's phone when she was younger. She also admitted that she told the forensic interviewer that Eubanks showed her a video called "step-dad having fun with daughter" on his phone. Child explained she did not tell her mother about later videos she watched with Eubanks on his phone "[b]ecause that's when he was doing the physical things."

On redirect, the State asked Child if she saw Eubanks watching pornographic videos on more than one occasion. Child testified he watched videos by himself, or he would lie beside her in bed and watch them, and that he also showed her videos on the television in the house. Eubanks objected to Child's statement that Eubanks kept pornographic material in a storage tub in a storage building, arguing her testimony that she saw a video on his cell phone did not open the door to questions about other pornographic material Eubanks might legally watch or possess. The circuit court found the State's questioning about the storage building pornography was appropriate on redirect because on cross, Eubanks elicited testimony from Child about pornography when he asked her about the cell phone video in an effort to imply he never showed Child pornography.

In admitting the redirect testimony on the sole basis that it found Eubanks opened the door, the circuit court did not address the relevance of the evidence under Rule

401 or its admissibility (or inadmissibility) as character evidence under Rule 404. Accordingly, we find these arguments—raised for the first time on appeal—are not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). However, we find the circuit court erred in finding Eubanks opened the door to Child's testimony on redirect about the pornography Eubanks kept in the storage building. Eubanks's cross-examination inquiries about the internet searches and the State's subsequent question on redirect about the tub of videos addressed two separate matters. *See State v. Simmons*, 430 S.C. 1, 15, 841 S.E.2d 845, 852 (2020) (reiterating that our supreme court will not condone "a thinly-veiled attempt to show propensity by way of the open-door doctrine" (quoting *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595)); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595 (requiring a proportional response confined to the topics on which the door has been opened).

Despite this, we find Eubanks was not prejudiced by the admission of this testimony because Child testified Eubanks never showed her the videos from the storage building. Child had already testified Eubanks showed her "dirty" videos on his iPhone and on the television in his bedroom, and the jury already knew Eubanks watched pornography on his own and in the presence of Child. Thus, any error in admitting the references to the videos Eubanks kept in the storage building was harmless. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("No definite rule of law governs this finding [of harmless error]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008))).

III. Eubanks's Testimony about Internet Searches

Eubanks next contends the circuit court erred in allowing the State to cross-examine him about his internet searches for adult pornography because such questioning was not relevant under Rule 401, resulted in the admission of inadmissible character evidence under Rule 404, and was unfairly prejudicial under Rule 403, SCRE.

When the State asked Eubanks about his sexual interests and attractions, Eubanks's counsel objected as to relevance. The circuit court found Eubanks opened the door to the State's questioning as to whether he had performed internet searches for "young looking girls" when he testified he did not intend to become aroused when Child "wiggled" on his lap. However, the circuit court sustained Eubanks's objection to the State's questioning regarding Eubanks's familiarity with specific sites based on data from his cell phone. Thereafter, the State asked Eubanks if he had searched the internet for "young looking girls," and he responded, "I have done searches." Later, he admitted he was attracted "to young girls, but over the age of 18."

We find Eubanks's testimony that he did not intend to become aroused by Child's wiggling on his lap did not open the door to the State's questioning about his internet searches related to "younger looking girls" because these acts do not arise from the same fact or transaction. *See Heyward*, 426 S.C. at 637, 828 S.E.2d at 595 (requiring a proportional response confined to the topics on which the door has been opened). Nevertheless, we find any error harmless. Child had already testified as to Eubanks's search for a "Birthday Sex" video and his showing her a video called "step-dad having fun with daughter." Thus, even if the circuit erred in finding Eubanks opened to the door to the State's questioning about his internet searches, he was not prejudiced by this.

IV. Courtroom Demonstration

Eubanks further argues the circuit court erred in allowing the State to call him down from the witness stand to demonstrate how Child wiggled on his lap. We find this error unpreserved.

Eubanks claimed his relationship with Child was a normal father-daughter relationship and denied inappropriately touching her. Eubanks testified he did not tell Child to sit on his lap in the barn and he was embarrassed about what happened. During his testimony, the State asked Eubanks to step down and show the jury how Child wiggled on his lap. Eubanks objected:

> [Eubanks]: Your Honor, I don't—I don't know if this is a proper demonstration even because it's—having never heard of it before.

> [The State]: I want to see it demonstrated.
>
> THE COURT: If he's able to pull it off, then he's able to pull it off. Let's see if he can do it. Go ahead.

Eubanks did not argue before the circuit court that this demonstration was "inflammatory and prejudicial," as he now asserts on appeal, and we find this general objection at trial was insufficient to put the circuit court on notice of the grounds for his argument. *See State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) ("An objection must be made on a specific ground.").

V. The State's Closing Argument

Eubanks next asserts he is entitled to a new trial because the State's closing argument was improper and highly prejudicial. Eubanks admits he did not contemporaneously object to the statements he now challenges but argues a narrow exception to our preservation rules permits an appellate court to consider such "dehumanizing" statements. We disagree.

Eubanks contends the following aspects of the State's closing arguments were improper and inflammatory:

- "Do y'all remember Mitchell [sic] twerking Eubanks? He's not here today. I looked for him after his examination yesterday. It was pathetic. I looked for him. I wanted to talk to him but he was out the door."

- The State's "mocking" of Eubanks about his liking the articles in his pornographic materials, his favorite "story lines," and his sexual interests.

- The State's references to Eubanks as "grinning Cliff" and "smirking smiling Eubanks."

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94. "[E]ven in the absence of a contemporaneous objection, a new trial

motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994). Yet, our supreme court later added, "*Toyota* and the line of cases preceding it concern abuse of a witness or litigant. Accordingly, we now clarify that our holding in *Toyota* excuses the failure to make contemporaneous objection only where the challenged argument constitutes abuse of a party or witness." *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998). The court further clarified in *Dial* that "[u]nder *Toyota*, the issue of inflammatory argument must be raised to the trial judge by way of post-trial motion to preserve the issue for appeal." 333 S.C. at 257, 509 S.E.2d at 271.

Eubanks did not object during the State's closing argument, nor did he raise this issue in his posttrial motion for a new trial. Thus, we find Eubanks's challenges to the State's closing argument are not preserved for our review. *See State v. Young*, 364 S.C. 476, 494, 613 S.E.2d 386, 395–96 (Ct. App. 2005) (noting that under *Toyota*, flagrant, abhorrent conduct toward a party or witness must be raised to the trial court by way of a post-trial motion, and issue was not preserved because the appellant failed to do so), *aff'd as modified on other grounds*, 378 S.C. 101, 661 S.E.2d 387 (2008).

VI. Motion for a Continuance

Eubanks contends the circuit court erred in denying his request for a continuance to find an expert to analyze his damaged iPhone, which he produced a week before trial began. He further asserts the court erred in denying him a mid-trial continuance for him to call his physician, Dr. Joanne Brownlee, to testify about a medical report he sought to introduce.

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." *State v. Wrapp*, 421 S.C. 531, 535, 808 S.E.2d 821, 823 (Ct. App. 2017) (quoting *State v. Ravenell*, 387 S.C. 449, 455, 692 S.E.2d at 554, 557 (Ct. App. 2010)). "Generally, a motion for continuance should be made at the time the underlying reason for such becomes known." *State v. Nelson*, 431 S.C. 287, 304, 847 S.E.2d 480, 489 (Ct. App. 2020).

a. Damaged iPhone

Pretrial, and before the jury was sworn, Eubanks moved to continue the trial to allow an expert to examine his broken iPhone. The State noted Eubanks turned over the iPhone the week before trial but the phone was so severely damaged, the parties were unable to access it. Eubanks claimed he wanted to contact a cell phone expert in North Carolina to see if he could access the data on the phone.

Eubanks argued the iPhone would be important if Child testified she saw pornography on his cell phone—as she disclosed in her forensic interview. Eubanks wanted an expert to examine the iPhone so that he could show there was nothing inappropriate on it. Trial counsel was unaware that the State did not have the iPhone until a few weeks before trial. When the circuit court asked Eubanks why he had not sent the phone to the North Carolina expert himself, his counsel responded, "[W]ell, one, SLED is cheaper than the guy in North Carolina. Right? Or whoever they sent it to. Right? In all honesty, . . . I did not know they didn't get his phone from him." The circuit court denied Eubanks's request for a continuance, noting the iPhone related to a collateral matter and raising a concern about authentication of the device.

When Eubanks moved for the continuance, the State agreed it would not elicit testimony about his cell phone searches. However, Eubanks referenced the iPhone during his cross-examination of Child. Notably, Eubanks could not identify any specific information on the iPhone that might be helpful to him, other than the purported absence of pornographic internet searches. We find the circuit court did not abuse its discretion in denying Eubanks a continuance to retain an expert to access a damaged device he possessed during the months prior to trial. *See, e.g.*, *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (finding circuit court did not abuse its discretion in denying defendant's motion for a continuance to test certain evidence because he "had a significant period of time to obtain the testing and his failure to do so was a result of his own inaction and not a lack of preparation time").

b. Dr. Brownlee

Mother testified she and Eubanks had a great sex life until her 2013 accident. She claimed Eubanks told her he was unable to achieve an erection due to problems with high blood pressure and low testosterone.

During Eubanks's testimony, he sought to introduce a medical report prepared by his physician, Dr. Joanne Brownlee. The State had never seen the report and asserted Dr. Brownlee's testimony was necessary for the document's admission. Eubanks claimed he did not know the report would be relevant until that day of trial. The circuit court noted the potential authentication issue with the document and stated it would be best for Eubanks to call Dr. Brownlee to testify. Still, the circuit court clarified Eubanks could testify about his own physical condition and what he reported to his doctor. The circuit court briefly recessed late in the afternoon so Eubanks could contact Dr. Brownlee. Following this recess, Eubanks testified he suffered from erectile dysfunction and low testosterone.

At the end of the day, Eubanks stated he would contact Dr. Brownlee first thing the next morning; however, the following morning, Eubanks moved for a directed verdict. After a brief discussion, the circuit court noted, "Technically, you had not rested before you made your directed verdict motion, but you did indicate in chambers that you did not intend to call additional witnesses." Eubanks responded, "Now that you mention that, we did contact Dr. Brownlee this morning. Her office is closed. . . . I would actually request the Court continue this case to Monday so that we can have Dr. Brownlee available."

We find the circuit court did not abuse its discretion in denying Eubanks's motion to continue the remainder of the trial so that Eubanks could attempt to obtain Dr. Brownlee's testimony. Despite Eubanks's claim that he was unaware his medical condition would be relevant, he was prepared to use Dr. Brownlee's medical report at trial. And, as the circuit court noted, because Eubanks did not provide Dr. Brownlee's name as a potential witness, there was a risk that the jury could have contained some of her patients. Therefore, we find the circuit court acted within its discretion in declining to postpone the remainder of the trial.

VIII. Juror Bias

Eubanks argues the circuit court erred in failing to discharge a member of the jury, Bailey, after the juror revealed he was a realtor and had in the past sold a house to one of Child's relatives. Eubanks also argues the circuit court erred in denying his motion for a new trial without convening a hearing to question this juror when Eubanks learned after the trial that Bailey was "Facebook friends" with Investigator Hunnicutt and with the grandmother of a witness.

"All criminal defendants have the right to a trial by an impartial jury." *State v. Coaxum*, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) (quoting *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)).

> To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determinate whether the jurors are aware of any bias or prejudice against a party, as well as to "elicit such facts as will enable [the parties] intelligently to exercise their right of peremptory challenge."

Id. (alteration in original) (quoting *Woods*, 345 S.C. at 587, 550 S.E.2d at 284).

"We review a ruling on a new trial motion based on a juror's alleged concealment during voir dire for abuse of discretion." *State v. Tucker*, 423 S.C. 403, 410, 815 S.E.2d 467, 471 (Ct. App. 2018). The circuit court should grant a mistrial based on a juror's concealment of information only when "absolutely necessary." *Coaxum*, 410 S.C. at 327, 764 S.E.2d at 242 (quoting *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998)). "In order to receive a mistrial, the defendant must show error and resulting prejudice." *Kelly*, 331 S.C. at 142, 502 S.E.2d at 104.

A new trial due to a juror's concealment during voir dire "is warranted when: (1) the juror intentionally concealed information, and (2) the information withheld would have triggered a challenge for cause or been material to a party's choice to use a preemptory challenge." *Tucker*, 423 S.C. at 411, 815 S.E.2d at 471. "[I]ntentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable."

Id. (alteration in original) (quoting *State v. Galbreath*, 359 S.C. 398, 404 n.2, 597 S.E.2d 845, 848 n.2 (Ct. App. 2004)). "[A] juror who intentionally conceals is presumptively biased." *Id.* "Unintentional concealment, . . . , occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Coaxum*, 410 S.C. at 325 n.4, 764 S.E.2d at 244 n.4 (omission in original) (quoting *Woods*, 345 S.C. at 588, 550 S.E.2d at 284).

During jury selection, the circuit court read a list of potential witnesses and asked if any member of the panel was related by blood or marriage to, or had a close business or social relationship with, a potential witness. No member stood in response. Eubanks did not indicate any witnesses were omitted from the list, nor did he argue the circuit court failed to read his list of witnesses.

Bailey was the first juror selected, and Eubanks did not challenge his selection. Eubanks used eight of his ten preemptory challenges on other potential jurors. The circuit court selected Bailey to be the foreperson because he was the first juror seated.

After opening statements, Bailey realized his ex-wife was related to members of Child's biological father's family (the Lyons family). Bailey disclosed that he and his ex-wife had been divorced for eleven years but noted he was a real estate agent and had sold one of the family members a house approximately two years before the trial. Bailey averred his prior relation to the Lyons family would not affect his ability to be fair and impartial. After a bench conference, the circuit court asked Bailey to which family member he sold the house, and Bailey responded that he sold an aunt a house two years prior. The circuit court then called the rest of the jury back into the courtroom and stated, "The jury is back. I think we're good" and instructed the State to call its first witness.

Eubanks later argued he was entitled to a new trial because after the trial, he learned Bailey was Facebook friends with Investigator Hunnicutt and with a witness's grandmother. In denying the motion for a new trial, the circuit court found being a Facebook friend with someone does not necessarily rise to the level of "a close business or social relationship" and noted Bailey became friends on Facebook with Investigator Hunnicutt only after the trial had ended. The circuit court further held Bailey's Facebook friendship with a witness's grandmother was

discoverable prior to trial and recognized it would be difficult to impanel a jury with "absolutely no ties" to any witnesses because Laurens County is an "interconnected community." The circuit court found a posttrial hearing was unnecessary due to its inquiry with Bailey at the beginning of the trial when the issue with the house sale arose.

First, we find Eubanks's argument that the circuit court should have excluded Bailey as a juror based on a real estate transaction involving a member of the Lyons family is likely unpreserved. After Bailey brought to the court's attention that his ex-wife was related to members of the Lyons family and that he sold an aunt a home, the circuit court asked the State and Eubanks if they had any additional voir dire for the jury. Eubanks stated, "Yeah," and a bench conference was held. The substance of the bench conference was not placed on the record, and no further discussion followed at this time regarding Bailey. However, we address the merits of this argument as the circuit court later addressed the juror issue in its order denying Eubanks's motion for a new trial.

We find the circuit court acted within its discretion in declining to remove Bailey due to his remote relationship with the Lyons family. Bailey's initial concealment of the prior family connection was unintentional. During voir dire, the circuit court asked if any member of the jury panel was related to a potential witness by blood or marriage or if they had a close business or social relationship with a potential witness. When listing the witnesses, the circuit court referred to Mother by her married name, Eubanks. Child and Brother would have been very young when Bailey was connected to the Lyons family through his ex-wife because the two divorced eleven years prior to trial. Therefore, Bailey may not have realized the connection until he heard during opening statements that Mother's nickname was "Deanie" and that Child and Brother's father was Josh Lyons. Mother testified Josh struggled with substance abuse and left when she was seven months pregnant with Child, and he was not involved in the children's lives. Accordingly, Bailey's relationship with the Lyons family via his ex-wife was "so far removed in time that the juror's failure to respond is reasonable under the circumstances." *See Coaxum*, 410 S.C. at 325 n.4, 764 S.E.2d at 244 n.4 (quoting *Woods*, 345 S.C. at 588, 550 S.E.2d at 284). Eubanks contends he would have used a peremptory strike had he known this information before jury selection. However, Bailey's ex-wife's relation to the Lyons family and the fact that Bailey sold a home to a Lyons aunt does not suggest he had a "close business or social relationship" with a potential witness—particularly when the person to whom he sold the home was not a witness at trial.

Significantly, Bailey told the circuit court he could be fair and impartial in adjudicating Eubanks's innocence or guilt.

Further, the fact that Bailey was a Facebook friend of Investigator Hunnicutt and the grandmother of a witness is not problematic under the circumstances presented here. In response to Eubanks's new trial motion, the State notified the circuit court of Investigator Hunnicutt's statements that Bailey requested to be his Facebook friend after the trial concluded and that "he had no idea who the guy was." Moreover, the fact that Bailey was a Facebook friend of an individual who did not testify does not indicate he had a "close business or social relationship" with a witness. As there is no suggestion that Bailey deliberately concealed information during voir dire and the social media connections are tangential, we find the circuit court did not abuse its discretion in declining to replace him on the jury or in denying the motion for a new trial without convening a hearing to further question the juror.

IX. Lesser Included Offense

In declining to charge the jury with second-degree assault and battery as a lesser included offense of third-degree CSC with a minor, the circuit court cited the court of appeals' unpublished opinion in *State v. Hernandez* as guidance. There, the defendant argued the circuit court erred in failing to instruct the jury "regarding the lesser-included offenses of assault and battery in the first and second degrees when the offenses are lesser included offenses of CCSM [CSC with a minor] in the second degree and the evidence supported the instructions." *State v. Hernandez*, Op. No. 2018-UP-343 (S.C. Ct. App. Filed Sep. 26, 2018) at 3. This court disagreed, finding second-degree assault and battery did not satisfy the elements test for inclusion as a lesser included offense of CSC with a minor in the second degree. The court further recognized that "had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CCSM, it could have so provided." *Id*. at 5.

The supreme court affirmed as modified, *State v. Hernandez*, 428 S.C. 257, 261, 834 S.E.2d 462, 464 (2019) (per curiam), but addressed whether assault and battery of a high and aggravated nature (ABHAN) is still a lesser included offense of CSC after the Legislature's 2010 codification of the assault and battery crimes. Finding ABHAN is no longer a lesser included offense of CSC subsequent to the enactment of the Omnibus Crime Reduction and Sentencing Act, the court

affirmed the circuit court's denial of the charge requests. *Id.* at 261, 834 S.E.2d at 464 ("Now that the Legislature has codified all degrees of assault and battery crimes, and has particularly set forth which offenses are lesser included offenses, we no longer see the need to ignore the elements test. We now hold ABHAN is not a lesser included offense of CSC.").

Section 16-3-600(D) of the South Carolina Code (2015) provides,

> (1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:
>
> > (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or
> >
> > (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.
>
> (2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than two thousand five hundred dollars, or imprisoned for not more than three years, or both.
>
> (3) Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

Here, the circuit court properly denied Eubanks's request to charge second-degree assault and battery as a lesser included offense of third-degree CSC with a minor because the plain language of the statute does not list third-degree CSC with a minor as one of the offenses of which second-degree assault and battery is a lesser included offense. *See* S.C. Code Ann. § 16-3-600(D)(3). As the court stated in

Hernandez, if the Legislature had intended to classify second-degree assault and battery as a lesser included offense of CSC third with a minor, it would have provided such in the statute.

X. Cumulative Error

Finally, Eubanks contends he is entitled to a new trial based on the cumulative errors at trial. The State argues this issue is not preserved for our review.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.* The cumulative error doctrine is subject to the rule that an issue must be raised to and ruled upon by the circuit court. *Id.* at 236, 746 S.E.2d at 489.

Eubanks did not raise the cumulative error doctrine before the circuit court or in his motion for a new trial. Therefore, this argument is not preserved for our review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693–94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). In any event, we find Eubanks has not demonstrated that the posited errors, even when considered together, deprived him of a fair trial. *See e.g.*, *State v. Daise*, 421 S.C. 442, 467, 807 S.E.2d 710, 722–23 (Ct. App. 2017) (noting any errors by the circuit court were not prejudicial and did not combine to affect Daise's right to a fair trial).[4]

[4] We decline to address Eubanks's request for guidance regarding the court reporter's change of employment following his trial but prior to the completion of the trial transcript. The South Carolina Appellate Court Rules provide a process for challenging the accuracy of transcripts. *See* Rule 607(i), SCACR (addressing retention of primary and backup tapes and the time for a party to challenge the accuracy of the transcript); Court Reporter Manual published by South Carolina Court Administration, https://www.sccourts.org/courtreporter/CourtReporterManual.pdf. At Eubanks's request, Court Administration conducted an independent review of the transcript and required the correction of "proofreading errors that included word misspellings

Conclusion

Based on the foregoing, Eubanks's convictions are

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

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and grammar, punctuation, and typographical errors." This court can provide no further relief regarding the court reporter or the transcript, and it would be inappropriate to issue an advisory opinion that does not affect the outcome of the case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nicole Lampo, Respondent,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, Appellants.

Appellate Case No. 2019-000451

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5934
Heard February 9, 2022 – Filed August 10, 2022

REVERSED AND REMANDED

George A. Reeves, III, of Columbia, and Jason D. Keck, of Chicago IL, both of Fisher & Phillips, LLP, for Appellants.

James Paul Porter, of Cromer Babb Porter & Hicks, LLC of Columbia, for Respondent.

HILL, J.: This appeal of an order denying a motion to compel arbitration turns on whether Nicole Lampo agreed to arbitrate disputes arising out of her employment with Amedisys Holding, LLC (Amedisys). The key question is whether, under the specific circumstances of this case, Lampo accepted the arbitration agreement by acknowledging receipt of the agreement and continuing to work at Amedisys. We

conclude she did because she had actual notice of Amedisys' offer to modify her employment agreement to include the arbitration provision. Accordingly, we reverse the denial of Amedisys' motion to compel arbitration.

I. FACTS

Lampo worked as a physical therapist at Amedisys from July 2013 until March 2018, when she was fired. In December 2018, Lampo sued Amedisys and Appellant Leisa V. Neasbitt, her former supervisor, alleging wrongful discharge, interference with prospective contractual relations, and defamation. In response, Amedisys moved to compel arbitration, asserting Lampo's claims against both Amedisys and Neasbitt were subject to an arbitration agreement Lampo had accepted a month after she began her employment.

In support of the motion, Amedisys included affidavits and exhibits demonstrating that on August 26, 2013, it sent an email to its employees with the subject line, "Important Policy Change – Must Read." The message contained a hyperlink, stating, "This e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." Upon clicking the link, the following pop-up message filled the employee's screen:

> THE AMEDISYS ARBITRATION PROGRAM
>
> **ACKNOWLEDGEMENT FORM**
>
> By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**
>
> By clicking the "Acknowledge" button below on this screen, I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.

(Emphasis in original). Upon clicking "Acknowledge," employees were automatically directed to a webpage providing descriptions and links entitled: "Arbitration Agreement," "Cover Letter," and "Frequently Asked Questions."

The arbitration agreement stated it was governed by the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. (2018) (FAA) and applied "to any dispute arising out of or related to Employee's employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates." The arbitration agreement also limited the parties' discovery to "the right to take the deposition of one individual and any expert witness designated by another party."

The agreement stated acceptance of the agreement was not a mandatory condition of employment and employees could opt out of the agreement by printing an attached opt-out form and mailing it to an address in Louisiana. The form was required to be postmarked within thirty days of "Employee's acknowledgment of receipt of this [arbitration agreement]" and "[s]hould Employee fail to opt out of this [arbitration agreement] within the 30-day period in the manner provided above, Employee's continuation of his or her employment with [Amedisys] shall constitute Employee's and [Amedisys'] mutual acceptance of the terms of this [arbitration agreement]."

Amedisys attached electronic records to its motion to compel arbitration that indicated Lampo had used her unique username and login to both open the email and click the "Acknowledge" button on the pop-up acknowledgment form on August 6, 2013, at 1:55 pm. However, Amedisys did not provide any evidence demonstrating Lampo scrolled or read through the Arbitration Agreement, Cover Letter, or Frequently Asked Questions links and documents. In her pleadings, Lampo alleged she had no actual notice of the alleged arbitration agreement because she did not recall receiving the August 26, 2013 email or reading the linked documents.

After a hearing, the circuit court denied Amedisys' motion to compel arbitration, ruling "there is no competent record evidence of acceptance, mutual assent, or a meeting of the minds to warrant declaring the arbitration agreement enforceable." The circuit court did not separately address the issue of notice.

On appeal, Amedisys argues Lampo accepted the arbitration agreement by continuing to work at Amedisys after declining to opt-out of the arbitration agreement within thirty days.

Lampo argues the circuit court correctly found she did not accept the agreement and presents three other sustaining grounds to affirm the denial of the motion to compel arbitration. First, Lampo asserts she received no actual notice of the terms of the agreement, or alternatively, she is entitled to a jury trial on the notice issue. Second, Lampo claims the arbitration agreement's restrictions on discovery render the entire arbitration agreement unconscionable and, consequently, unenforceable. Third, Lampo asserts the scope of the arbitration agreement does not cover disposition of her post-termination claims or her claims against Neasbitt.

II. DISCUSSION

A. Actual Notice and Continued Employment as Acceptance

We review a trial court's ruling on a motion to compel arbitration de novo, but we will not reverse factual findings of the trial court that are reasonably supported by the record. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). The FAA requires that courts treat arbitration agreements the same as all other contracts—no more, no less. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."). "Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

Because the core of the FAA is consent, arbitration may be compelled only when the parties have agreed to it. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Because arbitration under the FAA rests entirely upon consent, it is always up to the court to determine if the parties have an agreement to arbitrate. *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 296 (2010). Whether the parties have formed an agreement to arbitrate is determined by applying South Carolina contract law. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019).

The familiar requisites to a binding contract are a meeting of the minds of the parties as to all essential and material terms, supported by consideration. *See Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 368, 593 S.E.2d 170, 173 (Ct. App. 2004) ("The necessary elements of a contract are offer, acceptance, and valuable consideration."); *id*. at 369, 593 S.E.2d at 173 ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." (quoting Restatement (Second) of Contracts § 50

(1981))). A party cannot assent to something he does not know about, so the law in general requires that for an offer to be effective, the responding party must have reasonable notice of the offer's terms. *See* Restatement (Second) of Contracts § 53 cmt. c (1981) (stating that when the offeror invites performance as acceptance, "[t]he offeree's conduct ordinarily constitutes an acceptance in such cases only if he knows of the offer"); *id* ("[The offeree's] rendering of the invited performance with knowledge of the offer is a sufficient manifestation of assent."). In South Carolina, our supreme court has equated reasonable notice of an offer to modify employment contracts with actual notice. *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 595–96 (1994). *Fleming* held actual notice was required when an employer attempted to modify an employment contract with a subsequent handbook. *Id*. Yet, just as in *Towles v. United HealthCare Corp.*, we do not need to address whether *Fleming*'s actual notice rule extends beyond the handbook context to all employment contract modification scenarios because, as explained below, we conclude Lampo received actual notice. 338 S.C. 29, 37–38, 524 S.E.2d 839, 844 (Ct. App. 1999).

Usually, the question of whether an employee has received actual notice is for the jury; however, an employer may conclusively prove an employee has actual notice of the terms of the employment agreement if the employee signed an acknowledgment form stating she received the agreement and promised to review it. *Id.* at 39–40, 524 S.E.2d at 845. This is true even if the employee has electronically signed the acknowledgment form. *See* S.C. Code Ann. § 26-6-70 (2007) (providing an electronic signature has the same force and effect as a signature in writing).

We find Amedisys' email—combined with the links to the arbitration agreement, FAQs, and cover letter—was effective to communicate the offer of the arbitration agreement to Lampo. Only one rational inference may be drawn from the undisputed fact that Lampo clicked "Acknowledge" on the pop-up acknowledgement form while logged into her unique employee username: Lampo had actual notice of the offer. *See Towles*, 338 S.C. at 39, 524 S.E.2d at 845 (finding "[a]fter receiving and signing the Acknowledgment, [the employee] cannot legitimately claim [the employer] failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document"). After all, the email subject heading alerted Lampo that she "must read" the content and the form twice notified her she was required to read the entire agreement. The language of the offer also makes clear that acceptance would not be accomplished by the employee's signature (electronic or otherwise) but instead by the employee's

continued performance of job duties after declining to opt-out of the agreement. Finally, there is no dispute that Lampo declined to opt out of the agreement and continued working at Amedisys. Accordingly, we find her conduct demonstrates as a matter of law that she had actual notice of the arbitration agreement and accepted it. *Id.* at 40, 524 S.E.2d at 845 (holding employee accepted arbitration offer by continued employment). We therefore reverse the circuit court's denial of Amedisys' motion to compel arbitration.

Courts judge online transactions by the same law that has long governed contracts memorialized by ink and paper. Today, terms such as "click wrap" and "browse wrap" seem less exotic to our so-called modern ears than "foolscap," the standard term for legal paper a century ago. For many good reasons, the law in most instances lags behind technology, and the challenge for courts is how to apply old law to new circumstances. *See, e.g.*, *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034 (7th Cir. 2016) (applying general principles of state contract formation and the rule that a person has notice of the terms of the paper he or she is signing to online contracting). The "old" law controlling here includes *Towles*, and we have no difficulty transplanting the principles of that well-reasoned decision to the new circumstances of this case, even if the legally binding agreement was formed in cyberspace rather than face to face across a conference table. *See generally Sarchi v. Uber Techs., Inc.*, 268 A.3d 258, 270–74 (Me.2022) (collecting and synthesizing cases concerning electronic assent to online arbitration agreements in consumer transactions). As fewer contracts are presented on paper and in person, the risk rises that the frontiers of online transactions may cross borders established by traditional contract principles. *See, e.g., Berkson v. Gogo LLC*, 97 F. Supp.3d 359, 385–86 (E.D.N.Y. 2015) (cataloging ten unique differences between online "wrap" contracts and traditional contract practice and doctrine). Still, "[c]ourts are not licensed to ignore the old chestnuts—cases that remind us that (1) certain formalities are required for a contract to be formed . . . and (2) when the formalities are met, a contract it does make . . . ." *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 260 (4th Cir. 2021) ("The electronic age has not made the formalities of contract less crucial, but more so . . . .").

We caution that the arbitration agreement designed by Amedisys may well be at the outer limits of what constitutes a valid offer to modify the terms an employment agreement to add an arbitration agreement. To be sure, Amedisys did not mandate arbitration as a condition of employment. However, Amedisys is a sophisticated, multi-state corporation employing over sixteen thousand people, whose offer to

arbitrate all employee-related claims was designed with specific choice architecture: it was sent by email (rather than presented in person, on paper), with barriers to opting out of the modification (having to print a form and send it in the mail to an out-of-state address), and no barriers to accepting the modification (just keep showing up to the job the employee has already agreed to do). The acknowledgement form did not require Lampo to confirm she read the arbitration agreement but only to promise she would read it. We understand why the circuit court was hesitant to find Lampo agreed to this modification of her employment contract. Nevertheless, we must conclude Lampo received actual notice of the arbitration agreement and accepted it by her continued employment.

We also find Lampo agreed to arbitrate her claim against Neasbitt. While the agreement did not name Neasbitt, it did state that, as used in the agreement, the term "Amedisys" included reference to and was synonymous with its employees and agents. Because Neasbitt is an employee and agent of Amedisys, the arbitration agreement is directly enforceable by Neasbitt against Lampo. *Cf.Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel."). In light of this disposition, we need not analyze whether Neasbitt may enforce it derivatively.

B. Unconscionable Terms

Having found the parties formed an agreement to arbitrate, we move to the next issue: whether the agreement is valid. Parties may delegate the issue of whether their arbitration agreement is valid to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). They did not do so here, so we must decide it.

To prove the arbitration agreement is unconscionable, Lampo must show (1) she lacked a meaningful choice as to whether to arbitrate because the agreement's provisions were one-sided and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007).

Although the arbitration agreement allows each party to take the deposition of only one witness and any expert witness designated by another party, the parties are equally limited by this term and both parties retain the right to additional discovery by mutual agreement or by order of the arbitrator upon request. *See Lucey v. Meyer*,

401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012) ("While the arbitration clause here does limit discovery by allowing the parties to be the only witnesses called in person, this cannot, standing alone, be a reason to invalidate an arbitration agreement."); *see also Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 983–85 (2010) (rejecting claim that arbitration provision limiting discovery to one deposition per party and the deposition of experts was unconscionable, especially where arbitrator could order additional discovery).

One of arbitration's main benefits is that it allows parties to agree to an alternative, informal forum to resolve their disputes by streamlined process. Limiting formal discovery is essential to the mission of arbitration, provided the limits do not deprive parties of a "fair opportunity to present their claims." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Lampo lodges a general argument that most of her potential witnesses remain employed by Amedisys and limiting her to deposing only one fact witness cripples her ability to fully develop her case. Lampo has not provided any concrete evidence specific to her case showing the limitation is actually unfair; though, as her case progresses, the arbitration agreement allows her the opportunity to persuade the arbitrator to enlarge her discovery rights. We therefore find the arbitration agreement is not unconscionable.

C. Scope of the Arbitration Agreement

Lampo's final contention is that the scope of the arbitration agreement does not cover any causes of action that arose after she was fired. Because the arbitration agreement delegates issues concerning its "interpretation or application" to the arbitrator, the question of whether the arbitration agreement encompasses Lampo's post-termination claims must be decided by the arbitrator, not the court.

We therefore reverse the circuit court's denial of Amedisys' motion to compel arbitration.

REVERSED AND REMANDED.

GEATHERS, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Gulfstream Café, Inc., Appellant,

v.

Palmetto Industrial Development, LLC, Respondent.

Appellate Case No. 2019-000885

Appeal from Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5935
Heard March 16, 2022 – Filed August 10, 2022

AFFIRMED

Robert P. Wood and Sean Matthew Foerster, both of Rogers Townsend LLC, of Columbia; and Simon H. Bloom, Adam D. Nugent, and Andrea J. Pearson, all of Atlanta, Georgia, for Appellant.

Henrietta U. Golding, of Burr & Forman LLP, of Myrtle Beach, for Respondent.

LOCKEMY, A.J.: The Gulfstream Café, Inc. (Gulfstream) appeals the circuit court's order granting summary judgment in favor of Palmetto Industrial Development, LLC (Palmetto) on Gulfstream's request for attorneys' fees based on a warranty provision in its easements. On appeal, Gulfstream argues the circuit court erred in denying it attorneys' fees. We affirm.

FACTS/PROCEDURAL HISTORY

Gulfstream and Palmetto are neighbors in Murrells Inlet with a relationship that is tenuous at best. Gulfstream is a restaurant that is part of the Marlin Quay Marina Development. Next door to Gulfstream, Palmetto owns a marina, a store, a parking lot, and a property where a restaurant was previously located. J. Mark Lawhon (Mark) owns Palmetto.

In 1986 and 1990, Marlin Quay Marina Corporation, Palmetto's predecessor, granted Gulfstream four joint, non-exclusive easements. The 1990 easement specifically gave Gulfstream:

> A non-exclusive perpetual easement appurtenant to the premises of [Gulfstream] hereinafter described for the full and free right of ingress and egress on, over and across the following described property of [Marlin Quay Marina Corporation], together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the [Marlin Quay Marina Corporation] hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to [Gulfstream's] hereinafter described property. It is anticipated by the parties that while they will each have joint and non-exclusive use at all times of the area covered by this easement that the [Marlin Quay Marina Corporation] will utilize the premises primarily during the daytime regular business hours of [Marlin Quay Marina Corporation] and [Gulfstream] will utilize the premises primarily in the evening regular business hours of [Gulfstream.]

Gulfstream and Palmetto's relationship began to sour in 2016 when Palmetto demolished and started to rebuild its building. In that same year, Gulfstream sued Palmetto and Mark for interfering with its easement and received a temporary injunction which restrained Palmetto from interfering with Gulfstream's easement

rights. Palmetto was subsequently held in criminal contempt for willfully violating the injunction.

On February 23, 2018, Gulfstream filed a complaint against Palmetto, seeking (1) a declaratory judgment requiring Palmetto to defend Gulfstream in Gulfstream's trial against Palmetto based on Palmetto's interference with the easements and (2) a finding that Palmetto breached its warranty to Gulfstream. Gulfstream also levied allegations regarding Palmetto's conduct, including the demolition and construction of Palmetto's building, incidents regarding window washers, and other various hostilities between the parties. Later that year, the circuit court conducted a trial in the 2016 action, and a jury found for Gulfstream on its claim of interference with the easement against Palmetto.

Gulfstream's February 23, 2018 complaint also included the properties' recorded easements and plats, and all of the easements included a general warranty provision. In the 1990 easement, Palmetto's predecessor specifically warranted:

> [T]he said Marlin Quay Marina Corporation does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said easement unto the said The Gulfstream Café, its successors and assigns, against itself and its successors and assigns and all others whomsoever lawfully claiming, or to claim the same or any part thereof.[1]

Gulfstream further attached a letter that it sent to Palmetto and Mark, demanding Palmetto provide a defense for, and indemnification of, Gulfstream. Gulfstream requested the circuit court to award "attorneys' fees and costs for the prosecution of this action as well as those attorneys' fees and costs incurred in other actions and

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[1] This language is consistent with the language for a general warranty as set forth in section 27-7-10 of the South Carolina Code (2007). *See generally Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984) ("A South Carolina general warranty deed embraces all of the following five covenants usually inserted in fee simple conveyances by English conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances.").

venues to defend its rights as necessitated by and due to Palmetto's breaches thereof."

Gulfstream moved for summary judgment, arguing the plain language of the warranties provided for Palmetto's obligation to defend Gulfstream and Palmetto breached its obligations. Gulfstream included an affidavit of Edward Cribb, Jr., the president of Gulfstream from 1986 to 1996, who stated he would not have signed the 1986 and 1990 easements without the warranties and he and the grantor intended for the grantor to pay "for Gulfstream's attorney's fees and costs incurred in defending or bringing litigation to protect Gulfstream's use of the [p]arking [l]ot or its easement rights if those rights were challenged by anyone, including the [g]rantor."

Palmetto also moved for summary judgment and opposed Gulfstream's summary judgment motion. Relying upon the plain language of the warranty provisions and *Black v. Patel*,[2] Palmetto asserted it did not have a duty to indemnify Gulfstream. Palmetto further argued that under *Black*, "Gulfstream would be entitled to recover under the warranty provisions only if a court determined that it in fact did not have an easement and that the grant from Marlin Quay Marina Corporation was ineffective in some manner." Additionally, Palmetto contended Cribb's affidavit was insufficient because Cribb did not provide any information about how he knew what the grantor intended.

Gulfstream responded to Palmetto's motion for summary judgment, reasserting its prior arguments and alleging that *Black* recognized an exception to the general rule involving successful claims against the grantee: when "the grantor's own wrongful act gives rise to the litigation, then the grantor's obligation to defend is not limited to successful claims." Moreover, Gulfstream asserted there was a "critical" distinction between a regular warranty deed and an easement because for a normal title transfer, the "grantor has no future rights or relationship with the grantee," but for an easement, there is "an ongoing relationship."

The circuit court heard arguments on the summary judgment motions. On May 6, 2019, the circuit court filed a formal order, finding *Black* governed this case and thus, "Palmetto [wa]s not required to warrant and defend the easement from the

[2] 357 S.C. 466, 594 S.E.2d 162 (2004).

claims made in the prior litigation between Gulfstream and Palmetto." This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in denying Gulfstream attorneys' fees?

STANDARD OF REVIEW

"In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP." *Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). "Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* The nonmoving party "is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "When a circuit court grants summary judgment on a question of law, [an appellate court] will review the ruling de novo." *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

LAW/ANALYSIS

Gulfstream argues the circuit court erred in granting summary judgment on its attorneys' fee request because *Black* permits a grantee to obtain attorneys' fees when the grantor "wrongfully [seeks] to repudiate [an] easement." In reply to Palmetto's arguments, Gulfstream contends (1) Gulfstream successfully challenged Palmetto's "claim against the easement[s]," (2) Palmetto's conduct challenged Gulfstream's rights and was "equivalent to a claim to title," (3) there would be inequities if this court affirmed, and (4) this court should not rely on alternate sustaining grounds—Gulfstream's failure to timely invoke its rights under the warranties and Cribb's affidavit was not competent evidence—because the circuit court refused to rule on these issues. We disagree.

"In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001); *see also Black*, 357 S.C. at 471, 594 S.E.2d at 164 ("[A]ttorneys' fees are not recoverable unless authorized by contract or statute.").

"The purpose of a general warranty deed is to indemnify the purchaser against the loss or injury it may sustain by a failure or defect in the vendor's title; the grantor warrants that it will restore the purchase price to the grantee if the land is entirely lost." 21 C.J.S. *Covenants* § 22 (2022); *see also* 20 Am. Jur. 2d *Covenants, Conditions, & Restrictions* § 58 (2022) ("[A] warranty of title is a contract on the part of the grantor to pay damages in the event of a failure of title."). "Generally, reasonable attorney's fees expended by a covenantee in good faith in defending title are recoverable by the covenantee in an action on the covenant." 21 C.J.S. *Covenants* § 84. "When a grantor refuses to defend title, after covenanting to defend title thereto against all lawful claims, the grantee must be allowed to recover attorney's fees in defending title." *Id.* "As a general rule, however, where a covenantee successfully defends title, the covenantee is not entitled to attorney's fees from the covenantor under a warranty deed." *Id.* The exception to this rule is "where the wrongful act of the covenantor in a warranty deed causes the covenantee to be in litigation with a third party, then the covenantor is liable for costs despite the fact that the covenantee prevailed." 21 C.J.S. *Covenants* § 83 (citing only *Black*).

In *Black*, our supreme court considered whether a grantee should be entitled to attorneys' fees from a grantor when the grantee defended its title against a third party. 357 S.C. at 469, 594 S.E.2d at 163. Specifically, Jagdish and Usha Patel (the Patels) purchased property from Dr. Abraham Karrottukunnel (Grantor), and the deed included a general warranty provision that provided for a duty to defend. *Id.* at 468, 594 S.E.2d at 163. The Patels built a motel on the property, and the heirs of a neighboring landowner (Plaintiffs) subsequently brought suit, claiming the Patels' motel was encroaching on their land. *Id.* The Patels informed Grantor of the suit and requested he defend them. *Id.* Grantor did not respond, and the Patels answered Plaintiffs' complaint, brought a third-party complaint against Grantor, and requested costs, expenses, and attorneys' fees. *Id.* at 468-69, 594 S.E.2d at 163. Grantor then participated at trial but did not take over the Patels' defense. *Id.* at 469, 594 S.E.2d at 163. The Patels successfully defended title, and the Master-in-Equity awarded the Patels costs against Grantor but not attorneys' fees. *Id.*

Our supreme court explained: "The general rule for cases in this context is that only 'lawful'—that is, successful—claims asserted against title justify an award of attorneys' fees where the covenantor has failed to defend." *Id.* at 471, 594 S.E.2d at 164. However, in footnote 4 of the opinion, our supreme court noted that,

"There are exceptions to this rule, for example, where it is the wrongful act of the covenantor which causes the covenantee to be in litigation with the third party, then the covenantor would be liable for costs despite the fact that the covenantee prevailed." *Id.* at 471 n.4, 594 S.E.2d at 165 n.4.

In reviewing this general rule, our supreme court found the rule made "logical sense":

> First, the covenantor has not conveyed bad title in any way, so it seems unfair to shift the burden of the costs of defense to him. Moreover, if the covenantor decides against taking over a defense of title after being notified of litigation, that is his risk to bear because if title is **unsuccessfully** defended by the covenantee, then the covenantor would be liable for breach of the general warranty deed.
>
> Second, and more importantly, the language in the general warranty deed itself (which is based upon state statute) compels application of this rule. The general warranty deed specifically states that the duty to defend goes to defending only against those people "**lawfully** claiming" the land. The court in *Outcalt* held that "in the context of the covenant of warranty, a 'lawful claim' necessarily means a successful claim." [*Outcalt v. Wardlaw*, 750 N.E.2d 859, 864 (Ind. Ct. App. 2001)]. We agree that in this context, the language that a claim to title must be "lawful" in order to trigger the duty to defend indicates that the duty extends only to claims which are ultimately successful. *Cf. Murchie v. Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993) (where the court allowed appellant attorneys' fees after successfully defending her title since the covenant to warrant and defend **specifically** stated that "**all** claims whatever" would be defended). In other words, a covenant of warranty simply "does not protect against every **unfounded** adverse claim." 20 Am. Jur. 2d *Covenants* § 139 [(1995)] (emphasis added).

Id. at 472, 594 S.E.2d at 165. Thus, our supreme court found the Patels were correctly denied attorneys' fees because "title was **successfully** defended against [P]lantiffs' claims." *Id.*

Accordingly, we hold the circuit court did not err in granting summary judgment in favor of Palmetto. *See Companion Prop. & Cas. Ins. Co.*, 369 S.C. at 390, 631 S.E.2d at 916 ("Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); *Wright*, 426 S.C. at 212, 826 S.E.2d at 290 ("When a circuit court grants summary judgment on a question of law, [an appellate court] will review the ruling de novo.").

Here, the question before us is whether the warranty provisions in Gulfstream's easements provide that Gulfstream is entitled to attorneys' fees from Palmetto. We hold the answer is "no" because Gulfstream's "title"[3] is not in issue. Palmetto has not disputed that Gulfstream has easements over Palmetto's property; rather, Palmetto, at worst, has been infringing upon Gulfstream's rights. Moreover, the jury found in favor of Gulfstream at the 2018 trial. Thus, pursuant to *Black's* general rule, Gulfstream is not entitled to attorneys' fees. *See Black*, 357 S.C. at 471, 594 S.E.2d at 164 ("The general rule for cases in this context is that only *'lawful'*—that is, successful—claims asserted against title justify an award of attorneys' fees where the covenantor has failed to defend." (emphasis added)); *Nunes v. Meadowbrook Dev. Co.*, 24 A.3d 539, 540-44 (R.I. 2011) (affirming the denial of attorneys' fees when the grantor initially intended to leave itself an easement to the property, the deed omitted the easement, the grantor later started trying to use the easement, and the grantee successfully defended title to the property and excluded the easement); 21 C.J.S. *Covenants* § 22 ("The purpose of a general warranty deed is to indemnify the purchaser against the loss or injury it may sustain by a failure or defect in the vendor's title . . . ."); 20 Am. Jur. 2d *Covenants, Conditions, & Restrictions* § 58 ("[A] warranty of title is a contract on the part of the grantor to pay damages in the event of a failure of title.").

Although we acknowledge Gulfstream's reliance on footnote 4 from *Black*, we again emphasize Gulfstream's actual "title" has not been challenged and there is

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[3] *See Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970) ("An easement gives no title to the land on which the servitude is imposed. It is, however, property or an interest in the land.").

not a third party involved as contemplated in *Black*. *See Black*, 357 S.C. at 471 n.4, 594 S.E.2d at 165 n.4 ("[W]here it is the wrongful act of the covenantor which causes the covenantee to be in litigation with the third party, then the covenantor would be liable for costs despite the fact that the covenantee prevailed."). We believe the situation our supreme court envisioned in *Black* was that in which a grantor deeds the same property to two or more individuals and although one of the grantees may be saved by a recording act, the grantor would still be liable to that grantee too. *See generally* Ray E. Sweat, *Race, Race-Notice and Notice Statutes: The American Recording System*, Prob. & Prop., May/June 1989, at 27 (discussing recording acts broadly). However, we do not believe our supreme court contemplated the situation here.

Finally, we note that our decision today does not prevent Gulfstream from seeking attorneys' fees in future contempt actions as a sanction if Palmetto continues to infringe upon Gulfstream's rights. *See Miller v. Miller*, 375 S.C. 443, 463, 652 S.E.2d 754, 764 (Ct. App. 2007) ("Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory."). Although we strongly encourage the parties to resolve the issues as neighbors, we believe their history indicates litigation is likely to continue.[4]

CONCLUSION

Based on the foregoing, we affirm the circuit court's granting of summary judgment.

AFFIRMED.

GEATHERS and HILL, JJ., concur.

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[4] This is the second of two cases between Gulfstream and Palmetto currently on appeal before our court. *See* App. Case No. 2019-001446. At oral arguments, counsel for the parties informed this court that they were again going to trial the Monday after oral arguments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Gulfstream Cafe, Inc., Respondent,

v.

J. Mark Lawhon, Individually, and Palmetto Industrial Development, LLC, Appellants.

Appellate Case No. 2019-001446

Appeal from Georgetown County
Steven H. John, Circuit Court Judge

Opinion No. 5936
Heard March 16, 2022 – Filed August 10, 2022

AFFIRMED

Henrietta U. Golding, of Burr & Forman LLP, of Myrtle Beach, for Appellants.

George W. Redman, III, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach; Sean Matthew Foerster, of Rogers Townsend LLC, of Columbia; and Simon H. Bloom and Adam D. Nugent, both of Atlanta, Georgia, all for Respondent.

LOCKEMY, A.J.: Palmetto Industrial Development, LLC (Palmetto) and J. Mark Lawhon (Mark; collectively, Appellants) appeal the circuit court's order finding them in criminal contempt for parking a golf cart in front of The

Gulfstream Café, Inc.'s (Gulfstream's) delivery gate, which violated a permanent injunction and impacted Gulfstream's use of a joint, non-exclusive easement. On appeal, Appellants argue the circuit court erred because (1) parking the golf cart in a parking spot did not violate the injunction; (2) Appellants presented evidence that undermined Gulfstream's claimed use of the delivery gate and the circuit court's finding of a willful violation; (3) the circuit court should not have denied Appellants' Rule 59(e), SCRCP, motion based on Rule 59(g), SCRCP; and (4) the circuit court's order was insufficient. We affirm.

FACTS/PROCEDURAL HISTORY

This appeal is another episode in a series of disputes between Appellants and Gulfstream involving a joint, non-exclusive easement.[1] By way of background, Gulfstream is a restaurant located in Murrells Inlet and is part of the Marlin Quay Marina Development. Prior to November 2016, a store, a restaurant called the Marlin Quay Marina Bar & Grill, and a marina were located on the lot adjacent to Gulfstream. The restaurant was demolished in November 2016. Palmetto owns the marina, store, parking lot, and property where the restaurant was, and Mark owns Palmetto. Chris Lawhon (Chris), Mark's son, was the manager of the marina's restaurant.

Gulfstream possesses four joint, non-exclusive easements that were issued in 1986 and 1990 by Palmetto's predecessor—Marlin Quay Marina Corporation. The 1990 easement intended to clarify Gulfstream's rights. Specifically, Gulfstream retained:

> A non-exclusive perpetual easement appurtenant to the premises of [Gulfstream] hereinafter described for the full and free right of ingress and egress on, over and across the following described property of [Marlin Quay Marina Corporation], together with the rights of vehicular parking on and vehicular and pedestrian access to, all in accordance with all governmental rules, regulations, ordinances or laws, the premises of the [Marlin Quay Marina Corporation] hereinafter described, and also for the purpose of maintenance, repair, alteration and/or improvements to [Gulfstream's] hereinafter described property. It is anticipated by the parties that

[1] *See also* App. Case No. 2019-000885.

> while they will each have joint and non-exclusive use at all times of the area covered by this easement that the [Marlin Quay Marina Corporation] will utilize the premises primarily during the daytime regular business hours of [Marlin Quay Marina Corporation] and [Gulfstream] will utilize the premises primarily in the evening regular business hours of [Gulfstream.]

In 2016, the saga of disputes between Appellants and Gulfstream unfolded over Appellants' plans to demolish their own building and rebuild a larger building that would have been on stilts and evidently extended over the parking lot. On November 16, 2016, Gulfstream filed suit against Appellants, alleging (1) intentional interference with its easement rights; (2) trespass and nuisance; and (3) forcible entry, detainer, and waste. Gulfstream obtained a temporary restraining order and temporary injunction, prohibiting Appellants from "interfering with [Gulfstream's] perpetual easement rights to use the [p]arking [l]ot." During the hearing on the temporary injunction, the parties were warned about contempt because the court believed that one of the parties was "intentionally misleading" about what was happening.

The relationship between Gulfstream and Appellants continued to sour, and Gulfstream moved for contempt. In May 2017, Mark was held in criminal contempt for interfering with Gulfstream's easement rights during a fishing tournament and for calling law enforcement to remove Gulfstream's window washers on two occasions. The circuit court ordered Mark to pay a $3,000 fine or serve thirty days in jail for the incidents with the window washers.

In June 2018, Gulfstream and Appellants proceeded to trial before the circuit court and a jury. The jury found for Gulfstream based on Appellants' "interference with [Gulfstream's] easement" and awarded Gulfstream $1,000. On June 12, 2018, the same day as the jury verdict, the circuit court entered a permanent injunction: "[Appellants] are enjoined from preventing [Gulfstream] from enjoying the right[s] granted to it in the recorded nonexclusive joint easement. [Appellants] are restrained and may not expand the outside boundaries of any new building beyond those previously used. The [c]ourt is specifically not talking about height, only the outside boundaries." On June 22, 2018, Gulfstream filed a Rule 59(e) motion to clarify the injunction, and Appellants responded.

One month later, in July 2018, Gulfstream moved to hold Appellants in criminal contempt because Chris parked a golf cart in front of Gulfstream's delivery gate on "at least four (4) separate occasions."[2] Included in the contempt motion were photos of a U.S. Foods truck that was unable to access Gulfstream's delivery gate. Gulfstream also provided an affidavit from Jef Kirk, a manager for Gulfstream, and included pictures, text messages, and a statement from a delivery driver to support Kirk's affidavit. Specifically, Kirk alleged Appellants were "intentionally and repeatedly interfering with" Gulfstream's easement rights:

> (1) on July 11, 2018, Chris parked the golf cart in front of the delivery gate and did not move the cart until the evening of July 12, 2018;
> (2) on July 13, 2018, the golf cart was back again and blocked a U.S. Foods' delivery truck; Kirk texted Chris, asking him to move the cart; and the delivery driver did the same;
> (3) on July 15, 2018, the golf cart was parked in the early morning to block the delivery gate;
> (4) on July 17, 2018, Kirk reviewed security camera footage and saw that Chris parked the golf cart in front of the delivery gate and walked in the opposite direction of Appellants' business; Kirk texted Chris, asking him to move the cart; and
> (5) on July 19, 2018, the golf cart was again blocking the gate.

According to Kirk, "[e]ach time the . . . golf cart was parked in front of Gulfstream's delivery gate, there were numerous other parking spaces available." Kirk emphasized that when the vendors did not use the delivery gate, the process was "extremely inefficient and cause[d] excess wear and tear to the floors." Kirk stated he added a sign to the delivery gate on July 18, 2018, asking patrons not to block the gate from 10:00 a.m. to 4:00 p.m.

On July 27, 2018, the circuit court amended its permanent injunction:

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[2] Gulfstream later raised other matters about lights in the parking lot, a delivery truck, and boat trailers; however, the circuit court did not find Appellants in contempt on these matters, and we do not discuss them on appeal.

> [Appellants] are enjoined from preventing [Gulfstream] from enjoying the right[s] granted to it in the recorded nonexclusive joint easement. [Appellants] are restrained and may not expand the outside boundaries of any new building beyond those previously used. The outside boundaries specifically are the outside boundaries of the old building, which was depicted on the 1985 Plat recorded at Plat Book 6, Page 214 of the Georgetown County real property records and was demolished by [Appellants] in November 2016. The outside boundaries do not include any outbuildings, fixtures, concrete pads, dumpsters, or other accessories. As a result, any new building must be located on the same footprint as the old building. The [c]ourt is specifically not talking about height, only the outside boundaries.

On August 6, 2018, Appellants moved to alter or amend the circuit court's July 27, 2018 order, arguing (1) the new order created confusion and uncertainty, (2) an injunction should not have been granted because the jury awarded monetary relief, (3) the amended permanent injunction enlarged the easement, and (4) other issues related to the building's construction.

On August 20, 2018, Appellants filed an opposition to the contempt motion, arguing Appellants did not violate the court's order when Chris parked the golf cart in a parking spot in front of the delivery gate. Additionally, Appellants emphasized Gulfstream's employees and others parked in the same spot and Gulfstream's vendors did not always use the delivery gate even when the gate was available. In support of their position, Appellants attached an affidavit from Chris and photographs. Chris stated (1) Gulfstream's employees park in front of the delivery gate; (2) he did not receive any communications from Kirk or the vendors until after July 19, 2018; (3) he did not see Gulfstream's sign about not parking in the spot; (4) he parked away from the marina in the mornings to allow customers and captains to park closer to the restaurant and store; and (5) he had not parked in the spot since Gulfstream filed the contempt motion. Mark also filed an affidavit, stating Gulfstream allowed vendors to use other access points beyond the delivery gate and asserted Gulfstream's employees parked in front of the delivery gate as well.

Gulfstream filed a reply in support of contempt and attached a second affidavit from Kirk. Kirk noted (1) he previously contacted employees of the marina to ask Chris to move the golf cart; (2) on July 27, 2018, Mark parked his SUV to block the delivery gate; (3) Kirk and Gulfstream's staff had started parking in front of the delivery gate to ensure their cars could be moved for when deliveries arrived; and (4) some deliveries came through the front door, but the food deliveries generally came through the delivery gate because there were generally more than 100 boxes of food. Appellants also filed a second affidavit from Chris.

On November 14, 2018, the circuit court heard Appellants' motion to amend the July 27, 2018 order, which it denied,[3] and Gulfstream's contempt motion. According to Appellants' counsel, Chris left the golf cart overnight on one occasion because it was raining; the time Chris walked away from the marina on the video footage was to pick up something he dropped; and after the 2018 trial, Chris blocked Kirk's phone number. The same day, the circuit court issued a Form 4 order, finding Appellants "engaged in criminal contempt of court by deliberate and intentional acts by placement of a golf cart which interfered with the proper use of the non-exclusive easement in this matter and was in direct violation of the [c]ourt's previous order." Thus, the circuit court fined Appellants $5,000.

On November 21, 2018, Appellants filed a Rule 59(e) motion as to the contempt order. Appellants failed to provide a copy of the Rule 59(e) motion to the circuit court judge within ten days of filing the motion. On December 13, 2018, Appellants appealed the circuit court's orders involving the permanent injunction. *See* App. Case No. 2018-002213. On February 1, 2019, our court dismissed based on Appellants' desire to withdraw their appeal. *See* App Case No. 2018-002213. Thereafter, on June 10, 2019, the circuit court instructed the parties to provide it with briefs on whether to consider Appellants' motion to reconsider its contempt order. The parties provided briefs to the circuit court.

The circuit court denied Appellants' Rule 59(e) motion because (1) the circuit court was not given the motion pursuant to Rule 59(g) and (2) on the merits, the circuit court found it properly ruled. This appeal followed.

[3] The July 27, 2018 order is not on appeal before this court.

ISSUES ON APPEAL

1. Did the injunction prohibit Appellants from parking a golf cart in a designated parking spot when the easement was joint and non-exclusive?

2. Did the evidence presented demonstrate beyond a reasonable doubt that Appellants violated the prior order?

3. Did the circuit court wrongly deny the motion to reconsider as untimely?

4. Did the circuit court's order provide a sufficient explanation for its decision?

STANDARD OF REVIEW

"A determination of contempt ordinarily resides in the sound discretion of the [circuit] court." *Rhoad v. State*, 372 S.C. 100, 104, 641 S.E.2d 35, 37 (Ct. App. 2007). "On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the [circuit court] has abused [its] discretion." *Stone v. Reddix-Smalls*, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

LAW/ANALYSIS

Appellants argue the circuit court erred by finding them in criminal contempt. First, Appellants aver the injunction was not specific as to prohibiting them from using any space in their joint, non-exclusive easement, Chris's conduct was permissible, and Chris's "motivation for parking the golf cart near the delivery gate [wa]s irrelevant." Second, Appellants contend they presented evidence that undermined the need to use the delivery gate because vendors used other access points. Appellants further argue that when Chris parked the cart and walked away on one occasion, he was picking something up, and this did not constitute a willful violation. Third, Appellants assert that when the circuit court instructed the parties to brief their issues, the court's actions were "tantamount to forgiving any" Rule 59(g) violation. Finally, Appellants argue the circuit court's order was insufficient. We disagree.

"Contempt results from the willful disobedience of an order of the court." *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.2d 754, 759 (Ct. App. 2007) (quoting *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); *see also* S.C. Code Ann. § 14-5-320 (2017) ("The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same."). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" *Miller*, 375 S.C. at 454, 652 S.E.2d at 759-60 (quoting *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001)).

"In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." *Id.* at 454, 652 S.E.2d at 760 (quoting *Hawkins v. Mullins*, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004). "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." *Id.* (alteration in original) (quoting *Widman*, 348 S.C. at 119, 557 S.E.2d at 705). "Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order." *Id.* (quoting *Widman*, 348 S.C. at 120, 557 S.E.2d at 705).

"It is within the [circuit] court's discretion to punish by fine or imprisonment all contempts of authority before the court." *Id.* (quoting *Brandt v. Gooding*, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006)). "In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." *Id.* at 455, 652 S.E.2d at 760 (quoting *Brandt*, 368 S.C. at 628, 630 S.E.2d at 264). "The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders." *Id.* at 456, 652 S.E.2d at 761 (quoting *Floyd v. Floyd*, 365 S.C. 56, 75, 615 S.E.2d 465, 475 (Ct. App. 2005). "In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt." *Id.* at 457, 652 S.E.2d at 761. "Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence." *Id.*

The circuit court did not abuse its discretion in finding Appellants in criminal contempt. *See Stone*, 295 S.C. at 516, 369 S.E.2d at 840 ("On appeal, a decision

regarding contempt should be reversed only if it is without evidentiary support or the [circuit court] has abused [its] discretion."); *Miller*, 375 S.C. at 457, 652 S.E.2d at 761 ("Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence."); *id.* ("In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt.").

Here, the circuit court issued a permanent injunction after the 2018 trial—later clarified to reference a plat—prohibiting Appellants from interfering with Gulfstream's joint, non-exclusive easement rights. The 1990 easement expressly provided that Gulfstream had an easement "for the full and free right of ingress and egress on, over and across" the property. We acknowledge the easement was joint and non-exclusive, but based on Kirk's affidavits and supporting exhibits, we find Chris's conduct was calculated to undermine the circuit court's injunction that permitted Gulfstream to use its easement. *See Miller*, 652 S.E.2d at 455, 652 S.E.2d at 760 ("[C]ourts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." (quoting *Brandt*, 368 S.C. at 628, 630 S.E.2d at 264)); *id.* at 456, 652 S.E.2d at 761 ("The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders." (quoting *Floyd*, 365 S.C. at 75, 502 S.E.2d at 475)). Additionally, it would be illogical to accept Appellants' implicit argument that they could park and block the delivery gate as much as they wanted to because Gulfstream only had a joint, non-exclusive easement.

Further, we acknowledge Appellants and Chris contend they were not intentionally violating the circuit court's order and Chris was simply using a parking spot. However, this was a factual determination the circuit court had to confront. Thus, even if we disagreed with the circuit court's ruling, we would still be bound by our standard of review, and there is sufficient evidence in the record to support the circuit court's finding. *See Stone*, 295 S.C. at 516, 369 S.E.2d at 840 ("On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the [circuit court] has abused [its] discretion."); *Rhoad*, 372 S.C. at 104, 641 S.E.2d at 37 ("A determination of contempt ordinarily resides in the sound discretion of the [circuit] court.").[4] We also understand how the circuit court likely

[4] Appellants suggest we should not defer to the circuit court's implicit credibility findings because at the contempt hearing, only the attorneys argued and affidavits were submitted. However, we give little weight to this argument. After all, the

discounted Appellants' contention that vendors did not always use the delivery gate; it is reasonable that the type of delivery would govern whether the vendors used the stairs or the delivery gate that is functionally a shipping dock.

Moreover, we disagree with Appellants' assertion that the circuit court's order was insufficient because we do not know *why* the circuit court discredited their versions of events. The circuit court plainly stated in its first contempt order—which was later turned into a formal order—that Appellants "engaged in criminal contempt of court by deliberate and intentional acts by placement of a golf cart which interfered with the proper use of the non-exclusive easement in this matter and was in direct violation of the [c]ourt's previous order." After reviewing all of the materials, we come to the same conclusion that the circuit did and would also find Appellants in contempt. Accordingly, we affirm the circuit court's order.[5]

Because we find the circuit court properly ruled on the merits, we need not address Appellants' arguments regarding Rule 59(g) and law of the case. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we affirm the circuit court's finding of contempt.

AFFIRMED.

GEATHERS and HILL, JJ., concur.

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circuit court judge who ruled on the contempt action was the same judge who sat through the 2018 trial; thus, the circuit court was very familiar with these parties.

[5] At oral arguments, the parties informed our court that they were again going to trial the Monday after oral arguments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Reggie ("Reg") Keith Wells, Appellant

v.

Vetech, LLC; Vetech Group; Fastube; Process Development Corporation; and James R. Pongracz, individually; Respondents.

Appellate Case No. 2019-001038

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

Opinion No. 5937
Submitted April 1, 2022 – Filed August 10, 2022

AFFIRMED AS MODIFIED

John G. Reckenbeil, of Law Office of John G. Reckenbeil, L.L.C., of Mauldin, for Appellant.

Hannah Rogers Metcalfe, of Metcalfe & Atkinson, LLC, of Greenville, for Respondents.

HILL, J.: Reggie K. Wells sued Respondents for unjust enrichment and violation of the South Carolina Wage Payment Act, S.C. Code Ann. §§ 41–10–10 to –110 (2021) (the Act). His claims included a request for treble damages and attorney's fees under the Act, as well as costs. A month after answering Wells' complaint, Respondents filed a Rule 68, SCRCP offer of judgment, offering for Wells to "take

judgment for all claims alleged" in the "total amount" of $5,968.89. Wells accepted the offer and, on the same day, filed a motion seeking an award of treble damages, attorney's fees, and costs under the Act and Rule 54, SCRCP. After a hearing that consisted only of oral argument and submission of exhibits, the trial court denied Wells' motion, ruling in a Form 4 order that "there was no record from which to determine whether attorney's fees and treble damages were appropriate" under the Act. Wells now appeals. Finding no error, we affirm.

I.

We first consider whether Wells' acceptance of Respondents' offer of judgment "for all claims alleged" foreclosed him from seeking treble damages, attorney's fees, and costs under the Act. Because interpreting offers made under Rule 68 involves construing a contract and a court rule—both questions of law—our review is de novo. We begin with the relevant portion of Rule 68(a), SCRCP:

> Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer.

Respondents' offer did more than merely give Wells judgment for a sum stated: in the language of Rule 68, "the effect specified in the offer" was for Wells "to take judgment against [Respondents] for all claims alleged in the above-captioned action in the total amount of $5,968.89." We do not believe the language of the offer of judgment permitted Wells to rationally think he could accept the offer and still hang on to his claim for treble damages and attorney's fees. *See Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999) (providing there was "no ambiguity" in an offer of judgment that stated "one total sum as to all counts of the amended complaint" because the only thing the offer could mean is "one amount encompassing all the relief sought in the counts," including attorney's fees); *McCain v. Detroit II Auto Fin. Ctr.*, 378 F.3d 561, 565 (6th Cir. 2004) (providing Rule 68 offer of judgment stating it included "all claims and causes of action" precluded later award of fees). Our conclusion might be different if the judgment offered had been only a stated sum, unadorned by any description of what it was for. But to any reasonable reader, the phrase "all claims alleged" encompasses all claims for all

available remedies under the Act, including Wells' claims for attorney's fees and treble damages. In interpreting a clear and unambiguous contract, our only role is to determine the parties' meaning and intent as expressed by the words they have used. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017); *see also McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) ("[W]e must enforce the language as written, for it is the objective expression of what the parties meant to agree upon when they made their contract, not the secret, subjective meaning one party later reveals.").

Further, even if one could stir up ambiguity over Respondents' Rule 68 offer, Wells' appeal still stumbles. Our supreme court has likened Rule 68 offers of judgment to settlements and has held they may not be construed as a resolution of the merits. *Belton v. State*, 339 S.C. 71, 74 & n.4, 529 S.E.2d 4, 5 & n.4 (2000). As such, there is no basis enabling a court to declare Respondents violated the Act, a necessary predicate for a discretionary award of attorney's fees per § 41–10–80(c).

Belton also answers the question of whether Wells can use the costs mechanism of Rule 54 to achieve what we hold Rule 68 does not permit: recovery of attorney's fees after acceptance of an offer of judgment that states it is for "all claims alleged" yet does not mention attorney's fees. It is true that statutory attorney's fees can be "taxable costs." Rule 54(e)(1), SCRCP ("All sanctions including reasonable attorneys fees, if ordered, imposed upon another party and in favor of the prevailing party under any statute or Rule of Civil Procedure are taxable[.]"). But *Belton* tells us a judgment obtained by Rule 68 is not a merits resolution, which we hold is a necessary precursor to recovery of attorney's fees under § 41–10–80(c) of the Act and, consequently, a precursor to recover them as Rule 54(e)(1) taxable costs in this case. 339 S.C. at 74, 529 S.E.2d at 5.

Our holding honors the plain language and intent behind Rule 68, which exists to encourage settlement and reduce litigation. *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 227, 433 S.E.2d 21, 24 (Ct. App. 1993); *Marek v. Chesny*, 473 U.S. 1, 6–7 (1985).

We must discuss something further about Wells' attorney's fees request. Wells relies on *Hueble v. Dept. of Nat. Res.*, for the principle that a party accepting an offer of judgment becomes a "prevailing party" entitled to attorney's fees under any statute that permits them. 416 S.C. 220, 785 S.E.2d 441 (2016). This stretches *Hueble* too far; the decision there seems driven by the fact that the attorney's fees derived from the unique fee-shifting mechanism of 42 U.S.C. § 1988, which generally requires a

court to award attorney's fees to the prevailing party unless special circumstances exist. *Hueble*, 416 S.C. at 229–31, 785 S.E.2d at 465–66.

II.

Even if Wells' avenue to seek treble damages and attorney's fees was not closed by his acceptance of the offer of judgment, the trial court correctly declined to award them. A court may only award treble damages, attorney's fees, and costs under the Wage Payment Act if it finds there was no bona fide dispute the wages were owed and the employer withheld them unreasonably and in bad faith. § 41–10–80(c); *Rice v. Multimedia, Inc*., 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995). According to Wells, there is no bona fide dispute because the offer of judgment matched the precise amount he claimed was owed. The trial court was not persuaded by this argument, and neither are we.

Respondents may have had many reasons to settle the lawsuit as they did. The fact that the offer of judgment mirrored Wells' demand does not, without more, reflect that Respondents withheld Wells' wages in bad faith or without good reason, and it proves nothing related to recovery of fees under the Act. *Cf. Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009) ("A finding that an employee is entitled to recover unpaid wages is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages."). Likewise, the evidence Wells presented of his email exchange with Respondent Vetech's human resources manager does not dispel the existence of a bona fide dispute.

We do, though, agree with Wells that Rule 54, SCRCP, entitled him to recover his $198.73 in costs. We therefore modify the order of the trial court to tax these costs against Respondents.

AFFIRMED AS MODIFIED.

GEATHERS, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy J. Register, Appellant,

v.

Angel M. Register Dixon and Lee Dixon, Respondents.

Appellate Case No. 2019-000854

Appeal From Richland County
Michelle M. Hurley, Family Court Judge

Opinion No. 5938
Heard March 9, 2022 – Filed August 10, 2022

REVERSED AND REMANDED

Carrie Ann Warner, of Warner Law Firm, LLC of Columbia for Appellant.

Angel M. Register Dixon and Lee Dixon, pro se.

GEATHERS, J.: In an appeal from the family court following a contempt proceeding, Appellant Timothy Register ("Register") asks this court through its *de novo* review authority to find that Respondent Angel Dixon ("Angel") did not meet her burden of proof regarding child support payments. Further, Register argues that Angel should be required to reimburse him for all his attorney's fees and costs in connection with the contempt proceedings. We reverse and remand for further contempt proceedings consistent with this opinion.

FACTS/PROCEDURAL HISTORY

Register and Angel were formerly husband and wife, and they are the biological parents of one minor child (E.R.). Register and Angel obtained a Decree of Divorce on February 19, 2014, and Angel is now married to Respondent Lee Dixon ("Lee," collectively, "the Dixons").

On November 24, 2015, Register was the subject of a finding of a substantial risk of sexual abuse upon E.R. from the Department of Social Services ("DSS") based upon allegations made by Angel. Register appealed the finding within DSS on December 28, 2015, and was subsequently notified that DSS was suspending his right to file an appeal due to a contested action it had filed in the family court.[1]

On April 26, 2016, Register filed an action against Angel and DSS for post-divorce modification of custody and/or visitation, seeking an order for custody of, or in the alternative, liberal visitation with, E.R., child support, attorney's fees and costs, and related relief. Angel never filed a responsive pleading. DSS filed a Complaint for Intervention against Register that included two hearing notices for hearings scheduled in June and July 2016. On June 17, 2016, a Temporary Order was issued by Judge Michelle Hurley continuing the DSS hearings regarding Register and ordering DSS to grant Register an administrative hearing on his appeal. Pending the disposition of Register's appeal, the Temporary Order granted him supervised visitation with E.R., utilizing an independent supervisor,[2] and appointed Jacqueline Draper as Guardian ad Litem.

On July 8, 2016, Register filed a Motion for Joinder of Third Party Defendant seeking to add Lee Dixon as a party to his custody action.

Following a hearing before an Administrative Officer, a Final Administrative Order was issued on October 18, 2016, dismissing the DSS case against Register and questioning Angel's credibility in light of the contradictory reports made by E.R.

In the custody action, Judge Dorothy M. Jones issued an order on April 20, 2017, that required the immediate transfer of custody of the minor child to Register, granted Angel supervised visitation for a period of 30 days, added Lee as a party, and granted Register attorney's fees and costs totaling $2,455.00.

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[1] The record does not specify the nature of that contested action.

[2] The parties were ordered to equally divide the cost of the supervisor.

Following a two-day hearing, a Final Order was issued by Judge Jones on January 16, 2018. That order granted continued sole custody to Register and required Angel to pay him $239.00 per month for child support. Angel was granted supervised visitation as well as limited unsupervised visitation, provided that "Lee Dixon shall not be present or in the vicinity of Ms. Dixon's visitation," and such visits last no longer than five consecutive hours. The order stated that "both [Angel and Lee Dixon] engaged in conduct intended to alienate E.R.'s trust and affection with [Register]," and discussed the "impropriety of Defendant Lee Dixon's conduct . . . and controlling behavior along with Defendant Angel Dixon's conduct," which "adversely affected the child's affection for her father." Moreover, the order granted Register an attorney's fee award of $17,500.00,[3] to be paid in a lump sum by the Dixons no later than March 2, 2018, by and through Register's counsel, Carrie A. Warner.

On November 8, 2018, Register commenced an action seeking a court order to hold Angel in willful contempt for failure to pay child support totaling $2,390.00 as of the date of filing. He also sought a court order to hold the Dixons in willful civil contempt for failing to pay his attorney's fees and costs totaling $17,500.00, as ordered in the January 16, 2018 Final Order.

A hearing was held in front of Judge Michelle Hurley on January 22, 2019, and judicial notice was taken of the January 16, 2018 Final Order. At that hearing, Register testified that since the Final Order was issued requiring Angel to pay child support, she did not make any payments toward her child support obligation. He also testified that he sought the payment of total attorney's fees plus judgment interest, alleging that the Dixons failed to pay the attorney's fees award. Register introduced into evidence a summary of the judgment interest owed on his attorney's fees, making the total amount of attorney's fees plus interest $18,841.03.

Prior to the hearing, Angel submitted to the court a financial declaration indicating that she had no income. During the hearing, Angel stated that she made

[3] Judge Jones found that the total fees and costs incurred by Register were "made necessary as a result of the actions of the [Dixons]" and "exceeded $40,000.00." However, she awarded Register only $17,500.00 in attorney's fees and costs, noting that "[w]hile this amount is not sufficient to adequately compensate [Register], it does take into consideration that the financial abilities of [the Dixons] are limited." During the pendency of this appeal, the Dixons satisfied the attorney's fees awarded in the original order by Judge Jones.

cash[4] payments totaling $2,315.00 towards the satisfaction of her child support obligation but indicated that she did not ask Register to sign receipts for the transactions. Angel further testified that she had no proof of the payments she allegedly made to Register and conceded the nonexistence of any supporting bank statements, cash withdrawals, or checks.[5] Angel did, however, testify that she created a list of the alleged cash payments made to Register, including the amounts, dates, and locations of the transactions.

The Dixons both testified that neither Angel nor Lee made any payments towards the attorney's fees as ordered.

At the conclusion of the hearing, the family court determined that Angel had made cash payments to Register totaling $2,315.00 and found that Angel owed Register only $553.00 in unpaid child support. As a result, the family court required Angel to pay $15.00 per month to Register, in addition to her court ordered child support amount, until the outstanding $553.00 was satisfied.

The family court also found the Dixons in willful contempt for not paying the attorney's fees award of $17,500.00, and sentenced them each to thirty days in jail, which could be purged upon their payment of $400.00 per month consecutively until the $17,500.00 was paid in full.[6] The Dixons were also ordered to pay $701.05[7] toward Register's attorney's fees and costs for the contempt proceeding ($1,402.01). Register's request for judgment interest was denied.

Register filed a Motion to Reconsider on March 12, 2019, which was subsequently denied. This appeal followed.

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[4] At the hearing, Angel testified that she used cash from odd jobs to pay child support.

[5] Angel testified that Register did not accept her checks because he "did not want a check with [her] husband's name attached to it."

[6] In Register's initial appeal, he asserted that Judge Hurley erred by modifying the Final Order to allow for monthly payments rather than a lump sum payment, but on April 28, 2022, he submitted a Motion to Withdraw Ground for Appeal requesting to withdraw that issue from our consideration, and that Motion was granted.

[7] This amount is approximately one-half of Register's total attorney's fees regarding the contempt proceeding.

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In equity cases, the appellate court shall review findings of fact as well as law *de novo*. *Stoney v. Stoney*, 422 S.C. 593, 595, 813 S.E.2d 486, 487 (2018) (citing S.C. CONST. art. V, § 5)). Accordingly, "[o]n appeal from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *S.C. Dep't of Soc. Servs. v. Polite*, 391 S.C. 275, 279, 705 S.E.2d 78, 80 (Ct. App. 2011). However, "this broad scope of review does not alter the fact that a family court is better able to make credibility determinations because it has the opportunity to observe the witnesses." *Wilburn v. Wilburn*, 403 S.C. 372, 380, 743 S.E.2d 734, 738 (2013). "Additionally, the de novo standard does not relieve the appellant of the burden of identifying error in the family court's findings." *Id.* "Accordingly, we will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing [that] the preponderance of the evidence actually supports contrary factual findings by th[e appellate] court." *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012).

LAW/ANALYSIS

I. Burden of Proof

Register challenges the family court's finding that Angel met her burden of proof in showing that certain cash payments for child support were made to Register because, other than her testimony that she made the payments, she submitted no direct evidence in support of this contention. *See* ALEX SANDERS & JOHN S. NICHOLS, TRIAL HANDBOOK FOR S.C. LAW. § 10.1, at 391 (5th ed. 2021) ("Proof of facts is the soul of every trial. If there is no need to prove facts, then there is no need for a trial; the case presents only questions of law for the court.").

"Contempt results from the willful disobedience of a court's order." *Moseley v. Mosier*, 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983). There are two elements in proving contempt: (1) a court order and (2) voluntary disobedience of that order. *See id.* In child support issues, "[c]ontempt occurs when a parent ordered to pay child support voluntarily fails to pay." *Id.* However, "[w]hen a parent is *unable* to make the required payments, [she] is not in contempt." *Id.* In the context of civil contempt, an act is willful if it is "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." *Spartanburg Cnty. Dep't of Soc. Servs. v.*

Padgett, 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988) (quoting *Willful*, BLACK'S LAW DICTIONARY (5th ed. 1979)). Contempt must be proven by clear and convincing evidence, and the record must demonstrate the specific contemptuous act. *Ex parte Lipscomb*, 398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct. App. 2012); *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982). In a proceeding for contempt following the alleged violation of a court order, the moving party must show noncompliance, and the burden then shifts to the offender to establish his or her defense. *Brasington v. Shannon*, 288 S.C. 183, 184, 341 S.E.2d 130, 131 (1986).

In this case, Register testified that Angel had made no payments to him since the child support order was issued. Having shown Angel's noncompliance via sworn testimony, the burden then shifted to Angel to show by a preponderance of the evidence that she had in fact complied with the order. The only evidence upon which the family court relied was testimony from Angel that she paid Register child support in cash and a document written by Angel noting the amounts, dates, and locations of these alleged transactions. Angel alleged her cash payments to Register spanned from January 2018 to December 2018. Notably, in Angel's list of alleged cash transactions, she lists the first four transactions as: (1) January 27, 2018, $200.00 at the bowling alley; (2) February 11, 2018, $150.00 at the state museum; (3) March 4, 2018, $175.00 at the Columbiana movie theater; and (4) April 15, 2018, $200.00 at the Columbiana Mall. On April 19, 2018, Register's attorney sent Angel a letter informing Angel that she was four months delinquent in her child support payments to Register and indicating that no payments had been made at that time. In response to this letter, Angel sent Register's attorney an e-mail dated April 26, 2018, in which Angel stated: "I would like to make a payment arrangement with you for the fees owed. Please let me know how we can start this arrangement. Pertaining to *child support, I have attempted to pay* Mr. Register but he has made it difficult." (emphasis added). Angel stated that the reason for the failure of her attempt to pay Register was her inability to find him, as he had recently moved to a new home.

When juxtaposing the details of Angel's list of alleged cash payments to Register with the contents of her e-mail correspondence with Register's attorney, there are clear discrepancies. The most compelling of these discrepancies is that both the letter from Register's attorney and Angel's electronic correspondence are dated *after* the alleged inception of Angel's cash payments to Register. If these payments had been occurring as alleged in Angel's transaction list, we believe it is likely that Angel would not have stated she "attempted to pay" Register but would have stated that she *had paid* Register. Further, Angel's transaction list indicated that she met Register several times at various locations to pay him child support prior to the e-mail she sent to Register's attorney, but in the e-mail, Angel did not indicate

that she had seen or paid Register; rather, she indicated that she had been unable to find Register in order to pay him. These discrepancies cast doubt upon the legitimacy of Angel's list of alleged cash transactions. In the absence of *any* supporting evidence of these alleged cash transactions beyond Angel's own self-serving testimony, and pursuant to our authority to find facts in accordance with our own view of the evidence, we find Angel did not meet her burden of proving by a preponderance of the evidence that she made cash payments for child support to Register. *See Lewis*, 392, S.C. at 384, 709 S.E.2d at 651 ("In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." (quoting *Easton v. Easton*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009))).

While this court normally defers to the family court's assessment of witness credibility, the April 26 e-mail put Angel's credibility on the witness stand in doubt. Our supreme court tells us that

> appellate court decisions have continued to reflect a preference to sustain a family court's factual findings.
>
> The highly fact-intensive nature of family court matters lends itself to a respect for the factual findings of our able and experienced family court judges who are in a superior position to assess the demeanor and credibility of witnesses. Indeed, life-altering credibility determinations often lie at the heart of family court factual findings. However, neither our respect for the family court bench nor the special need for finality in family court litigation may serve as a license to lessen our standard of review in family court appeals.

Id. at 390, 709 S.E.2d at 654.

While we generally defer to the family court in matters of evidence, we cannot do so automatically and blindly. *See id.* Indeed, we cannot lessen our standard of review by affording unlimited deference to the family court. Accordingly, this court may reverse factual findings made by the family court when the appellant satisfies this court that such findings are against the preponderance of the evidence. *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965) (citing *Forester v. Forester*, 266 S.C. 311, 315, 85 S.E.2d 187, 188–89 (1954)).

Moreover, at the time of the hearing, the family court had already taken judicial notice of the January 16, 2018 Final Order, in which there are many adverse findings against Angel that call into question her candor and honesty to the court. Specifically, Angel's self-serving testimony, coupled with the unfounded and grave accusations against Register, call into question her credibility. Therefore, relying on Angel's testimony alone, without any corroborating evidence is not sufficient for a finding that payments were made. As a result, we reverse the family court's finding that Angel made cash payments for child support.

II. Contempt Proceeding Attorney's Fees

Register argues that the family court erred by not requiring the Dixons to reimburse him for the entire amount of attorney's fees related to the contempt proceeding. We decline to address this issue.

Whether additional attorney's fees are due in this matter will depend on whether the family court finds Angel's failure to pay child support was voluntary. *See Moseley*, 279 S.C. at 351, 306 S.E.2d at 626 ("Contempt occurs when a parent ordered to pay child support *voluntarily* fails to pay." (emphasis added)). Therefore, this is an issue that must be addressed by the family court alone.

CONCLUSION

We reverse the family court's finding that Angel Dixon made cash payments to Register for child support and remand for the family court's determination as to whether Angel's nonpayment was voluntary, and whether Register is entitled to additional attorney's fees.

REVERSED AND REMANDED.

HILL, J. and LOCKEMY, A.J., concur.