The Supreme Court of South Carolina

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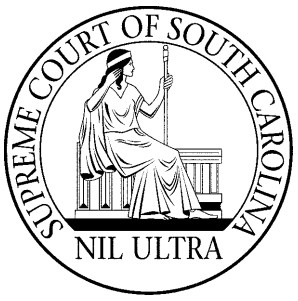
August 24, 2022



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
August 24, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Opternative, Inc., Respondent,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation, Defendants,

and South Carolina Optometric Physicians Association, Defendants-Intervenors,

of which South Carolina Optometric Physicians Association is the Petitioner.

Appellate Case No. 2021-000818

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28106
Submitted August 10, 2022 – Filed August 24, 2022

AFFIRMED

Kirby Darr Shealy, III, and Luke M. Allen, both of Adams and Reese LLP, of Columbia, for Petitioner.

William C. Wood, Jr., of Columbia, and Miles Edward Coleman, of Greenville, both of Nelson Mullins Riley & Scarborough, LLP; and Robert J. McNamara and Joshua A. Windham, of the Institute for Justice, of Arlington, Virginia, admitted pro hac vice, for Respondent.

PER CURIAM: Petitioner, the South Carolina Optometric Physicians Association, seeks a writ of certiorari to review the court of appeals opinion in *Opternative, Inc. v. S.C. Bd. of Med. Examiners*, 433 S.C. 405, 859 S.E.2d 263 (Ct. App. 2021). We grant the petition, dispense with briefing, and affirm, with clarification, the court of appeals' determination that Opternative, Inc. has constitutional standing to challenge the constitutionality of the Eye Care Consumer Protection Law.[1]

Standing is "a fundamental prerequisite to instituting an action." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Whether a party has standing, however, is a separate question from whether that party will prevail on the merits. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 215–16, 845 S.E.2d 481, 489 (2020) (stating it is error to confuse standing and the merits such that a party must prove it will prevail on the merits in order to establish standing). In the context of constitutional standing, any discussion of the three elements required for constitutional standing—injury in fact, causal connection, and redressability—is not an analysis of the merits of the underlying action. *See Pres. Soc'y of Charleston*, 430 S.C. at 210, 845 S.E.2d at 486 (summarizing the three elements of constitutional standing). Rather, an analysis of constitutional standing is solely an analysis of the allegations the plaintiff made in the complaint. *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76–77, 753 S.E.2d 846, 851 (2014) (analyzing only the plaintiffs' allegations before concluding they lacked standing). Accordingly, the decision of the court of appeals as to standing should in no way be construed as a comment on the merits of the action. *See Pres. Soc'y of Charleston*, 430 S.C. at 219, 845 S.E.2d at 491 (emphasizing "that our decision as

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[1] *See* S.C. Code Ann. §§ 40-24-10 to -20 (Supp. 2021).

to standing should in no way be construed as a signal of our view of the merits of the issues").

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Zane Allen Powell, Respondent,

v.

Renee Anne Dolin, Appellant.

Appellate Case No. 2019-001308

Appeal From Charleston County
Michael S. Holt, Family Court Judge

Opinion No. 5940
Heard June 22, 2022 – Filed August 24, 2022

REVERSED AND REMANDED

Anthony B. O'Neill, Sr. and Elonda Fair O'Neill, of O'Neill & Fair, of Charleston, for Appellant.

Roger Scott Dixon, of Dixon Law Firm, of Charleston, for Respondent.

MCDONALD, J.: In this appeal from family court, Renee Dolin argues the family court erred in: (1) finding a common law marriage; (2) declaring Dolin's recently sold real property was marital; (3) reducing Zane Powell's child support despite his failure to document his income; and (4) declining to award her requested attorney's fees and costs. We reverse and remand.

Facts and Procedural History

Dolin and Powell met at a coffee shop in 1998 or 1999 but did not begin dating for a year or two. In 2001, Dolin moved in with Powell at 58A Rutledge Avenue, where they lived together for approximately two years. During this time, Dolin worked as a counselor at the Department of Mental Health, and Powell owned and operated Powell Waterproofing and Roofing.

In 2001 or early 2002, Powell began looking at residential properties for investment purposes. Shortly thereafter, he and Dolin decided to purchase and renovate a duplex at 696 King Street in downtown Charleston. Although both Dolin and Powell testified Dolin obtained a loan from BB&T to purchase the property, they gave different accounts regarding the down payment. Powell explained that because his roofing company was involved in an ongoing lawsuit, he believed it would be in his best interest to purchase the property in Dolin's name. He testified that in order to get the loan, he put $30,000 from a workers' compensation settlement into a joint account with Dolin at BB&T. Dolin denied any such joint account existed. Powell was unable to document the $30,000 he claimed he contributed to the purchase of 696 King Street.

By contrast, Dolin claimed she solely purchased the property on May 10, 2002 for $105,000; she made a $10,000 down payment using money given to her by a former boyfriend—kept in a certificate of deposit at BB&T—and borrowed the remaining $95,000. Like Powell, Dolin was unable to obtain records from BB&T verifying these transactions.[1] However, Dolin's homeowner's insurance policy noted "Mortgage from Renee Ann Dolin to Branch Banking and Trust Company of South Carolina, dated 5/10/02, in the original principal amount of $95,000, recorded on May 15, 2002, at 10:56 AM in Mortgage Book H406 at Page 071 Charleston County Records." Additionally, it is undisputed that the loan obtained to purchase 696 King Street, the loan obtained to renovate the property, and the

[1] Both parties testified as to their inability to obtain BB&T records due to the age of the referenced accounts.

subsequent mortgages obtained for the purpose of refinancing the original loans were all undertaken by Dolin solely in her name.[2]

Upon Dolin's purchase of 696 King Street, Powell immediately began working to rebuild and renovate the property; Dolin does not contest that Powell worked on the renovation and property improvements; however, she contends he was paid for his work and also lived with her rent-free. Powell's friend and witness, Robert Mallard, described Powell as the "owner, supervisor, lead man on the job" and general contractor; Powell called himself the project manager. Mallard further testified that he pulled one of the two building permits for the renovation of the duplex, assisted Powell with finding sub-contractors, and otherwise confirmed proper inspections were being done, while Dolin, as the owner of record, pulled the other permit. Mallard attested to Powell's significant work on the property and identified a series of photographs showing the renovation. Similarly, Powell identified the photographs, which he took, and testified extensively as to his work on the renovation project, which took the better part of a year.

Powell maintains the labor and materials he contributed, including the demolition of the walls, porches, and fireplaces; the foundation repair; the installation of a new copper roof; concrete work; painting; and carpentry, were paid for through Powell Waterproofing and Roofing—not with loans Dolin obtained—and the new roof alone cost thirty to forty thousand dollars. When questioned about whether she paid Powell for his work or the materials he furnished, Dolin noted a second loan from Spartanburg Mortgage was used solely to pay for the renovation. Dolin acquired this $47,750 loan approximately one year after her initial purchase of the property.

On October 5, 2003, the couple's first child (CAP) was born. Dolin rented the upstairs and downstairs units at 696 King Street to third parties from 2003 through 2006. Powell testified the parties had tenants at the King Street property for approximately two and a half years while continuing to live in his Rutledge Avenue apartment, with the intention of flipping the King Street building rather than using it as their personal residence. However, Dolin, Powell, and CAP moved

[2] None of these documents suggest Powell held an ownership interest in the King Street property.

into the downstairs unit at 696 King Street around 2006, and Dolin continued to rent out the top unit, using the rent proceeds to pay the mortgage.

In 2005 or 2006, Dolin and Powell leased a space at 708 King Street, adjacent to Powell's roofing business, which they renovated and opened as Zappos Pizza. Dolin handled the business transactions: she opened the business bank account, researched and created the menu, programmed the cash register, obtained the business license, and handled advertising. Initially, Powell did not work at Zappos. However, he closed his roofing company in 2007, and began working at Zappos full-time making pizzas. After the birth of the couple's second child (SBP) on March 22, 2007, Powell took over the operation of Zappos, and Dolin assisted at Zappos from time to time.

Following a 2011 domestic incident, law enforcement interviewed Powell at Zappos but neither arrested nor charged him with any crime related to criminal domestic violence. The morning after this incident, January 5, 2011, Dolin sought an order of protection against Powell, alleging he was violent and abusive, she feared for her safety, and he was using drugs. The family court granted Dolin an order of protection restraining Powell from entering her residence at 696 King Street or the business at 708 King Street. The order restrained Powell from all contact with Dolin or the couple's minor children, including emailing, calling, texting, or coming within 100 feet of the three.

On May 31, 2011, Powell filed an action in family court seeking to vacate the order of protection; he also sought custody, visitation, child support, and his own restraining order. In his verified complaint, Powell alleged, "Plaintiff and Defendant have resided together since 2002 but Plaintiff does not consider Defendant to be his Wife nor does Plaintiff believe that Defendant considers him to be her Husband. No formal wedding ceremony has been held nor does Plaintiff believe that a common law marriage exists." Additionally, Powell alleged he was the "owner and operator" of Zappos Pizza but not of 696 King Street, which he referred to as "the home where he was living." Finally, Powell's affidavit in the 2011 litigation states, "Mother, the Defendant, Renee Ann Dolin and I never married but lived together and co-parented our children since the day they were born."

In her answer to Powell's 2011 complaint, Dolin stated, "Plaintiff and Defendant have resided together since 2002 but Defendant does not consider Plaintiff to be

her husband nor does Defendant believe that Plaintiff considers himself to be Defendant's husband. No marriage ceremony has been held nor does Defendant believe herself to be in a common law marriage." On November 21, 2011, the parties filed a custodial and support settlement agreement giving Dolin primary custody with final decision-making authority for the minor children. The parties never sought court approval of this agreement, and the case was administratively dismissed in July 2012.[3]

Dolin testified the parties continued to live separately with Powell returning to 696 King Street only to visit and care for the children when Dolin was out. Both parties dated other people from 2011 through the March 18, 2019 final hearing. Powell claims he lived at the residence from late 2011 or early 2012 until 2015 but would often sleep at Zappos. However, the record reflects Powell lived with two different women around 2015–16, and eviction records suggest he had two apartments during this time period. Powell admitted that after Zappos closed in 2014, he rented a residence for approximately three months before returning to 696 King Street.

On June 29, 2018, Dolin listed 696 King Street for sale.[4] Three days later, Powell filed this action claiming a common law marriage due to the years he and Dolin lived together and held themselves out to the public as husband and wife.[5] In support of his claim, Powell alleged the parties: (1) had the mutual intent to enter a

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[3] Powell testified the parties reconciled following Dolin's October and December 2011 hospitalizations for mental health treatment. Although Dolin acknowledged these hospitalizations, her complete testimony was not included in the record.

[4] 696 King Street sold for $675,000 on August 17, 2018. After paying off her mortgage, Dolin netted $385,776.90.

[5] In addition to Powell's 2011 complaint alleging he and Dolin were *not* married, Powell's pleadings and testimony contain numerous inconsistencies regarding the marriage issue. For example, Powell claimed the parties have been in a common law marriage since January 2002; Powell claimed he can prove he and Dolin have been in a common law marriage since August 2002; Powell explained he did not know when the common law marriage commenced; Powell considered himself married to Dolin when she moved her grandmother's ring from her right hand to her left hand; and Powell told his former lawyer he and Dolin were not married.

marriage contract and agreed to be married; (2) represented and held themselves out to the community that they were married and that they were husband and wife; (3) cohabitated and lived together for an extended period time; (4) were not married to other persons at the time; and (5) established a valid common law marriage in January 2002. Additionally, Powell sought a divorce based on habitual drunkenness, equitable division of the marital property, certain mutual restraints, and attorney's fees and costs. Regarding custody, visitation, and child support, Powell stated the parties already had an order in place and modification of that order was not necessary.

On August 8, 2018, Dolin filed an answer and counterclaim, in which she admitted the parties had two minor children in common but denied all other essential allegations of Powell's complaint. In her counterclaim, Dolin requested: (1) sole custody of the parties' minor children; (2) that Powell's visitation with the children be supervised; (3) appointment of a guardian ad litem should custody be contested; (4) child support; (5) certain restraining orders; (6) an order determining Powell's common law marriage claim was frivolous in light of Powell's 2011 action claiming the parties did not consider themselves married; (7) sanctions; and (8) attorney's fees.

Dolin subsequently sought temporary relief, and on September 24, 2018, the parties entered a temporary order by consent. The parties agreed Dolin would have sole custody of the minor children and that upon providing documentation that he had a working refrigerator and beds for the children, Powell would have visitation every other weekend and midweek. The parties further agreed Powell would pay biweekly child support to Dolin based on Powell's annual income of $70,000 and Dolin's annual income of $18,216. Exchanges of financial declarations with income documentation within three days and mediation within sixty days were to follow. Finally, the parties agreed to mutual restraining orders and certain parental guidelines. A supplemental consent child support order awarded Dolin monthly child support payments of $1,031.

Prior to the call of the case on March 18, 2019, Dolin moved to dismiss Powell's action for common law marriage on judicial estoppel grounds. The family court reserved its ruling until the issuance of the final order and proceeded with the final hearing. In its final order, the family court denied Dolin's motion to dismiss; declared Powell and Dolin had a common law marriage; denied Powell's claim for divorce on the ground of habitual drunkenness; declared 696 King Street was

marital property and awarded Powell half of the proceeds from the sale; ordered Powell to pay attorney's fees of $10,000 to Dolin's counsel; maintained the custody and visitation schedule to which the parties agreed in the temporary order; and reduced Powell's monthly child support obligation from $1,031 to $942. After the family court denied Dolin's motion to alter and amend, Dolin timely appealed.

Standard of Review

"Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings." *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019); *Stoney v. Stoney*, 422 S.C. 593, 595 n.2, 813 S.E.2d 486, 487 n.2 (2018) (noting an abuse of discretion standard is to be used for reviewing a family court's evidentiary or procedural rulings).

Law and Analysis

I. Common Law Marriage

Dolin argues the family court erred in finding a common law marriage existed based on the preponderance of the evidence. South Carolina's landmark case on common law marriage, *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (2019), was released after the family court's final order in this case. In *Stone*, our supreme court abolished common law marriage prospectively and refined how South Carolina courts are to determine whether a common law marriage exists, stating:

> We have concluded the institution's foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted. Accordingly, we believe the time has come to join the overwhelming national trend and abolish it. Therefore, from this date forward—that is, purely prospectively—parties may no longer enter into a valid marriage in South Carolina without a license. Consistent with our findings regarding the modern applicability of common-law marriage rationales, we also take this opportunity to refine the test courts are to employ henceforth.

Id. at 82, 833 S.E.2d at 267.

Citing *Callen v. Callen*, 365 S.C. 618, 620 S.E.2d 59 (2005), the court explained:

> A common-law marriage is formed when the parties contract to be married, either expressly or impliedly by circumstance. The key element in discerning whether parties are common-law married is mutual assent: each party must intend to be married to the other and understand the other's intent. Some factors to which courts have looked to discern the parties' intent include tax returns, documents filed under penalty of perjury, introductions in public, contracts, and checking accounts.

Id. at 87–88, 833 S.E.2d at 270.

Consistent with our supreme court's "discussion regarding the sanctity of a marital relationship and our reticence to impose one on those who did not fully intend it," the court found "a heightened burden of proof is warranted" and held "the 'clear and convincing evidence' standard utilized in probate matters should also apply to living litigants." *Id.* at 89, 833 S.E.2d at 271. The court clarified that "a party is not required to show his opponent had legal knowledge of common-law marriage; ignorance of the law remains no excuse." *Id.* The party claiming common law marriage "must demonstrate that both he and his partner mutually intended to be married to one another, regardless of whether they knew their resident state recognized common-law marriage or what was required to constitute one." *Id.* The court concluded by restating that "in the cases litigated hereafter, a party asserting a common-law marriage is required to demonstrate mutual assent to be married by clear and convincing evidence." *Id.* "Courts may continue to weigh the same circumstantial factors traditionally considered, but they may not indulge in presumptions based on cohabitation, no matter how apparently matrimonial." *Id.* Although the court "set forth the law to be applied in future litigation," it applied "the principles in effect at the time this action was filed to the case at hand." *Id.*

The following language was in effect when Powell filed this case:

> Appellate courts have previously recognized two lines of cases regarding common-law marriage. The first holds that a party proves a common-law marriage by a

> preponderance of the evidence. The second relies on "a strong presumption in favor of marriage by cohabitation, apparently matrimonial, coupled with social acceptance over a long period of time." This presumption—like common-law marriage itself—is based on a conception of morality and favors marriage over concubinage and legitimacy over bastardy. It can only be overcome by "strong, cogent, satisfactory or conclusive evidence" showing the parties are not married. This Court has held that once a common-law marriage becomes complete, "no act or disavowal" can invalidate it.

Id. at 88, 833 S.E.2d at 270–71 (internal citations omitted).

Powell's testimony focused on the parties' lengthy periods of cohabitation; the raising of their two children together; their alleged partnership in acquiring, renovating, and renting 696 King Street; and their partnership in owning and operating Zappos Pizza. Powell did not submit any evidence that the parties were jointly titled on 696 King Street, mortgages, or bank accounts or that they ever filed joint tax returns. Instead, Powell submitted Dolin's stepfather's 2004 obituary—which Dolin testified she did not write—listing Dolin as the decedent's daughter and Powell as her husband; an administrative law court order referring to Powell as Dolin's husband in its findings of fact regarding a beer and wine permit sought for Zappos; and a 2003 mechanic's lien referring to Powell as Dolin's husband and stating Dolin owns 696 King Street.

Powell also offered testimony from Mallard, Deena Frooman, and John Cathcart to support his common law marriage claim. All three witnesses testified Powell held himself out to be married to Dolin but only Frooman and Cathcart said the same was true for Dolin regarding Powell. Frooman indicated Powell purchased 696 King Street "to support his, essentially, wife and family"[6] but believed Dolin and Powell did not begin holding themselves out as husband and wife until 2013–14. However, Frooman also acknowledged that she knew Dolin was dating other people during this time period and that she did not know whether Powell gave

[6] Dolin purchased 696 King Street in 2002; the couple had their first child in 2003.

Dolin the ring she wore on her left ring finger.[7] Frooman equivocated when asked about the 2011 affidavit she helped Powell prepare but eventually admitted this "definitely was before they were holding out they were married." Cathcart testified he believed Dolin and Powell began holding themselves out as husband and wife in 2009; however, he believed Powell to be married during 2004–07, which he described as the "early years" he knew Powell.[8]

Powell testified that Dolin first introduced him as her husband after CAP was born in 2003 but he corrected her, stating he was her boyfriend. Powell admitted he never proposed to or was engaged to Dolin and that he does not know when they became husband and wife.

As for Dolin, she testified she never intended to marry Powell. Dolin presented her tax returns from 2007–16, which indicated "head of household" rather than married; the deed to 696 King Street and mortgage documents listing only her name; her petition for an order of protection petition on which she checked the box "parties have children in common" rather than "husband and wife"; and her answer to Powell's 2011 complaint in which she stated, "Plaintiff and Defendant have resided together since 2002 but Defendant does not consider Plaintiff to be her husband nor does Defendant believe that Plaintiff considers himself to be Defendant's husband. No marriage ceremony has been held nor does Defendant

[7] Dolin testified the ring she wears on her left ring finger belonged to her grandmother and was given to her after her grandmother's death around 1994, which predated her meeting Powell. Despite Powell's testimony that he believed the parties to be married when Dolin began wearing the ring on her left hand, Dolin explained that wearing her grandmother's ring never indicated she held herself out as married to Powell.

[8] This testimony, from Powell's own witnesses, offers no support for the family court's finding that Powell established a common law marriage as of October 5, 2003.

believe herself to be in a common law marriage."[9] Additionally, Dolin noted the couple's minor children received Medicaid because she was a single mother.[10]

Our de novo review of the record suggests Powell called himself married when it was convenient and financially beneficial for him but considered himself single when marriage was inconvenient or financially detrimental. Assuming arguendo that Powell intended to be married to Dolin throughout this time—which the evidence presented does not support—a critical inquiry is whether Dolin so intended. *See Stone*, 428 at 87, 833 S.E.2d at 270 ("The key element in discerning whether parties are common-law married is mutual assent: each party must intend to be married to the other and understand the other's intent."). The parties lived together (for various periods of time), raised two children together, and ran Zappos Pizza together. Although some witnesses testified the two introduced each other as husband and wife, others testified they never heard Dolin do so, and still others testified they heard neither Powell nor Dolin do so.

Although the evidence regarding introductions is mixed, the remaining factors appellate courts consider in determining intent are decidedly against a finding of common law marriage. *See id.* at 88, 833 S.E.2d at 270 ("Some factors to which courts have looked to discern the parties' intent include tax returns, documents filed under penalty of perjury, introductions in public, contracts, and checking accounts."). Dolin filed her taxes as "head of household" during the entirety of her relationship with Powell. Additionally, both she and Powell filed documents under penalty of perjury claiming they were not married. The parties signed some contracts jointly, but many more were in Dolin's name only. Finally, the parties produced no evidence of shared mortgages, checking accounts, or savings accounts.

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[9] Likewise, in his May 31, 2011 affidavit for that round of litigation, Powell stated, "Their Mother, the Defendant Renee Anne Dolin and I are not married but lived together and co-parented our children since they were born." At trial before the family court in this action, Powell testified that when he filed the 2011 action, he claimed he was not married in order "to protect himself."

[10] Powell never listed Dolin as his wife with the Veterans Administration where he received healthcare benefits for himself.

Accordingly, we find the parties' conduct does not demonstrate they each intended to be married or knew the other intended the same. Notably, the benefits Powell received in claiming he and Dolin were not married were contrary to any finding that he believed himself to be married or that he conducted himself as a married man. Powell was not subject to paying spousal support, providing Dolin or their children health insurance, sharing assets, or any other financial obligations a spouse might incur. Moreover, Powell was aware Dolin was involved in relationships with other men, and he provided care for the parties' children when Dolin went out on dates. All of this, when considered alongside the verified complaint and sworn affidavit from Powell's 2011 family court litigation, convinces us the family court erred in finding a common law marriage existed.

II. Nonmarital Property

Dolin argues the family court erred in determining the property located at 696 King Street was marital property and awarding Powell half of the proceeds from the property's sale. We find no common law marriage existed between the parties, and the family court lacked jurisdiction to equitably apportion Dolin's nonmarital property. *See* S.C. Code Ann. § 20-3-630)(B) (2014) ("The court does not have jurisdiction or authority to apportion nonmarital property.").

III. Child Support

Dolin argues the family court erred in reducing Powell's child support obligation without the income documentation necessary to do so. The temporary consent order required documentation of the parties' respective incomes, and Dolin provided a pay statement with her financial declaration. She also testified as to her employment status. However, Powell admitted at trial that he did not provide any documentation regarding his income and testified he could earn up to $250,000 yearly. Because the family court accepted Powell's financial declaration on its face without requiring any evidentiary support, in light of Powell's own testimony, we reverse and remand this issue to the family court with instructions that both parties must submit documentation of their respective incomes—as they agreed to do in the temporary consent order. The family court should consider such supporting documentation in conjunction with the testimony in the record, applicable statutory authority, and child support guidelines in making its child support determination.

IV. Attorney's Fees and Costs

Dolin argues the family court erred in awarding her only $10,000 of the $18,623 in attorney's fees and costs she incurred in defending this action. We agree.

In order to award attorneys' fees, a court should consider several factors including: (1) ability of the party to pay the fees; (2) beneficial results obtained; (3) financial conditions of the parties; and (4) the effect a fee award will have on the party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992). In determining the amount of attorneys' fees, the family court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, the professional standing of counsel, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Here, the family court stated,

> With regard to the issue of attorney fees, the Plaintiff submitted a fee statement with attorney's fees in the amount of $9,470.50. Defendant objected to the fee affidavit because it was not itemized and there were dates that predated this action. The Court overruled the objection and entered the affidavit and fee statement into evidence. The Court accepted a copy of an itemized billing statement at the conclusion of the trial and entered [it] into evidence without testimony and without objection from Defendant. Defendant submitted a fee affidavit with attorney's fees in the amount of $18,623.00 excluding previously ordered fees. The Court considered all of the factors when awarding fees and finds and concludes that Plaintiff shall pay to Defendant's attorney $10,000 within 7 days of the disbursement as provided for herein. Let it be noted that the Court finds that Plaintiff frustrated the discovery process, which [led] to the Defendant incurring additional fees and also engaged in other behavior which frustrated this litigation.

We reverse and remand the analysis of attorney's fees. On remand, the family court should make specific findings of fact as to the parties' respective incomes and abilities to pay once the financial documentation required by the temporary order is produced. In considering the remaining pertinent fee factors, we instruct the family court to consider the beneficial results Dolin has obtained on appeal.[11]

Conclusion

For the foregoing reasons, the order of the family court is

REVERSED AND REMANDED.

THOMAS and HEWITT, JJ., concur.

[11] We decline to address whether the family court erred in considering the issue of judicial estoppel Dolin raised in her pretrial motion to dismiss. *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 where a prior issue was dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Charleston Housing Authority, Respondent,

v.

Katrina Brown, Appellant.

Appellate Case No. 2018-002155

Appeal From Charleston County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5941
Heard June 9, 2021– Filed August 24, 2022

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Matthew M. Billingsley, of S.C. Legal Services, of N. Charleston, and Adam Protheroe, of S.C. Appleseed Legal Justice Center, of Columbia, both for Appellant.

Theodore Parker, III, of Parker Nelson & Associates, of Las Vegas, NV, and Jacqueline Dixon Phillips and Thomas Bacot Pritchard, both of Parker Nelson & Associates, of Charleston, all for Respondent.

PER CURIAM: Katrina Brown, a tenant of the City of Charleston Housing Authority (CHA), appeals the circuit court's order affirming her and her minor children's eviction from their home. We affirm in part, reverse in part, and remand for proceedings in accord with this opinion.

I.

The facts are not disputed. On December 16, 2015, Brown renewed her lease as a public housing tenant at CHA. Brown's minor son and daughter were named in the lease as residents and members of her household. On January 13, 2016, Brown's son—who was seventeen at the time—was arrested a mile away from his home carrying a gun. Two weeks after his arrest, CHA sent an official thirty-day notice of termination for Brown's lease. The notice informed Brown that her termination was based on the lease's prohibition against violent criminal behavior.

CHA then began eviction proceedings in magistrate's court to evict Brown and her family. At the hearing in front of the magistrate, CHA presented Detective Jason Jarrell from the Charleston Police Department who testified Brown's son confessed to an attempted armed robbery that occurred two days before his arrest and approximately a mile away from Brown's housing complex. CHA did not present any other evidence at the hearing.

Brown testified her son was being held in the Charleston County jail, and if he was able to make bond, the plan was for him to stay at her mother's (his grandmother's) house and no longer reside with her and her daughter. Brown testified neither of her son's crimes were alleged to have taken place on CHA grounds, and she had no knowledge of the alleged incidents until her son was arrested.

After finding "evictions based on criminal activity provisions of the housing lease agreements must be determined on a case-by-case basis," the magistrate considered the testimony as well as factors from federal law (specifically 24 C.F.R. § 966.4(l)(5) (2022)), and denied CHA's application for eviction. CHA appealed, and the circuit court remanded the case to the magistrate for further factual findings and analysis regarding whether Brown's eviction was warranted under 42 U.S.C. § 1437d(l)(6) (2012 & Supp. 2021), the federal statute governing public housing leases, which is colloquially known as the "One-Strike Rule."[1] In the

[1] The "One-Strike Rule" enacted by Congress in 1988 and expanded in 1996 requires federally-funded public housing authorities and private landlords renting their properties to tenants receiving federal housing assistance (Section 8) to include a provision in all leases stating that drug-related criminal activity, as well as criminal activity that threatens other tenants or nearby residents, are grounds for eviction, regardless of the tenant's personal knowledge of the criminal activity. § 1437d(l)(6). This strict-liability, no-fault rule was premised on the idea that public housing tenants are entitled to homes that are "decent, safe, and free from illegal drugs," *U.S. Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002)

remand order, the circuit court stated the magistrate "may conduct an additional evidentiary hearing or rely upon the previous record." The magistrate declined Brown's written request for another hearing but accepted memoranda of law regarding whether eviction was warranted under federal law. In her memorandum, Brown asserted her son's actions did not amount to good cause for her eviction under the One-Strike Rule, but even if they did, CHA acted arbitrarily by evicting her.

On May 15, 2017, the magistrate issued an order evicting Brown based on her son's actions. Relying specifically on *United States Department of Housing and Urban Development v. Rucker*, which upheld the constitutionality of the One-Strike Rule, the magistrate found there was good cause for Brown's eviction. 535 U.S. at 128. Brown appealed.

At the appeal hearing before the circuit court, Brown asserted under *Rucker*, § 1437d(l)(6), and 24 C.F.R. § 966.4(l)(5)(ii), non-drug related criminal activity can only be grounds for termination of a public-housing tenancy if the activity constitutes a present threat to the residents of the public housing authority and occurred in the immediate vicinity of the public housing authority. Brown asserted her son was not a threat to public housing tenants because his alleged criminal activity did not occur within the immediate vicinity of CHA and he would not be returning to her home if he were released from custody.

Brown also argued that, under the One-Strike Rule, both *Rucker* and § 1437d(l)(6) require local public-housing authorities to demonstrate they used discretion in evaluating the circumstances and alternatives to the eviction of an innocent tenant before evicting an entire household for the actions of one of its members. Brown asserted that, because CHA made no showing it exercised discretion by considering the mitigating circumstances of her case before pursuing eviction, the eviction was arbitrary and an abuse of the discretion conferred on CHA by Congress.

The circuit court affirmed Brown's eviction, issuing an order finding her son's actions warranted eviction under the One-Strike Rule but not addressing Brown's discretion argument. Brown filed a Rule 59(e), SCRCP motion asking the circuit court to reconsider the order and also seeking a ruling on her discretion argument. The circuit court denied Brown's motion for reconsideration, finding first, there was evidence CHA exercised its discretion because it was aware of the applicable

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(quoting 42 U.S.C. § 11901(1) (1994 ed.)), and to achieve this policy, the "rule for residents who commit crime and peddle drugs should be 'one strike and you're out.'" *See* 142 Cong. Rec. H768, H770 (daily ed. Jan. 23, 1996) (State of the Union Address by the President of the United States).

regulations when it proceeded with Brown's eviction, and second, the One-Strike Rule did not require the threat to tenants to be ongoing to be cause for eviction. Rather, the circuit court found, in order for the eviction to be proper under § 1437d(l)(6), Brown's son's alleged criminal activity need only have been a threat when it occurred. This appeal follows.

II.

In an eviction action first heard by the magistrate and affirmed by the circuit court, the court of appeals is without jurisdiction to reverse the findings of fact of the circuit court if there is any evidence supporting them. *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp*., 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984). However, the court of appeals "retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law." *Bowers v. Thomas*, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007).

"It is axiomatic that judicial interference with the discretion accorded [by Congress to a public housing authority] is only warranted when a review of its actions reveals by clear and convincing evidence some arbitrary action outside the boundaries of the federal laws and regulations." *Greenville Hous. Auth. of City of Greenville by Carlton v. Salters*, 281 S.C. 604, 608, 316 S.E.2d 718, 720 (Ct. App. 1984).

III.

A. Good Cause

Brown contends her eviction lacked good cause. We disagree. Under § 1437d(l)(6) every public housing authority is required to use leases that:

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .

The regulations accompanying § 1437d(l)(6) further expound that a public-housing authority "may terminate the tenancy only" for the enumerated grounds in the regulation, and non-drug-related criminal activity is cause for termination of a public-housing lease if that activity "threatens the health, safety, or right to

peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises." 24 C.F.R. §§ 966.4(l)(2) and (5)(ii)(A) (2022).

The text of § 1437d(l)(6) and 24 C.F.R. § 966.4 (2022) is unambiguous. *See S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012) (stating words of both statute and regulation are given their plain and ordinary meaning). Drug-related criminal activity is grounds for termination of a lease regardless of where the activity occurred, whereas non-drug related activity—even violent criminal activity—may only be grounds for termination if the activity "threatens the health, safety, or right to peaceful enjoyment" of other tenants or "persons residing in the immediate vicinity of the premises." § 1437d(l)(6); 24 C.F.R. § 966.4(l)(2) and (5)(ii).

In *Lowell Housing Authority v. Melendez*, 865 N.E.2d 741 (Mass. 2007), the Massachusetts Supreme Court found while not all non-drug related crimes committed a mile outside of the premises of a public housing authority constitute cause for termination of a lease under the One-Strike Rule, a violent robbery certainly did. *Id.* at 744–45. In *Lowell*, the tenant of a public-housing authority robbed a convenience store a mile away from his apartment with a knife. *Id.* at 741–42. The question on appeal was whether this crime constituted a threat to the "health, safety, or right to peaceful enjoyment of the premises by other tenants." Reasoning that this type of crime could be a ground for termination of the public- housing lease, the *Lowell* Court found:

> Whether the criminal activity is cause for termination will depend largely on the facts of each case. It is enough to say here that certain criminal activity, such as assault by means of a dangerous weapon and armed robbery, is so physically violent, or associated with violence, that one who engages in it normally would pose a threat to, or reasonably inspire a significant level of fear on the part of tenants forced to live in close proximity to the offending tenant To hold otherwise would send a message that it is acceptable for persons to commit violent crimes elsewhere and continue to be entitled to live in public housing developments. Tenants of public housing developments . . . represent some of the most needy and vulnerable segments of our population, including low-income families, children, the elderly, and the handicapped. It should not be their fate, to the extent manifestly possible, to live in fear of their neighbors.

Id. at 744–45 (quoting § 1437d(l)(6)). We find this reasoning persuasive. Detective Jarrell's testimony that Brown's son was arrested carrying a gun and confessed to attempting to rob a victim at gunpoint a mile away from his home demonstrated his activities posed a threat to the "health, safety, or right to peaceful enjoyment of the premises by tenants," and therefore, CHA had good cause for terminating Brown's Lease under § 1437d(l)(6), its accompanying regulations, and *Rucker*.

We further hold § 1437d(l)(6) does not require the threat to be "ongoing" to justify terminating a public-housing lease. While the statute and its accompanying regulatory language are written in the present tense, the statute only requires the activity to have been a threat when it occurred. *See Blue Moon of Newberry, Inc.*, 397 S.C. at 261, 725 S.E.2d at 483 (stating words of both statute and regulation are given their plain and ordinary meaning). Accordingly, we find Brown's argument that her son is incarcerated and no longer physically able to threaten other public-housing tenants or neighbors does not weigh in the threshold showing of whether good cause exists to evict Brown's household under the One-Strike Rule. Rather, as discussed below, it is a factor that may be taken into consideration by CHA in discerning whether Brown and her minor daughter should be evicted for her son's actions.

B. Use of Discretion

As *Rucker* held, a violation of the One-Strike Rule does not automatically require a public-housing tenant's eviction. The federal regulations governing public-housing leases authorize the use of discretion when determining whether to evict under § 1437d(l)(6), stating:

> (B) Consideration of circumstances. In a manner consistent with such policies, procedures and practices, the [public-housing authority] may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

> (C) Exclusion of culpable household member. The [public-housing authority] may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

24 C.F.R. § 966.4(l)(5)(vii)(B), (C).

The discretionary nature of the decision to evict was key to *Rucker*, where, in a unanimous decision, the United States Supreme Court found Congress' rationale behind the One-Strike Rule was not absurd because "[t]he statute does not *require* the eviction of any tenant who violated the lease provision." *Rucker*, 535 U.S. at 133–34 (emphasis in original). Instead, the Supreme Court noted § 1437d(l)(6) "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity." *Id*. at 136. In so reasoning, the Supreme Court noted Congress entrusted the decision to evict under § 1437d(l)(6) to local public-housing authorities because they "are in the best position to take account of, among other things, the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.'" *Id*. at 134 (citations omitted).

In *Eastern Carolina Regional Housing Authority v. Lofton*, a North Carolina public-housing tenant was being evicted under § 1437d(l)(6) for her baby-sitter's marijuana possession. 789 S.E.2d 449, 451 (N.C. 2016). The supreme court of North Carolina found that under the clear language of § 1437d(l)(6), the baby-sitter's drug activity was cause for termination of Lofton's lease. *Id*. at 452. However, in finding Lofton's eviction was not proper, the *Lofton* Court recognized the policy interest of ensuring tenants of public housing have a home that is "decent, safe, and free from illegal drugs," included tenants whose lease may be terminated under § 1437d(l)(6). *Id*. at 452–53. *Lofton* held the public-housing authority was prohibited from evicting a tenant under § 1437d(l)(6) without exercising discretion in doing so. *Id*. at 454. Thus, it found before an eviction may occur under § 1437d(l)(6), a public housing authority must not only consider whether "the facts permitted eviction" but must also complete "the critical step of determining whether eviction should occur." *Id*. *Lofton* held eviction was not proper under the One-Strike Rule unless there is both: 1) cause for terminating the

lease and 2) use of discretion in deciding whether a lease should be terminated. The *Lofton* Court emphasized courts would not second-guess the exercise of discretion used by a public-housing authority in deciding to pursue eviction of a tenant under the One-Strike Rule, but the exercise of discretion must occur. *Id*.; *see also Hous. Auth. of Covington v. Turner*, 295 S.W.3d 123, 129 (Ky. Ct. App. 2009) (Moore, J., concurring) ("While much discretion rests with the local Housing Authority, *Rucker* does require some thresholds to be met or facts to be taken into consideration for the eviction of a tenant under 42 U.S.C. § 1437d(l)(6). In other words, discretion must be exercised, rather than a blind application of the law because 42 U.S.C. § 1437d(l)(6) does not *require* evictions." (emphasis in original)).

In South Carolina, we defer to a public housing authority's administration of its programs, knowing "the policy of delegating responsibility to the local housing authorities was expressly set forth at 42 U.S.C. Section 1437." *Salters*, 281 S.C. at 608, 316 S.E.2d at 720. Section 1437 states in relevant part:

> It is the policy of the United States . . . to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public.

Accordingly, in a hearing on an application for an eviction subject to § 1437d(l)(6), once a public-housing authority has shown good cause for the eviction, the magistrate may only deny the application if there is clear and convincing evidence the public housing authority's decision to pursue the eviction was an "arbitrary action outside the boundaries of the federal laws and regulations." *Salters*, 281 S.C. at 608, 316 S.E.2d at 720. South Carolina courts have examined and explained "arbitrary" action in many contexts, stating:

> "Arbitrary" means based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules or standard.

Turbeville v. Morris, 203 S.C. 287, 315, 26 S.E.2d 821, 832 (1943); *see also In re Blue Granite Water Co.*, 434 S.C. 180, 187, 862 S.E.2d 887, 891 (2021); *Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019); *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–

85, 332 S.E.2d 539, 541 (Ct. App. 1985); *Hatcher v. S.C. Dist. Council of Assemblies of God, Inc.*, 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976).

Our courts have held a flat refusal to exercise discretion—or to not realize one has such discretion—is in itself an abuse of discretion. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly."); *id* ("[T]he mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised[; i]t should be stated on what basis the discretion was exercised."); *Richardson on Behalf of 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 601, 846 S.E.2d 14, 17 (Ct. App. 2020) ("A court that does not use discretion—or recognize it has discretion—when discretion exists commits an error of law.").

As we have noted, Detective Jarrell was the sole witness for CHA at the original hearing on the application for eviction. Upon remand, the magistrate declined to conduct a further evidentiary hearing. As discussed above, Detective Jarrell's testimony demonstrates Brown's son's criminal activity was good cause for eviction under § 1437d(l)(6). CHA therefore had the right to evict Brown, but this does not answer the question of whether CHA knew it could refrain from invoking the One-Strike Rule in Brown's specific circumstances. As the record now stands, it is unclear whether CHA knew it had the discretion to call Brown out after the first strike. Without seeing that CHA considered some factors or policy, such as those outlined in 24 C.F.R. § 966.4(l)(5)(vii)(B), (C), or discussed in *Rucker* and *Lofton*, we cannot know whether CHA's decision to pursue the eviction of Brown and her daughter was the result of applied discretion or the rote, discretionless enforcement of the One-Strike Rule. Accordingly, the circuit court erred in concluding CHA demonstrated it exercised discretion simply by being "aware of the applicable regulations" when it chose to evict Brown's family for her son's actions. This finding is not supported by the record, nor could it be, as the record is silent as to CHA's exercise of discretion. We therefore reverse this finding, and remand this case to the magistrate for a hearing to determine whether CHA exercised discretion in deciding to pursue the eviction of Brown's entire household for the criminal actions of her son.

IV.

We find Brown's son's criminal activities were good cause for her eviction under § 1437d(l)(6). However, because there is no evidence in the record indicating CHA either knew it had discretion or exercised discretion before pursuing eviction of Brown's household for her son's actions, we remand for consideration of whether CHA did exercise this discretion.

We recognize reasonable minds may wonder how CHA could exceed its discretion if it had good cause under the statutory scheme to evict Brown. But to so conclude would be equivalent to saying eviction under the One-Strike Rule is always automatic, and Chief Justice Rehnquist, writing on behalf of the unanimous United States Supreme Court, rejected that very conclusion in *Rucker*. Because CHA was never given the opportunity to demonstrate whether it exercised discretion in deciding to evict Brown, we must remand to provide that opportunity. While we affirm there was good cause to evict Brown, on remand, the magistrate must conduct an evidentiary hearing to determine whether CHA exercised its discretion pursuant to *Rucker* when it chose to pursue Brown's eviction.

Accordingly, the circuit court's order affirming Brown's eviction is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS, C.J, THOMAS and HILL, JJ., concur.