Judicial Merit Selection Commission

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M E D I A R E L E A S E

August 4, 2023

The Public Hearings for the Judicial Merit Selection Commission have been scheduled to begin Monday, November 6, 2023, with the hearings commencing at 9:00 a.m. regarding the qualifications of the following candidates for judicial positions:

Circuit Court

2nd Judicial Circuit, Seat 2	**Grant Gibbons,** Aiken, SC **David W. Miller,** Aiken, SC **Martha M. Rivers Davisson,** Aiken, SC
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14th Judicial Circuit, Seat 3	**The Honorable Marvin Dukes, III,** Beaufort, SC
15th Judicial Circuit, Seat 3	**David Pierce Caraker, Jr.,** Myrtle Beach, SC **Joshua D. Holford,** Myrtle Beach, SC **Leah T. Petree-Angone**, Pawleys Island, SC **Douglas M. Zayicek,** Conway, SC

Family Court

1st Judicial Circuit, Seat 4	**Jerrod A. Anderson,** Orangeburg, SC **Deanne M. Gray,** Summerville, SC **The Honorable Pandora Jones-Glover,** Orangeburg, SC

7th Judicial Circuit, Seat 4	**Pete G. Diamaduros,** Spartanburg, SC **Jonathan W. Lounsberry,** Spartanburg, SC
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Master-in-Equity	
Kershaw County	**William B. Cox, Jr.,** Camden, SC **The Honorable David Paul Reuwer,** Camden, SC

Persons desiring to testify at public hearings shall furnish written notarized statements of proposed testimony, in accordance with the Procedural Rules of the Judicial Merit Selection Commission. These statements must be received by **Noon, Monday, October 23, 2023**. The Commission has witness affidavit forms that may be used for proposed testimony. While this form is not mandatory, it will be supplied on request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Erin B. Crawford, Chief Counsel
104 Gressette Building
Post Office Box 142
Columbia, SC 29202

All testimony, including documents furnished to the Commission, must be submitted under oath. Persons knowingly giving false information, either orally or in writing, shall be subject to penalty.

For further information about the Judicial Merit Selection Commission and the judicial screening process, the website is available at:
https://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php

Questions concerning the hearing and procedures should be directed to the Commission at (803) 212-6623.

The Supreme Court of South Carolina

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N O T I C E

VACANCY ON THE COMMITTEE ON CHARACTER AND FITNESS

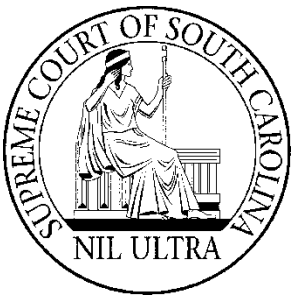
Pursuant to Rule 402(l) of the South Carolina Appellate Court Rules, the Supreme Court appoints members of the South Carolina Bar to serve on the Committee on Character and Fitness. *See also* Rule 402(l)(5), SCACR (setting forth the duties of the Committee); Appendix B, Part IV, SCACR (setting forth rules and regulations relating to the Committee).

Lawyers who meet the qualifications set forth in Rule 402(l) and are interested in serving on the Committee may submit a letter of interest to CCFInterest@sccourts.org.

Any submissions must be in Adobe Acrobat portable document format (.pdf).

Submissions will be accepted through September 30, 2023.

Columbia, South Carolina
August 9, 2023



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 9, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, Respondent,

v.

The Estate of Patricia Ann Owens Houck, Tammy M. Bailey, South Carolina Department of Motor Vehicles, Defendants,

of which the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the Petitioners.

Appellate Case No. 2021-001292

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
James O. Spence, Master-in-Equity

Opinion No. 28169
Heard June 7, 2023 – Filed August 9, 2023

AFFIRMED AS MODIFIED AND REMANDED

Andrew Sims Radeker, of Harrison, Radeker & Smith, P.A., of Columbia, for Petitioners.

Jonathan Edward Schulz and George Benjamin Milam, both of Bradley Arant Boult Cummings LLP, of North Carolina, for Respondent.

JUSTICE JAMES: In this appeal, we must decide whether a bank's foreclosure claim is barred because the bank did not assert the claim as a counterclaim in prior litigation between the parties. In 1998, Petitioner Patricia Ann Owens Houck, now deceased, purchased a mobile home and placed it on her land in Lexington County. At closing, Houck executed a $60,400 note in favor of NovaStar Mortgage, Inc. The note contained a fifteen-year balloon provision, requiring the balance to be paid in full on July 1, 2013. The note was secured by a mortgage on Houck's mobile home and real property. Houck subsequently conveyed the property to Petitioner Tammy Bailey, and NovaStar assigned the note to Respondent Deutsche Bank (the Bank).

In 2013, Petitioners commenced an action against the Bank for conversion, violations of the Attorney Preference Statute,[1] and violations of the South Carolina Unfair Trade Practices Act (SCUTPA).[2] At that time, Petitioners were not in default on the note. However, Petitioners defaulted on the note before the Bank answered the complaint. The Bank did not assert a foreclosure counterclaim. The action was tried before a jury, and a verdict was rendered for the Bank.

In 2016, the Bank commenced this foreclosure action against Petitioners. Petitioners moved for partial summary judgment, arguing the foreclosure claim was a compulsory counterclaim in the 2013 litigation and was therefore barred under Rule 13(a) of the South Carolina Rules of Civil Procedure. The Master-in-Equity agreed, granted Petitioners' motion for partial summary judgment, and ordered the

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[1] S.C. Code Ann. § 37-10-102 (2015) (providing that when the primary purpose of a loan secured by a mortgage is for a personal, family, or household purpose, a "creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction").

[2] S.C. Code Ann. §§ 39-5-10 to -730 (2023).

Bank to record a satisfaction of the mortgage. The Bank appealed.[3] The court of appeals reversed the Master's grant of partial summary judgment to Petitioners and remanded for further proceedings, holding that under the "logical relationship test," the Bank's foreclosure claim was not a compulsory counterclaim in the 2013 litigation. *Deutsche Bank Nat'l Tr. Co. v. Est. of Houck*, 434 S.C. 500, 509-10, 863 S.E.2d 829, 834 (Ct. App. 2021).

We first clarify the standard of review. Whether a counterclaim is compulsory is a question of law to be reviewed de novo. *Ziegler v. Dorchester Cnty.*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019).

We affirm the result reached by the court of appeals under the logical relationship test, but we prospectively abolish that test. Although this Court adopted the logical relationship test in *North Carolina Federal Savings & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517-18, 381 S.E.2d 903, 905 (1989), we neither set forth factors to consider under the test nor explained whether the test expands or limits the scope of Rule 13(a). The test has since been cited and applied in a way that does not track Rule 13(a). *See, e.g.*, *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015); *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 330 n.7, 755 S.E.2d 437, 442 n.7 (2014); *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995); *First-Citizens Bank & Tr. Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). We now hold that in cases commenced on or after the effective date of this opinion, the question of whether a counterclaim is compulsory is governed by the plain language of Rule 13(a).

Rule 13(a) plainly provides that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP. Judges and lawyers are well-equipped to determine whether a claim is compulsory under the plain language of this rule.

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[3] Petitioners also appealed, arguing the Master erred in failing to order the Bank to pay a penalty under South Carolina Code section 29-3-320 (2007). That issue is not before us.

We affirm the court of appeals as modified and remand to the Master for further proceedings.

AFFIRMED AS MODIFIED AND REMANDED.

BEATTY, C.J., KITTREDGE, FEW and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Plaintiff,

v.

Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division, Defendant.

Appellate Case No. 2022-000388

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Opinion No. 28170
Heard February 9, 2023 – Filed August 9, 2023

CERTIFIED QUESTION ANSWERED

David Allen Chaney Jr., of Greenville, and Meredith McPhail, of Columbia, both of American Civil Liberties Union of South Carolina, for Plaintiff.

Andrew F. Lindemann, of Lindemann & Davis, P.A., of Columbia, for Defendant.

JUSTICE JAMES: A person who is convicted of certain sex offenses and who resides in South Carolina must register as a sex offender with the sheriff in his county of residence. The South Carolina Law Enforcement Division (SLED) then publishes certain information about convicted sex offenders on the Sex Offender Registry (the Registry). Doe is a convicted sex offender who moved from South Carolina to Georgia in 2015. He commenced this action in federal court against the Chief of SLED, Mark Keel, contending in part that because he no longer resides in South

Carolina, SLED should be prohibited from continuing to publish his name and information on the Registry.

Pursuant to Rule 244, SCACR, the United States District Court for the District of South Carolina certified the following question to this Court:

> Does the South Carolina Sex Offender Registry Act (SORA)[1] permit the publication of out-of-state offenders—i.e., individuals with qualifying sexual offenses but who do not live in South Carolina—on the state's public sex offender registry?

This question references an "out-of-state offender," which is defined by SLED regulations as "any person . . . who has been convicted in another state of any offense which can be reasonably interpreted as corresponding to those provided for in the South Carolina Code of Laws." S.C. Code Ann. Regs. 73-200(C) (2012). Doe's stipulated status as a nonresident, not his status as an out-of-state offender, is relevant to the certified question. For the purposes of SORA, "a person who remains in this State for a total of thirty days during a twelve-month period is a resident of this State." S.C. Code Ann. § 23-3-430(B). Therefore, we rephrase the certified question as follows:

> Does the South Carolina Sex Offender Registry Act (SORA) permit the publication of nonresident offenders—i.e., individuals with qualifying sexual offenses who do not live in South Carolina—on the state's public sex offender registry?

We hold SORA and SLED regulations[2] require us to answer this question "yes."

Background

In 2011, Doe was convicted of an online sexual offense in Colorado and sentenced to probation. When he committed the offense, Doe was a resident of Greenville County and a student at the University of South Carolina. Because Doe resided in South Carolina, section 23-3-430 of SORA required him to biannually register with the sheriff in the county of his residence. Doe registered in South Carolina until he moved to Georgia in 2015. Because he moved out of state, Doe's obligation to register in South Carolina was suspended and his probationary sentence was transferred to Georgia. After Doe completed probation, he successfully

[1] S.C. Code Ann. §§ 23-3-400 to -555 (2007 & Supp. 2022).

[2] S.C. Code Ann. Regs. 73-200 to -270 (2012).

petitioned in Georgia to be relieved of his duty to register under Georgia law. SLED agrees Doe is not required to physically register in South Carolina because he does not reside in South Carolina. However, SLED continues to publish Doe's name, picture, offense, vehicle information, and last known address (collectively, name and identifying information) on the Registry.

Discussion

Doe argues various SORA provisions and accompanying regulations require us to answer the certified question in the negative. Keel contends these provisions and regulations require us to answer the question in the affirmative.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The plain language of a statute is the best evidence of legislative intent. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

"[T]he Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). However, where the plain language of the statute "is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Brown*, 354 S.C. at 440, 581 S.E.2d at 838. Accordingly, the Court will defer to an agency's interpretation of a statute or regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute [or regulation]." *Kiawah*, 411 S.C. at 34-35, 766 S.E.2d at 718 (quoting *Chevron*, 467 U.S. at 844); *see Sierra Club v. S.C. Dep't of Health & Env't Control*, 426 S.C. 236, 257, 826 S.E.2d 595, 606 (2019) (declining to give regulatory deference to the Department of Health and Environmental Control's interpretation of "migration of water onto" because it ran "afoul of what [the Court] conclude[d] is the clear meaning of the phrase").

I. SORA Provisions

Section 23-3-400 of SORA provides,

> The intent of [SORA] is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (emphasis added). Read plainly, section 23-3-400 tells us several things. First, SORA's threshold purpose is to promote the public health, welfare, and safety of South Carolina citizens. Second, information placed on the Registry provides law enforcement with the tools needed to investigate criminal offenses. Third, statistics show "sex offenders often pose a high risk of re-offending." Fourth, the emphasized word "additionally" enhances—but does not restrict—both the purpose of SORA (promoting the public health, welfare, and safety of South Carolina citizens) and the role of the Registry (providing law enforcement with tools necessary to investigate criminal offenses). This Court has explained SORA exists to protect the public from sex offenders who may re-offend and to aid law enforcement in solving sex crimes. *See, e.g.*, *In re Justin B.*, 405 S.C. 391, 405, 747 S.E.2d 774, 781 (2013); *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002).

Section 23-3-400 must be read along with subsection 23-3-410(A), which provides:

> The registry is under the direction of the Chief of the State Law Enforcement Division (SLED) and shall contain information the chief considers necessary to assist law enforcement in the location of persons convicted of certain offenses. SLED shall develop and operate the registry to: collect, analyze, and maintain information; make information available to every enforcement agency in this State and in other states; and establish a security system to ensure that only authorized persons may gain access to information gathered under this article.

S.C. Code Ann. § 23-3-410(A).

In a mix of mandate and discretion, subsection 23-3-410(A) provides the Registry "shall contain information the chief considers necessary to assist law enforcement in the location of persons convicted of certain offenses." *Id.* Subsection 23-3-410(A) further requires SLED to develop and operate the Registry by collecting, analyzing, and maintaining information and to make that information available to law enforcement agencies in South Carolina and other states. As noted below, section 23-3-420 directs SLED to promulgate regulations to implement SORA.

As explained above, section 23-3-400 reflects the General Assembly's intent to "promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens" by providing "law enforcement with the tools needed in investigating criminal offenses." One such tool is the bank of information that is to be collected, analyzed, maintained, and made available to all enforcement agencies in this State and in other states pursuant to subsection 23-3-410(A). The information can hardly be made available to other states if it is not maintained in South Carolina.

Both section 23-3-400 and subsection 23-3-410(A) are silent as to the ramifications of a sex offender moving from South Carolina to another state. We conclude South Carolina has a legitimate and fundamental interest in promoting the public health, safety, and welfare of its citizens, regardless of imaginary boundary lines between states. For example (and there are many), a sex offender who resides in and registers in South Carolina might move to Savannah, Georgia or Charlotte, North Carolina and not remain in South Carolina "for a total of thirty days during a twelve-month period." S.C. Code Ann. § 23-3-430(B). While that offender would not be deemed a resident of South Carolina for SORA purposes and would no longer be required to physically register, he or she could easily travel to and from South Carolina at convenient times for licit and illicit purposes. To summarily conclude a nonresident offender's information should be deleted from the Registry would ignore the purpose of SORA as stated in section 23-3-400.

Doe relies heavily upon subsection 23-3-430(A) to advance his argument that a nonresident offender's name and identifying information should be removed from the Registry. Subsection 23-3-430(A) requires any person "residing in the State of South Carolina" who has been convicted of an offense listed in subsection 23-3-430(C) to register as a sex offender.[3] S.C. Code Ann. § 23-3-430(A). Doe argues

[3] As previously noted, subsection 23-3-430(B) provides that for the purposes of SORA, "a person who remains in this State for a total of thirty days during a twelve-

subsection 23-3-430(A) indicates that if a nonresident offender is no longer required to physically register in South Carolina, the offender's name and identifying information should be deleted from the Registry. We disagree. Subsection 23-3-430(A) refers only to the physical act of registering; it does not require SLED to remove a nonresident offender's name and identifying information from the Registry. If the General Assembly chooses to amend SORA to achieve the result urged by Doe, it may do so. *See Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) (explaining the General Assembly has plenary power to make policy decisions "unless limited by some constitutional provision").

Our court of appeals has similarly—and correctly—refrained from construing SORA in a manner inconsistent with its plain meaning. In *Young v. Keel*, a sex offender argued he was no longer required to physically register in South Carolina because his underlying conviction had been expunged. 431 S.C. 554, 557, 848 S.E.2d 67, 68 (Ct. App. 2020). The court of appeals addressed the several ways in which a sex offender can be relieved of the registration requirement. Writing for the court of appeals, then-Judge Hill (now Justice Hill) noted:

> While the text of SORA does not speak to the effect an expungement has on the registry requirement, the text is not unclear or ambiguous. We are mindful that "statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith v. Tiffany*, 419 S.C. 548, 555-56, 799 S.E.2d 479, 483 (2017) (citations omitted). The text of § 23-3-430 plainly lists only three exceptions to the registry requirement, and we hold § 22-5-920 does not, by statutory osmosis, create a fourth for expungement.

Id. at 558, 848 S.E.2d at 69.

The sex offender in *Young* sought to be relieved from the physical act of registering. Interestingly, however, the "three exceptions to the registry requirement" discussed in *Young* are, by their very terms, vehicles for removing an offender's name and identifying information from the Registry, which is the relief

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month period is a resident of this State." SLED Regulation 73-200(J) defines "resident" as "any person remaining in South Carolina for a period of twenty-eight (28) consecutive days," to include but not be limited to "earning a salary, attending school or college, recreation, visitation, and the like." Because SLED concedes Doe is not a resident of South Carolina, we do not address these different definitions.

sought by Doe. For example, subsection 23-3-430(E) provides, "SLED shall remove a person's name and any other information concerning that person from the sex offender registry" when the conviction is reversed, overturned, or vacated on appeal and final judgment to that effect has been rendered. Subsection 23-3-430(F) contemplates instances when an offender "may be removed from the registry" in the event of a pardon. Subsection 23-3-430(G) contemplates instances in which an offender may "be removed from the registry" in connection with a petition for a writ of habeas corpus or a motion for a new trial under Rule 29(b) of the South Carolina Rules of Criminal Procedure.

Doe argues *Young* does not apply to his request because the sex offender in *Young* was attempting to be relieved of the physical act of registering and was not attempting to have his name and identifying information removed from the Registry. We disagree. The SORA provisions cited in *Young* require the removal of the offender's name and identifying information from the Registry, which, again, is the relief sought by Doe.

In May of 2022, General Assembly enacted section 23-3-462, which added a fourth mechanism for the removal of a sex offender's name and identifying information from the Registry. Under section 23-3-462, "SLED shall remove the offender's name and identifying information from the sex offender registry" if the offender completes the requirements of section 23-3-462. Doe concedes he is not, at this time, entitled to relief under section 23-3-462.

We are persuaded by the rationale employed in *Young*. Section 23-3-462 and subsections 23-3-430(E), (F), and (G) set forth four scenarios in which a sex offender's name and identifying information can be removed from the Registry. Doe's nonresident status does not, "by statutory osmosis" or otherwise, create a fifth. *Young*, 431 S.C. at 558, 848 S.E.2d at 69. If the General Assembly desires to create additional methods for removal of an offender's name and identifying information from the Registry, it may do so. However, we will not strain the plain meaning of SORA to create an avenue for removal where none exists. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988) ("[I]n construing a statute its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."). Doe also argues "the certified question only involves temporary clerical removal of names from the [Registry] who have no active duty to register in South Carolina." To that end, Doe argues he seeks only a "temporary clerical removal" of his name from the Registry and should he reside in South Carolina in the future, his obligation to register in South Carolina would resume. That argument is meritless, as it would require us to ignore the grant of discretion given to the Chief of SLED by the General

Assembly in subsection 23-3-410(A). To do this, we would be engaging in a forced construction of SORA.

II. Regulations

In section 23-3-420, the General Assembly directed SLED to "promulgate regulations to implement the provisions of [SORA]." We would certainly take a dim view of any applicable regulations that expand SLED's authority beyond that granted in SORA. However, no regulations commit that evil, at least with respect to the certified question. Regulation 73-210 contains information to be gathered by various state entities and reported to the sheriff of the county in which the sex offender will reside. Regulation 73-220 prescribes procedures to be utilized by sheriffs' offices at the time of physical registration and re-registration. These procedures ensure transmission of required information by sheriffs to SLED. Regulation 73-240 provides "SLED will ensure that all information maintained in the Registry is as up-to-date and accurate as possible." Regulation 73-260 lists twenty-three categories of identifying information that must be provided by the sex offender when registering. None of these regulations require SLED to remove Doe's name and identifying information from the Registry.

Doe argues Regulation 73-250 entitles him to relief. We disagree. Regulation 73-250 contemplates a sex offender's move to either another county in South Carolina or another state. Regulation 73-250(A) sets forth the responsibilities of county sheriffs when offenders move from one county to another. If an offender moves to another county, the sheriff of the county from which the offender moved must place the offender on inactive status, and the sheriff of the county in which the offender now lives must enter the offender into the Registry "as a new entry." S.C. Code Ann. Regs. 75-250(A)(1)(2). If the offender moves to another state, Regulation 73-250(B) requires the sheriff of the county from which the offender moved to place the offender on inactive status and "notify the receiving state of the offender's relocation." Regulation 73-250 merely sets forth the record-keeping duties of county sheriffs when a registered sex offender moves from their county to either another county in South Carolina or, as in the case of Doe, another state. The placement of the nonresident offender on inactive status pursuant to 73-250(B) does not require SLED to remove the name and identifying information from the Registry.

III. Doe's Constitutional Arguments

Doe asks this Court to address several federal constitutional claims pending in this litigation before the district court. Because these claims are beyond the scope of the certified question, we decline to address them.

Conclusion

Provisions for removing a sex offender's name and identifying information from the Registry are set forth in section 23-3-462 and subsections 23-3-430(E), (F), and (G). None of these provisions apply to Doe's circumstances. The regulations promulgated by SLED neither expand SLED's authority beyond that granted by the General Assembly in SORA nor require SLED to remove Doe's name and identifying information from the Registry. We therefore answer the certified question, as amended, in the affirmative.

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice Kaye G. Hearn, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Carmie Josette Nelson, Petitioner.

Appellate Case No. 2021-001356

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson Jr., Circuit Court Judge

Opinion No. 28171
Heard May 17, 2023 – Filed August 9, 2023

REVERSED

Appellate Defender Sarah Elizabeth Shipe, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Tommy Evans Jr., of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

ACTING JUSTICE HEARN: The sole issue in this case is the admissibility of autopsy photos. A jury found Petitioner Carmie Nelson ("Carmie") guilty of murdering her roommate, and the trial court sentenced her to life imprisonment. Carmie appealed, arguing, *inter alia*, that the trial court erred in admitting gruesome autopsy photos in contravention of Rule 403, SCRE. The court of appeals, finding no error, affirmed in an unpublished opinion. *State v. Nelson*, Op. No. 2021-UP-330 (S.C. Ct. App. filed Sept. 15, 2021). This Court granted Carmie's petition for a writ of certiorari, and we now reverse. The photos admitted here surpassed "the outer limits of what our law permits a jury to consider." *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010).

FACTUAL BACKGROUND

Carmie, a former Army nurse, married Daniel Nelson, also a former Army member, in 2001. The two often lived separately due to Carmie's work as a traveling nurse, and when they did reside together, their relationship was somewhat tumultuous. In 2015, while the Nelsons were living in Charleston, Daniel was convicted of criminal domestic violence (CDV) for attacking Carmie with a knife. Daniel received probation, and the two continued to live together at various hotels and a friend's home in Alabama. They returned to Charleston in 2016 but then separated, with Carmie living at a hotel and Daniel at a homeless camp on Rivers Avenue. Nevertheless, they still maintained a relationship, and Carmie used Daniel's Veterans Administration benefits to pay for her hotel.

In January of 2017, Daniel was arrested for CDV against Carmie. While he was in jail, Carmie was kicked out of her hotel because Daniel stopped making the payments. Carmie, who suffered from addiction, then entered Palmetto Behavioral Health ("Palmetto"), a detox facility. It was at Palmetto where Carmie met Jordan Lum ("Victim"). Subsequently, Victim invited Carmie and her pets to move in with her in Summerville and live there rent-free.

Although Carmie and Victim had originally "hit it off," Carmie soon became tired of Victim and began disparaging her in texts to Daniel, referring to her as a "psychotic bitch." According to Daniel, who testified at trial, Carmie wanted him to assault Victim and suggested they take Victim's designer clothes, sell them, and split the money. The relationship between Carmie and Victim continued to deteriorate, and on the morning of April 2, 2017, the date of Victim's murder, Daniel retrieved Carmie's truck from her previous hotel, intending to go to Victim's house. However, high on meth, crack, and alcohol, he crashed the truck on the way.

Daniel and Carmie gave markedly different accounts of what transpired next. Daniel claimed that after his wreck, during one of several phone calls with Carmie, she asked him to come to Victim's home because she had just killed her and needed his help cleaning up the scene. Daniel explained he went, not only because he wanted to help her, but also because Carmie said she would drop the January 2017 CDV charge against him and offered him "pills, alcohol, and sex." He testified Carmie told him she hit Victim over the head with a hammer while Victim was sleeping on the couch and then stabbed Victim in the neck and body because Victim was still moving. He stated Carmie claimed she killed Victim because Victim was holding her hostage and hitting Carmie's dog. Daniel noted that over the next several days, he and Carmie cleaned up the house, drank, took pills, and discussed what to do with Victim's body, which had been placed in a crate in the garage.

Two days after Victim's death, Carmie drove the Victim's car to Harris Teeter and a liquor store to buy more cleaning supplies, beer, and liquor. According to Daniel, when she returned, things "went downhill quick." Because he and Carmie were frequently fighting, he decided to record their conversations on his phone to protect himself from being blamed for the murder. He surreptitiously recorded two conversations—the first was of Carmie talking about how he had wrecked her truck, and in the second, Carmie admitted to murdering Victim. Daniel testified that after he made the recordings, he packed up his things, left the house, and called 911 to report the murder.

Carmie relayed a different version of events. She testified that when Daniel arrived at Victim's home, she went to take a shower to prepare to go out with Victim, having canceled her date with Daniel because he had wrecked her truck. Carmie stated she heard Victim screaming while she was in the shower, but she did not think anything of it because Victim often yelled at her cat or the neighbors. According to Carmie, when she left the bathroom, Victim was dead. Carmie claimed Daniel took her cell phone, disconnected the landlines, and held her hostage in Victim's house for multiple days by threatening her pets. She admitted going to Harris Teeter and a liquor store on April 4th, but claimed she did so at Daniel's request and because of his threat to harm her and her pets if she called the police. She also claimed Daniel forced her to make the cell phone recordings, threatening to harm one of the dogs if she refused.

After Daniel called 911 and directed the police to Victim's home, police kicked open the door and placed Carmie in custody. The police found Victim's body in the crate in the garage as well as the murder weapon, a hammer. Carmie was arrested and subsequently indicted for murder.

At Carmie's trial, the only contested issue was who had murdered Victim—Carmie or Daniel. During Carmie's counsel's opening statement, he stated:

> We agree that the victim . . . was brutally murdered. We agree that she had at least 90 wounds to her body. We agree with the prosecutor about her cause of death. We agree about where she was killed. We agree in general what the murder weapon was, and we agree that on April 4, 2017, Daniel Nelson called police and reported a murder. . . . We disagree about one thing: Who killed her.

In addition to his version of the Victim's murder, Daniel testified that prior thereto, Carmie had asked him to harass and assault Victim, even going so far as to start planning Victim's murder. According to Daniel, he never agreed to help Carmie kill Victim, but he admitted she might have believed he had agreed to do so. Daniel also admitted he had been charged with accessory after the fact of murder for his involvement in this case, and he had charges pending for the January 2017 CDV against Carmie, the unlawful use of 911, and filing a false report of a felony nature. He further conceded he had provided law enforcement with multiple versions of his involvement in Victim's murder in an attempt to try to make himself look less culpable, including telling 911 and the police that he did not know Carmie had killed Victim when she asked him to come help her clean the house and saying he did not know what he was cleaning up when he knew it was blood.

The State also called the medical examiner who performed the autopsy on Victim, Dr. Nicholas Batalis. First, without the jury present, the State proffered Dr. Batalis's testimony regarding three of the State's exhibits, which were photos taken during Victim's autopsy. State's exhibits 75 and 76 are close-up photos of Victim's gruesome head and neck wounds, and they show partial decomposition of Victim's body. State's exhibit 77 depicts the victim lying on her stomach, showing stab wounds on her back and her swollen head, but it does not display the partial decomposition of Victim or her more gruesome wounds.

Dr. Batalis testified the photos showed fatal, blunt force wounds on the Victim's head, where the "skull had been shattered away" and "[y]ou can actually see down to the brain there," which were consistent with the Victim being hit with a hammer. He also stated the photos showed several sharp force wounds on Victim's neck, namely that her throat had been cut. He noted the photos showed some "green discoloration" on Victim's head where Victim was decomposing. Dr. Batalis admitted he had a diagram of Victim's injuries which he made during her autopsy,

and that he could testify and describe the wounds without the autopsy photos, but "the picture does a much better job of showing the feature, where the diagram is just an estimation." He stated his testimony as to his findings would remain the same with or without the pictures.

Carmie objected to the admission of autopsy photos, noting they were gruesome and would "inflame the passions of the jury," and that Batalis could testify using the diagram instead of the photos. The State asserted the photos were probative as to Victim's cause of death, would aid Dr. Batalis in describing the injuries to the jury, and were probative of malice. The trial court admitted the autopsy photos, "based on the doctor's testimony and the fact that he says it would help him show the jury the cause of death. . . . I think it does have some probative value. Probative value outweighs prejudicial value under 403."

Dr. Batalis then testified as an expert witness in front of the jury, and the State introduced the three autopsy photos into evidence over Carmie's renewed objections. Dr. Batalis testified Victim died on either April 2 or April 3, 2017, and she had 113 wounds to her head, neck, chest, and upper extremities. Dr. Batalis testified the blunt force trauma wounds to Victim's head were consistent with the Victim being struck by a hammer and were fatal, as was the sharp force injury to Victim's neck. He also explained Victim had nineteen stab wounds to her chest, which were consistent with being stabbed with a knife. Dr. Batalis opined Victim's cause of death was a combination of blunt force and sharp force wounds to her head, neck, and chest. Consequently, the jury heard a technical medical description. With or without the photos, Dr. Batalis nevertheless testified as to the gruesome nature of Victim's wounds. Thereafter, the jury convicted Carmie, and she was sentenced to life imprisonment.[1]

DISCUSSION

The sole issue before us is whether the court of appeals erred in affirming the admission of the autopsy photos over Carmie's Rule 403, SCRE, objection. Carmie sets forth several reasons why it was error to admit the autopsy photos, but the one we find most compelling is that the photos had little probative value as to any disputed fact in this case. Beginning with the opening statements at trial, it was clear that the only issue for the jury to decide was who killed Victim—Carmie or Daniel—

[1] Daniel was indicted for accessory after the fact of murder, pled guilty, and received a five-year sentence.

and that did not change throughout the trial. As we will discuss, the State always must prove its case beyond a reasonable doubt; however, the photos here provided little probative value as to any element of murder. Therefore, we hold it was error to admit the photos because their minimal probative value was substantially outweighed by the danger of unfair prejudice.

We begin our analysis by recognizing that the admission of evidence is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of an abuse of discretion accompanied by prejudice. *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). Under Rule 403, SCRE, relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Moreover, "[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Jones*, Op. No. 28145 (S.C. filed Mar. 29, 2023) (Howard Adv. Sh. No. 12 at 23, 54) (quoting *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986)).

Much of our case law surrounding the admission of gruesome autopsy photos and Rule 403, SCRE, arises in the context of the sentencing phase of a capital murder trial, where the scope of the probative value of such photos is necessarily broader. *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986) ("The trial judge is still required to balance the prejudicial effect of the photographs against their probative value. However, in the sentencing phase, the scope of the probative value is much broader."). By contrast, "[i]n the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *Id.* at 288–89, 350 S.E.2d at 185. Thus, while photographs may be inadmissible in the guilt phase of a trial, they are likely to be "relevant in the sentencing phase to show the circumstances of the crime and the character of the defendant." *Id.* at 289, 350 S.E.2d at 186; *see State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999) ("Photographs of a victim's body are admissible in the sentencing phase of a death penalty trial to show the circumstances of the crime and the character of the defendant.").

In *Kornahrens*, this Court found the trial court did not err in admitting autopsy photos during the sentencing phase of a capital murder trial because, "[They] showed what the defendant himself did to the bodies and nothing more. The appearance of the bodies as the defendant left them has not been altered by decomposition or by any other outside force." 290 S.C. at 288–89, 350 S.E.2d at 185–86. This court noted the autopsy photos "most likely would have been inadmissible in the guilt phase," but under the circumstances of the case, "they were relevant in the sentencing

phase to show the circumstances of the crime and the character of the defendant." *Id.* at 289, 350 S.E.2d at 186.

In *Middleton*, this Court concluded autopsy photographs showing a victim's scalp pulled away from her skull and the victim's vaginal cavity containing semen should have been excluded.[2] 288 S.C. at 24, 339 S.E.2d at 693. In reaching this finding, this Court noted the appellant offered to stipulate to the facts shown in the photos, but the State refused to accept the stipulation. *Id.* On appeal, the State argued the photos were properly admitted to corroborate forensic testimony, demonstrate the violent nature of the murders in this case, and to corroborate the appellant's statements, but the appellant argued the photographs did not contain disputed information and this information could have been proven by other evidence. *Id.* The State admitted the photos "were not essential to the prosecution." *Id.* In reversing, this Court noted appellant's offer to stipulate to the facts in the photos, that the information in the photos were not in dispute, and that the forensic pathologist's testimony "negated any arguable evidentiary value of the photographs." *Id.* Thus, this Court held, "[t]he prejudice created by the photographs clearly outweighed *any* evidentiary value." *Id.*

In *Torres*, this Court affirmed the trial court's decision to admit autopsy photos during the sentencing phase of a capital murder trial, noting the photos showed what the defendant did to the victim and went "straight to circumstances of the crime." 390 S.C. at 623–24, 703 S.E.2d at 229. This Court noted that while the photos were not "easy to view," the doctor who performed the victim's autopsy used the photos, including close-up photos of the victim's wounds, to "illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed" and "to help identify the nature of each particular injury." *Id.* at 624, 703 S.E.2d at 229. Importantly, we took the opportunity to address "an area of growing concern to this Court," stating:

> The photographs at issue in this case, while admissible, are at the outer limits of what our law permits a jury to consider. . . . *Today we strongly encourage all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured*.

[2] While *Middleton* was a capital murder case, it is unclear whether the autopsy photos were offered during the guilt phase or the sentencing phase of the trial.

Id. at 624, 703 S.E.2d at 229 (emphasis added).

This Court recently considered the admissibility of gruesome autopsy photos during the sentencing phase of a capital murder trial in *Jones*. Op. No. 28145, at 53-59. In *Jones*, we held the trial court erred in admitting autopsy photos of the bodies of the defendant's children during the sentencing phase of the trial, noting the autopsy photos had no probative value because they did not depict (1) the children's bodies in the same condition Jones left them in due to severe decomposition and (2) strangulation or ligature marks on the children and, as such, did not corroborate the testimony of the medical examiner. *Id.* at 57. We concluded that, even if the photos had probative value to show Jones's character and how Jones had disposed of his children's bodies, under Rule 403, SCRE, this probative value was substantially outweighed by the dangers of unfair prejudice. However, in *Jones*, the admission of the "horrific" photos was harmless because they did not contribute to the jury's decision to sentence Jones to death; instead, the admittedly horrific facts of the case did. *Id.* at 58–59.

The admission of autopsy photographs has also been discussed in non-capital murder trials. In *State v. Holder*, the defendant alleged the trial court erred in admitting autopsy photographs in a homicide by child abuse case despite the testimony of the doctor who performed the autopsy that while he could explain the victim's internal injuries to the jury without the photos, "he was not sure if he could explain it to their understanding" without the photos. 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). This Court affirmed the admission of the photos, noting they demonstrated the victim's injuries in a way the jury, which may have been unversed in medical issues, could easily understand. *Id.* at 290–91, 676 S.E.2d at 697. This Court also noted while the photos were graphic, "there is no suggestion their admission had an undue tendency to suggest a decision on an improper basis." *Id.* at 291, 676 S.E.2d at 697; *but see State v. Haselden*, 353 S.C. 190, 577 S.E.2d 445 (2003) (holding, based on Rule 403, SCRE, the admission of a photo of the victim's dilated anus during autopsy was error because it "did not go to the circumstances of the crime, the characteristics of the defendant, nor to the existence of aggravating circumstances . . . [t]he sole purpose of the photo was to insinuate that perhaps there was sexual abuse when, in fact, there was absolutely no evidence of such an assault").

In *State v. Collins*, a defendant was tried for several crimes, including involuntary manslaughter, related to his unrestrained dogs mauling a ten-year-old child to death. 409 S.C. 524, 531–34, 763 S.E.2d 22, 26–28 (2014). The trial court allowed the admission of seven autopsy photos taken by the forensic pathologist. *Id.*

at 532–33, 763 S.E.2d at 27. In *Collins*, the "nature and extent" of the victim's injuries was disputed by the defendant, and the photos, while gruesome, clearly showed the Victim's injuries. *Id.* at 532-33, 533 n.3, 763 S.E.2d at 27 n.3. Thus, this Court stated the photos should not be excluded on the ground they were gruesome when the photos were "highly probative, corroborative, and material in establishing the elements of the offenses charged; its probative value outweighed its potential prejudice; and the [court of appeals] should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.* at 535–36, 763 S.E.2d at 28. Yet, a majority of this Court in *Collins* reasoned the admission of the photos was error, although two of us concluded the error was harmless. *Id.* at 539–40, 763 S.E.2d at 30–31. Nevertheless, we noted "this case was tried in 2009, prior to our decision in *Torres,* where we expressed our concern over the State's seeming practice of seeking admission of highly prejudicial and inflammatory autopsy photographs." *Id.* at 539, 763 S.E.2d at 30 (Kittredge, J., concurring).

This case does not involve the admission of evidence during the sentencing phase of a capital murder trial; therefore, the trial court did not have broader discretion to allow evidence that would generally be inadmissible during the guilt phase of a trial. Our review of the jurisprudence in this area persuades us that this case follows those cases in which autopsy photos were admitted in error. This case is most similar to *Middleton*, wherein this Court noted the autopsy photographs in question had little, if any, evidentiary value because the information depicted in the photos was not in dispute and the scant evidentiary value they did contain was negated by the forensic examiner's testimony. 288 S.C. at 24, 339 S.E.2d at 693.

First, much like in *Middleton*, the information gained from the autopsy photos was not in question. Here, the only issue was who murdered Victim: Carmie or Daniel. Carmie raised no argument that Victim was not murdered, no argument that Victim was not murdered in the way the State claimed–namely, being beaten in the head with a hammer, having her throat slit, and receiving several stab wounds to her chest—and no argument that Victim did not have around 100 wounds on her body. Notably, Carmie did not even cross-examine Dr. Batalis, who performed the autopsy.

Second, as in *Middleton*, we believe the undisputed facts evidenced by the autopsy photos–the location, number, and type of wounds suffered by Victim and the inference of malice raised therefrom–could have been and were established by other convincing evidence. *See Kornahrens*, 290 S.C. at 288–89, 350 S.E.2d at 185 ("In the *guilt* phase of a trial, photographs of the murder victims should be excluded

where the facts they are intended to show have been fully established by competent testimony."). We agree with the State that even though these facts were undisputed, the State still had to prove how Victim was murdered and that Victim was murdered with malice. *See* S.C. Code Ann. § 16-3-10 (2023) (providing murder is "the killing of any person with malice aforethought, either express or implied").

However, we believe Dr. Batalis's testimony regarding the extent of Victim's injuries and Victim's cause of death established both how Victim was killed and that Victim was killed with malice. *See State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) ("'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong."). Dr. Batalis testified Victim had 113 wounds to her head, neck, chest, and upper extremities, including fatal blunt force trauma wounds to the head consistent with the Victim being struck by a hammer, a fatal sharp force injury to Victim's neck, and nineteen stab wounds to her chest consistent with being stabbed with a knife. Dr. Batalis opined Victim's cause of death was a combination of the blunt force and sharp force wounds to her head, neck, and chest. Dr. Batalis also stated he had a diagram he could use to show the jury the approximate locations and type of wounds suffered by the Victim, and his testimony as to Victim's cause of death would not change based on his ability to use the autopsy photos.[3] Thus, we believe Dr. Batalis's testimony as to Victim's 113 injuries could have properly established how Victim was killed and that Victim was killed with malice, negating the evidentiary value to be gained from the autopsy photos just as in *Middleton*. We note the State also established malice by introducing (1) Carmie's disparaging texts about Victim in the days preceding Victim's murder; (2) Daniel's testimony that Carmie had asked him to harass and assault Victim, and that Carmie had been planning to murder Victim; and (3) the recorded statement of Carmie saying she attacked Victim while she was on the couch and kept beating her after she fell to the ground.

[3] We acknowledge Dr. Batalis testified he believed the autopsy photos would better help the jury understand Victim's injuries than just his testimony and diagram similar to the medical examiner in *Holder*. 382 S.C. at 290–91, 676 S.E.2d at 697. However, we believe this case is distinguishable from *Holder* because, unlike the injuries in *Holder* which required the jury to understand the internal injuries suffered by the victim, 382 S.C. at 290–91, 676 S.E.2d at 697, we believe an average juror could understand just from Dr. Batalis's testimony that Victim died as a result of being bludgeoned in the head with a hammer, having her throat cut, and being stabbed multiple times in the chest.

In response to the State's argument the autopsy photos corroborated Daniel's testimony and therefore aided the jury in deciding whether he or Carmie was telling the truth about who murdered Victim, we note these photos provide no insight as to who killed Victim. Thus, we do not believe the autopsy photos corroborate Daniel's testimony that Carmie killed Victim. Under a Rule 403, SCRE, analysis, the photos had limited probative value. In this instance, where the photos were not needed to prove an issue in the case, the State should have heeded our warning in *Torres* to resist pushing the envelope on admissibility to gain a victory which was likely already assured.

The admission of these excessively gruesome autopsy photos unnecessarily created the potential for the jury to convict Carmie of the murder based on inflamed emotions in a case where the jury was provided with undisputed evidence as to how Victim died, as well as ample evidence that she had been killed with malice, whether by Carmie or Daniel. *See Jones*, Op. No. 28145, at 23, 54 ("[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." (quoting *Middleton*, 288 S.C. at 24, 339 S.E.2d at 693)). The potential for a verdict based on emotion was amplified by the fact the jury was informed that Daniel had also been charged in connection with this case but only faced an accessory after the fact of murder charge.

If this were a case such as *Collins* where the nature of the victim's injuries was in dispute or a case where there was no other convincing evidence of malice or the manner in which the victim died, then the photos may have had sufficient probative value to warrant their admission. In that scenario, while undeniably gruesome, the probative value of the photos may not have been substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. Nevertheless, here, there was minimal probative value in the photos because the issues of malice and how Victim was killed were not in dispute. Other convincing evidence established malice and how Victim was killed, thereby eliminating the photos' probative value. Thus, we believe the danger of unfair prejudice substantially outweighed any minimal probative value of the autopsy photos in this case. *See* Rule 403, SCRE. Accordingly, we believe the trial court erred in admitting the photos, and the court of appeals erred in affirming that decision.

REVERSED.

KITTREDGE, Acting Chief Justice, FEW, HILL, JJ., and Acting Justice Jean H. Toal, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James E. Carroll, Jr., Appellant,

v.

Isle of Palms Pest Control, Inc., SPM Management Company, Inc. and Terminix Service, Inc., Defendants,

Of which Isle of Palms Pest Control, Inc. and SPM Management Company, Inc. are Respondents.

Appellate Case No. 2019-000797

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 6011
Heard June 16, 2022 – Filed August 9, 2023

AFFIRMED

Robert T. Lyles, Jr., of Lyles & Associates, LLC, and Jody Vann McKnight, of McKnight Law Firm, both of Mount Pleasant; and Rose Beth Grossman Smith, of Greenville, all for Appellant.

Trent M. Kernodle and Stephen Michael Kozick, both of Kernodle Coleman, of James Island, for Respondent Isle of Palms Pest Control, Inc.; Robert Michael Ethridge, of Ethridge Law Group, LLC, and Mary Skahan Willis,

both of Mount Pleasant, for Respondent SPM Management Company, Inc.

VINSON, J.: In this civil action, James E. Carroll, Jr. appeals the circuit court's order granting partial summary judgment in favor of Isle of Palms Pest Control, Inc. (IOP) and SPM Management Company, Inc. (SPM) (collectively, Respondents). Carroll argues the circuit court erred in granting partial summary judgment in favor of Respondents as to his negligence claims when (1) the circuit court incorrectly held the economic loss rule applied; (2) Respondents owed Carroll duties created by the South Carolina Department of Pesticide Regulations (SCDPR) and industry standards that were separate and distinct from the contract; (3) the circuit court incorrectly limited Carroll's contractual remedy to $250,000; (4) by limiting Carroll's claims to breach of contract, the circuit court nullified the regulatory mandate requiring pest control applicators to carry insurance for the protection of homeowners because breach of contract claims are excluded from coverage; and (5) the circuit court's findings of fact and conclusions of law in its order denying his motion to reconsider were false and pretextual. We affirm.

FACTS AND PROCEDURAL HISTORY

This action arises from an alleged termite infestation and resulting damage to Carroll's residence. Carroll purchased 11 Tabby Lane on Isle of Palms (the Property) in November 2002. In February 2003, Carroll entered into a termite treatment and repair bond agreement (the Termite Contract) with IOP, a company owned and operated by Vincent Sottile. According to its terms, IOP was to treat the Property for subterranean termites, reinspect annually for infestations, and apply any necessary additional treatments, provided Carroll paid the annual reinspection fee of $250. Respondents agree that although Carroll did not sign the Termite Contract, it was a valid contract that remained in effect from February 2003 until the filing of this action. In June 2011, SPM was formed and took over IOP's termite services at the Property under the Termite Contract. Thereafter, SPM sold its assets to Terminix Services, Inc. (Terminix) in May 2013, and Terminix assumed the termite services at the Property. According to Carroll, Terminix inspected the Property in January 2014 and discovered "substantial live termites and termite damage." Carroll claimed Terminix treated the Property at that time and that in January 2015, Terminix again discovered and treated for live, active termites when it performed its annual reinspection. Carroll hired professional

contractors to complete an inspection of the Property, and they discovered the home was "inundated" with subterranean termites. Carroll claimed this demonstrated the treatments were not effective and that Respondents and Terminix were responsible for making repairs.

Carroll commenced this action against IOP, SPM, and Terminix[1] in November 2015 and filed a second amended complaint on July 27, 2016, asserting claims for breach of contract and negligence based on the alleged termite infestation and resulting damage to the Property. Carroll alleged IOP and SPM were negligent in failing to (1) properly inspect, treat, or apply treatment to the Property; (2) discover active termites in the Property; (3) train its employees regarding pest control management; (4) comply with South Carolina law and regulations pertaining to inspection for and treatment of termites; and (5) use the degree of care and caution that a reasonable, similarly situated termite pest management company would use. Carroll sought damages including the cost of repair to return the Property to its prior condition or, alternatively, for the replacement of the structure and for the diminished fair market value of the Property resulting from having to disclose termite damage to future potential homebuyers.

SPM moved for partial summary judgment on February 5, 2019—fourteen days before trial was scheduled to start—and argued it was entitled to summary judgment as to Carroll's negligence claims because he failed to allege SPM owed him any legal duties apart from those set forth in the Termite Contract and such claims were therefore barred by the "economic loss rule."[2] In addition, SPM argued it was entitled to summary judgment on the issue of damages and Carroll's damages award was limited to $250,000 as set forth in the Termite Contract.

According to Carroll, he emailed a copy of his memorandum in opposition to SPM's motion for partial summary judgment to the circuit court's law clerk and opposing counsel on February 18, 2019—two days before the hearing. Carroll

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[1] Terminix is no longer party to this lawsuit.

[2] *See, e.g.*, *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) ("The economic loss rule is a creation of the modern law of products liability. Under the rule, there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. In other words, tort liability only lies where there is damage done to other property or personal injury." (citation omitted)).

included several exhibits with the memorandum, including excerpts of deposition testimony from Sottile and Carroll's experts, Cecil Hernandez and Maxcy P. Nolan, III. Carroll acknowledged, however, he did not file this submission until February 22, 2019, two days after the hearing.

In his memorandum, Carroll argued regulation 27-1083[3] required a termite prevention company to maintain records for two years or the duration of the contract, whichever is longer. In addition, he argued regulation 27-1085(D)[4] required all chemicals used on a property to be used according to label instructions and documented with a special "Termiticide Disclosure Form." He stated that, according to Sottile's deposition, Sottile "decided to stop monitoring and protecting [the P]roperty with the Exterra Bait Stations[] and instead . . . applied Termidor termiticide to the ground" sometime in 2008. Carroll stated Sottile testified he "beaded" termiticide around the Property in 2003 but did not inform Carroll or "file the appropriate 'Termiticide Disclosure Form.'"

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[3] *See* S.C. Code Ann. Regs. 27-1083(C)(3)(b) (2011) ("Records of pesticide applications must be maintained by the company, firm, or licensed commercial or noncommercial applicator as detailed below: . . . For post-construction termite-control treatments, including the installation of bait systems and baits containing active ingredients, records of termiticide application must be maintained for a period of two (2) years from the date of application or as long as a continuing warranty or contract exists, whichever is longer . . . .").

[4] *See* S.C. Code Ann. Regs. 27-1085(D) (Supp. 2022) ("The chemicals, methods, and systems permitted in the control of termites or other wood-destroying organisms shall be only those pesticides which are registered in South Carolina for that use. The chemical and control methods must be used in the proper proportions and in the quantities and manner directed on the label or in these Standards."); *see also* Regs. 27-1085(D)(6) ("All applications of termiticides, including re-treatments and supplemental or 'booster' treatments, must be properly recorded on the Record of Termiticide Use form published by [SCDPR] or in an alternative manner acceptable to [SCDPR]. These record-keeping requirements for termiticide applications apply to bait installations and wood-treatment methods as well as to liquid termiticides. These records must be maintained by the firm as specified in [regulation] 27-1083[(C)] above and must be presented to the Director or his authorized representatives for review and duplication upon their request at the expense of [SCDPR].").

Carroll argued the economic loss rule did not apply and he could sue in tort and contract. He argued Hernandez's deposition testimony showed the use of termiticide treatment did not meet industry standards and that Sottile's trial testimony would show the treatment was not "an application according to labeled instructions" in violation of the SCDPR regulations. Finally, Carroll argued he was entitled to damages up to $250,000 under the contract for each year the contract was violated.

The circuit court heard SPM's motion for partial summary judgment on February 20, 2019. During the hearing, IOP stated it joined in SPM's motion on the same grounds. SPM argued the case *Duc v. Orkin Exterminating Co.*,[5] in which the South Carolina district court limited a plaintiff's claims to those available under contract, supported its position as to Carroll's negligence claims. Carroll argued he and IOP entered into an exterior bait station agreement and without telling Carroll, IOP undertook a duty separate from the contract "of putting termiticide around the home." He acknowledged "it was all related to . . . keeping termites out of the [P]roperty" but argued "the agreement did not call for that." Carroll referenced Sottile's deposition testimony during the hearing and stated Sottile "sa[id] he beaded" the termiticide and that Carroll's experts—Hernandez, Nolan, and James Wright—indicated in their depositions that such treatment was "not within the standards." Carroll argued regulation 27-1085 required termiticide to be applied "according to the label in the context in which it[wa]s being done" and here it was applied when there were no active termites. Carroll asserted IOP also failed to comply with regulation 27-1083 because it applied the termiticide without informing him or completing a Termiticide Disclosure Form. He maintained the economic loss rule did not apply because the losses were more than merely economic. Carroll argued he was entitled to $250,000 in damages for every year the Termite Contract was renewed. He additionally argued, in general terms, that insurance carriers did not provide coverage for breach of contract and this essentially "le[ft] homeowners with no money ever" if they were forced to only pursue contract remedies and were not permitted to sue for negligence.

At the conclusion of the hearing, the circuit court ruled in favor of Respondents. The court ruled that based upon the record, Carroll failed to demonstrate any negligent act that arose outside of the contract. The circuit court indicated its record included the file, the exhibits, and the exhibits submitted with the

[5] 729 F. Supp. 1533, 1535 (D.S.C. 1990).

memorandum in opposition to partial summary judgment. Thereafter, the circuit court issued a written order granting Respondents' motion for partial summary judgment. Citing to *Dixon v. Texas Co.*[6] and *Duc*, the circuit court ruled Carroll's remedy was for breach of contract because Respondents owed no duty distinct from the contract. The circuit court noted it reviewed the record, including Carroll's second amended complaint and the "motions and memorandum of law filed in support therewith." It then concluded Carroll's claims arose from the Termite Contract and his negligence claim must be dismissed as a matter of law because it was "barred by the economic loss rule."

Carroll filed a motion to reconsider. First, he argued the circuit court should acknowledge its review and consideration of his memorandum in opposing partial summary judgment, including exhibits. Second, he argued his claims for negligence arose out of duties created by the SCDPR regulations, which were separate and distinct from any duties owed under the contract. Specifically, he argued a duty arose under regulation 27-1085(A), (B)(2), and (D). Next, Carroll again argued the economic loss rule did not bar his negligence claims and his contractual remedies amounted to $250,000 per year for every year the contract was renewed. He additionally asserted Respondents' counsel admitted their insurance policy did not contain liability insurance for breach of contract. Carroll therefore contended that eliminating his tort claims would nullify the regulations requiring pest control applicators to carry insurance for the protection of homeowners and thus violated public policy. He attached several exhibits with his motion to reconsider, including a complete transcript of Nolan's November 2016 deposition testimony; a complete transcript of Wright's deposition testimony, including 140 pages of exhibits; a complete transcript of Sottile's deposition testimony; a complete transcript of Hernandez's deposition testimony; and a copy of his memorandum in opposition to the motion for partial summary judgment, including exhibits.

The circuit court denied Carroll's motion to reconsider. The circuit court rejected his request to consider his memorandum in opposing partial summary judgment and attached exhibits because it was neither filed prior to the hearing nor provided

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[6] 222 S.C. 385, 389, 72 S.E.2d 897, 899 (1952) ("Ordinarily, where there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract, but when the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is a tort.").

to the court at the hearing. It reasoned that pursuant to Rule 56(c), SCRCP, it had discretion to make the documents part of the file only if it did not prejudice Respondents. The circuit court concluded Respondents would "clearly be prejudiced" if it amended its order to include the unfiled memorandum and exhibits. In addition, the circuit court found Carroll attempted to raise the following as new legal arguments in his motion to reconsider: (1) Respondents owed duties created by the SCDPR and industry standards; (2) Respondents owed duties created by SCDPR regulation 27-1085(A) and (B)(2), neither of which he referenced in his memorandum in opposition; (3) the termite industry is a regulated industry and therefore falls within the narrow exception to the economic loss rule set forth in *Kennedy*[7]; and (4) Respondents owed him duties arising from regulatory and industry standards for application of termiticide separate and apart from the contractual duties under the Termite Contract. The circuit court declined to consider these arguments because Carroll failed to raise them during the hearing on the motion for partial summary judgment. The circuit court further declined to consider the additional exhibits because the exhibits Carroll attached to his memorandum in opposition included only excerpts from Hernandez's, Nolan's, and Sottile's depositions and did not reference Wright's deposition at all. The circuit court concluded that even if it were to take such arguments and evidence into consideration, it would still find Carroll's arguments were without merit. The circuit court stated the Termite Contract governed the relationship between Carroll and Respondents, Respondents agreed to inspect and treat the Property for termites and repair any damages resulting from termites up to $250,000, and South Carolina law did not recognize a tort duty under these circumstances. The circuit court concluded the economic loss rule barred Carroll's tort claims and that the exception in *Kennedy* did not apply because it was limited to residential housing construction. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding *Duc v. Orkin Exterminating Co.* and the economic loss rule applied to Carroll's negligence cause of action?

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[7] *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 345-47, 384 S.E.2d 730, 736-37 (1989) (holding the economic loss rule does not prevent the imposition of tort liability upon a residential homebuilder when the builder violates a legal duty and that the "violation of a building code" or failure to "undertake construction commensurate with industry standards" violates a builder's legal duty).

2. Did the circuit court err in granting Respondents' motion for partial summary judgment as to Carroll's negligence claim when SCDPR regulations and industry standards created a duty separate and distinct from duties owed under the contract?

3. Did the circuit court err in limiting the contractual remedy to $250,000 total, rather than $250,000 per year for each year the contract was renewed?

4. Did the circuit court err in limiting Carroll's claims to breach of contract when Respondents' insurance coverage excluded breach of contract from coverage?

5. Should this court reject the findings and conclusions of the circuit court's order denying reconsideration because they were false and pretextual?

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008). "[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 110, 662 S.E.2d at 41; *see also* Rule 56(c), SCRCP ("[Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

LAW AND ANALYSIS

A. Negligence Claims

Carroll argues the economic loss rule does not apply to his claims because the rule precludes tort liability when a defective product causes injury to the product itself and whether it applies to services is not settled law. He argues his claims arise from Respondents' failure "to properly perform pest control services at the

Property" in conformance with industry standards and regulations. Citing to *Kennedy*, Carroll further argues that when private parties contract in a "regulated industry," and a party violates the applicable regulations in performing the contract, the aggrieved party has a cause of action in tort. He contends that pursuant to *Kennedy*, regulations and industry standards create legal duties and Respondents were liable in tort because they violated these duties. Carroll contends the circuit court erred in relying on *Duc* because it did not involve alleged regulatory violations or allegations of other breaches of duties originating outside of the contract. He additionally asserts the economic loss rule did not apply to his claims because he sought damages for harm to the Property.

Carroll next argues that under regulation 27-1085(B)(2),[8] the breach of a contract is "a dual regulatory violation." He contends "evidence of a regulatory violation is evidence of negligence" and the duties arise out of both contract and regulation, allowing him to maintain causes of action for negligence and breach of contract pursuant to *Kennedy*. In addition, Carroll asserts that when Respondents applied termiticide, they undertook duties pursuant to regulatory requirements and industry standards for application of termiticide that were "separate and apart from the contractual and regulatory duties inherent to the [Termite Contract]." He argues the expert testimony of Wright, Nolan, and Hernandez created questions of fact as to whether Respondents violated "pesticide application and operator regulations as part of the contractual and extra-contractual activities in relation to the Property." Carroll asserts regulation 27-1083 requires records of treatment or bait station monitoring be kept for as long as the contract is in place and that Nolan testified IOP violated the regulations by failing to document such treatment. Carroll argues Wright testified Respondents violated the standard of care for termiticide use, bait station use, and bait station monitoring. We disagree.

"The economic loss rule is a creation of the modern law of products liability." *Sapp*, 386 S.C. at 147, 687 S.E.2d at 49. It provides "there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself." *Id.* "In other words, tort liability only lies where there is damage done to other property or personal injury." *Id.* The purpose of this rule "is to define the line between recovery in tort and recovery in contract." *Id.* "Contract law seeks to

[8] *See* S.C. Code Ann. Regs. 27-1085(B)(2) (Supp. 2022) ("Treatment and inspection must be performed in accordance with these regulations and with the terms of the written agreement or contract for as long as the contract is valid.").

protect the expectancy interests of the parties," whereas tort law "seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property." *Id.* "In most instances, a negligence action will not lie when the parties are in privity of contract. When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995).

In *Kennedy*, our supreme court established a narrow exception to the economic loss rule in the context of residential home building and held the rule did not bar recovery in tort when a builder violates an applicable building code or deviates from industry standards. 299 S.C. at 347, 384 S.E.2d at 738; *see also Sapp*, 386 S.C. at 148, 687 S.E.2d at 49 (explaining the court in *Kennedy* created a "narrow exception to the economic loss rule to apply solely in the residential home [building] context"). The court explained, "If a builder performs construction in such a way that he violates a contractual duty *only*, then his liability is only contractual," but "[i]f he acts in a way as to violate a legal duty . . . his liability is both in contract and in tort." *Kennedy*, 299 S.C. at 346, 384 S.E.2d at 737.

In *Tommy L. Griffin Plumbing & Heating Co.*, our supreme court held design professionals were not insulated from liability "when the relationship between the design professional and the plaintiff [wa]s such that the design professional owe[d] a professional duty to the plaintiff arising *separate and distinct from any contractual duties between the parties*." 320 S.C. at 55, 463 S.E.2d at 89 (emphasis added). The court explained,

> In our view, the *Kennedy* application of the 'economic loss' rule maintains the dividing line between tort and contract while recognizing the realities of modern tort law. . . . [T]he question of whether [a] plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty [the] plaintiff claims the defendant owed. A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising

> independently of any contract duties between the parties, however, may support a tort action.

Id. at 54-55, 463 S.E.2d at 88 (footnote omitted).

In *Koontz v. Thomas*, this court applied the economic loss rule to plaintiff's professional negligence claim against an architectural firm and upheld the circuit court's conclusion that the rule barred such claims because "the alleged breaches of duty in th[at] case [we]re contractual in nature." 333 S.C. 702, 712, 511 S.E.2d 407, 412 (Ct. App. 1999). We noted, "Our inquiry . . . is whether the duties [plaintiff] allege[d] . . . ar[o]se from the parties' contract or independently therefrom." *Id.*

Neither *Dixon* nor *Duc* specifically reference the economic loss rule, but in both cases, the court found the plaintiff was not entitled to bring tort claims when his allegations arose out of the performance or nonperformance of a contract. In *Dixon*, our supreme court concluded the plaintiff could bring an action only for breach of contract because "[t]he breach of duty complained of ar[ose] solely from contract and constitute[d] nonfeasance rather than misfeasance." 222 S.C. at 390, 72 S.E.2d at 899. The court stated, "Ordinarily, whe[n] there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract, but when the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is a tort." *Id.* at 389, 72 S.E.2d at 899. In *Duc*, the United States District Court granted summary judgment as to the plaintiff's allegations of negligence, holding the plaintiff could not recover on his negligence cause of action because the defendant owed him "no legal duties independent of the contract." 729 F. Supp. at 1535. The court stated, "South Carolina courts have recognized the distinction between contract and tort causes of action and have held that in order for a plaintiff to state a claim in tort, he must allege a duty owed him by the defendant separate and distinct from any duty owed under a contract." *Id.* In granting summary judgment, the court reasoned that the contract created and defined the duties and liabilities of the parties and that the plaintiff "alleged no breach of duty by [the defendant] that [wa]s independent of the contract." *Id.*

We hold the circuit court did not err in granting partial summary judgment in favor of Respondents on the ground that Carroll failed to identify a duty Respondents owed to him outside of the contract. Here, the Termite Contract defined the duties

and liabilities of the parties. Respondents' duty under the contract was to treat, reinspect, and control for termite activity. Carroll alleged that as a result of Respondents' failure to properly inspect and treat for termites, termite activity occurred and caused damage to the Property, which he seeks to repair. He acknowledged during the summary judgment hearing that Respondents' actions "all related to . . . keeping termites out of the [P]roperty." The contract therefore provided for the precise damage that occurred. Even assuming Respondents' failure to adequately perform pest control services violated regulations and industry standards, all of these acts relate to the duties Respondents' owed Carroll under the contract. Thus, such claims do not give rise to legal duties owed outside of the contract. Because Respondents' duties arise solely from contract, we hold the circuit court did not err in concluding Carroll was barred from pursing negligence claims against Respondents. Further, Carroll's allegations pertain to a contract to perform termite services and do not involve residential home building. Thus, we hold the exception to the economic loss rule set forth in *Kennedy* does not apply. *See Sapp*, 386 S.C. at 148, 687 S.E.2d at 49 (explaining the court in *Kennedy* created a "*narrow* exception to the economic loss rule to apply solely in the residential home [building] context" (emphasis added)); *see also Kennedy*, 299 S.C. at 347, 384 S.E.2d at 737 ("The 'economic loss' rule will still apply where duties are created *solely* by contract. In that situation, no cause of action in negligence will lie." (footnote omitted)). Based upon the foregoing, we affirm the circuit court's grant of partial summary judgment as to Carroll's negligence claims because he failed to identify a legal duty separate and distinct from Respondents' contractual duty under the Termite Contract.[9]

B. Limitation of Remedy to $250,000

Carroll argues each annual renewal of the contract entitled him to $250,000 for each year that Respondents were in breach of the contact.

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[9] Carroll asserts the issue of whether the economic loss rule applies to contracts for services remains unsettled law. We find this argument is not preserved for our review. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); *cf. Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 703 (D.S.C. 2004) (noting "the contours of the doctrine remain far from clear").

Carroll has cited no legal authority to support this argument. We therefore find this issue is abandoned. *See Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 594 (Ct. App. 2005) (noting the appellant abandoned issues on appeal and this court need not consider them when the appellant failed to cite any supporting authority for its position and its arguments were merely conclusory statements).

C. Exclusion from Coverage

Finally, Carroll argues SCDPR regulations require pest control companies to carry liability insurance and limiting his remedy to breach of contract would nullify this regulation. He contends that during an off-the-record discussion in chambers, Respondents' counsel informed the circuit court that Respondents' policies contained an exclusion for contractual liability. Carroll asks this court to take judicial notice that policy forms for commercial general liability insurance coverage "are generally alike, as evidenced by the exclusionary language in both [Respondents'] policies." He argues this provides another basis for allowing a cause of action in tort in this context.

We find these arguments are not preserved for appellate review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *see also Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). During the hearing on the motion for partial summary judgment, Carroll argued, in general terms, that insurance carriers do not provide coverage for breach of contract, leaving homeowners no remedy if they are unable to pursue negligence claims. However, Carroll provided no evidentiary support or legal authority for this argument prior to, or during, the summary judgment hearing. *See Loyd's Inc. by Richardson Constr. Co. of Columbia, S.C. v. Good*, 306 S.C. 450, 453, 412 S.E.2d 441, 443 (Ct. App. 1991) ("[Rule] 56(c) requires summary judgment motions and, inferentially, supporting materials to be on file when they are to be relied upon at a summary judgment motion hearing."). Further, Carroll acknowledged the discussion regarding liability coverage occurred off the record. *See York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review. "). We hold this was insufficient to raise the issue to the circuit court at the summary judgment

phase. Rather, Carroll argued Respondents' insurance policies contravened SCDPR regulations for the first time in his motion to reconsider. Accordingly, we hold Carroll failed to preserve these arguments for appellate review. *See Peterson v. Porter*, 389 S.C. 148, 152, 697 S.E.2d 656, 658 (Ct. App. 2010) (finding an issue was not preserved for appellate review when the appellant raised the argument in a motion to reconsider but failed to raise it during the summary judgment proceedings).

D. Motion to Reconsider

Carroll asserts this court should "reject the findings and conclusions" in the circuit court's order denying his motion to reconsider because they were "false and pretextual." Carroll contends that although the circuit court failed to mention the memorandum or exhibits in its order granting the motion for partial summary judgment, this court must consider these submissions part of the record because the circuit court incorporated them into the record during the hearing.

To the extent Carroll argues the circuit court erred in refusing to consider his memorandum opposing the motion for partial summary judgment and attached exhibits and in declining to consider evidence Carroll presented for the first time with his motion to reconsider, we find these arguments are without merit because the circuit court acted within its discretion. *See* Rule 56(c), SCRCP (providing a motion for summary judgment "shall be served at least [ten] days before the time fixed for the hearing," and "[t]he adverse party may serve opposing affidavits not later than two days before the hearing"); *Loyd's Inc.*, 306 S.C. at 453, 412 S.E.2d at 443 ("[Rule] 56(c) requires summary judgment motions and, inferentially, supporting materials *to be on file when they are to be relied upon at a summary judgment motion hearing*. To be on file, we hold they ordinarily must have been filed." (emphasis added); *id.* ("However, . . . whe[n] the court file is in the physical custody of the trial judge we hold she ha[s] the discretion and the inherent power to receive the documents and make them a part of the file provided their receipt did not prejudice [the defendant]."); *see also First Union Nat'l Bank of S.C. v. Hitman, Inc.*, 308 S.C. 421, 422, 418 S.E.2d 545, 545 (1992) ("[A] judge is not bound by [a] prior oral ruling and may issue a written order which is in conflict with the oral ruling."); *Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 ("An issue may not be raised for the first time in a motion to reconsider.").

Regardless, we have considered Carroll's memorandum and exhibits. Even considering these submissions, we hold the circuit court did not err in granting the motion for partial summary judgment. *See Town of Summerville*, 378 S.C. at 110, 662 S.E.2d at 41 ("[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."). Viewing this evidence in the light most favorable to Carroll, we find none of this evidence established the existence of a duty owed by Respondents to Carroll that was separate and apart from the contract. Rather, the testimony Carroll relies upon pertained to Respondents' failure to perform according to the terms of the Termite Contract. As to the expert testimony regarding the application of termiticide and the violation of regulations and industry standards, this testimony also relates to Respondents' conduct with respect to its duties under the Termite Contract. Thus, we hold the circuit court did not err in finding the evidence did not establish the existence of a duty owed to Carroll that was separate and distinct from the contract.

CONCLUSION

Based on the foregoing, the circuit court's order granting partial summary judgment in favor of Respondents is

AFFIRMED.

WILLIAMS, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kevin Cox, on behalf of himself and all others similarly situated, Appellant,

v.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery, and Intralot, Inc., Respondents.

Appellate Case No. 2019-000501

Appeal From Lee County
Kristi F. Curtis, Circuit Court Judge

Opinion No. 6012
Heard November 9, 2022 – Filed August 9, 2023

AFFIRMED

Joseph Clay Hopkins, of Charleston, for Appellant.

William Stevens Brown, V, and Miles Edward Coleman, both of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent South Carolina Education Lottery Commission.

Joseph Preston Strom and Bakari T. Sellers, both of Strom Law Firm, LLC, of Columbia; and Mario Anthony Pacella, of Strom Law Firm, LLC, of Brunswick, Georgia, all for Respondent Intralot, Inc.

VINSON, J.: Kevin Cox, on behalf of himself and all others similarly situated, appeals the circuit court's orders granting the South Carolina Education Lottery Commission's (SCELC's) and Intralot, Inc.'s[1] (Intralot's; collectively, Respondents') motions to dismiss for failure to exhaust administrative remedies. We affirm.

FACTS AND PROCEDURAL HISTORY

Cox filed a summons and putative class action complaint in February 2018, and an amended class action complaint in June 2018, alleging he purchased five Mega Millions[2] lottery tickets that he later discovered included four duplicate tickets. He estimated the purported class included at least 100,000 individuals with at least $100 in damages incurred as a result of Respondents' alleged misconduct.[3] The amended complaint raised the following four causes of action against Respondents: unjust enrichment, breach of contract and breach of implied contract, promissory estoppel, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).[4] Under Cox's causes of action for unjust enrichment and promissory estoppel, he specifically sought damages for the purchase of winning tickets. The amended complaint also raised a cause of action for negligence and gross negligence against Intralot, although Cox noted he specifically denied there was a printing error on the tickets.

Respondents filed motions to dismiss. SCELC argued, inter alia, the circuit court lacked jurisdiction over Cox's claims because he failed to exhaust his administrative remedies, some or all of his claims were barred by the doctrine of sovereign immunity, and the amended complaint failed to assert a cause of action upon which relief could be granted. Specifically, SCELC argued the South Carolina Education Lottery Act (the Act)[5] and SCELC regulations required any lottery player aggrieved by an action or decision of SCELC to first file a formal written complaint with SCELC's executive director. Thereafter, a player wishing to challenge the executive director's decision must appeal to the SCELC board within fifteen days of receiving the executive director's written decision and may

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[1] Intralot is a private company that provided administrative and technical services to SCELC.
[2] Mega Millions is a multi-state lottery game.
[3] It is unclear from the record on appeal whether the circuit court certified the class.
[4] S.C. Code Ann. §§ 39-5-10 to -730 (2023).
[5] S.C. Code Ann. §§ 59-150-10 to -410 (2020 & Supp. 2022).

appeal the board's decision to the administrative law court (the ALC). Because Cox failed to allege he had exhausted his administrative remedies through this procedure, SCELC contended Cox's suit was premature and should be dismissed on that ground. Further, SCELC argued the doctrine of sovereign immunity barred Cox's unjust enrichment and promissory estoppel claims. It asserted the Tort Claims Act (the TCA)[6] does not include a waiver of sovereign immunity for such equitable claims. Finally, SCELC argued that under section 59-150-230(C)(3),[7] it was prohibited from paying the purported prize money on the Mega Millions tickets at issue because they were unissued, or conversely, produced or issued in error. It asserted this statutory prohibition was also fatal to Cox's breach of contract and implied breach of contract claims because misprinted tickets could not form the basis for these claims.

Intralot argued Cox's complaint should be dismissed because he failed to exhaust his administrative remedies—incorporating by reference SCELC's administrative remedy argument—and failed to state a claim for which relief may be granted against Intralot. Intralot first argued Cox's unjust enrichment claim failed because he failed to plead any facts establishing a contractual relationship with Intralot, either express or implied. Second, it argued Cox's breach of contract and breach of implied contract claims failed for lack of standing when Cox did not allege Intralot was involved in the approval of lottery ticket retailers or the sale of lottery tickets or that he was in privity with Intralot. Third, Intralot argued Cox's promissory estoppel claim failed because he did not allege reliance on a negligent misrepresentation made by Intralot regarding payments for winning lottery tickets. Lastly, Intralot argued Cox's negligence cause of action failed because Cox did not include any factual allegations in his amended complaint demonstrating Intralot owed him a duty of care or establishing a breach of any such duty.

In response to Respondents' motions to dismiss, Cox filed a memorandum only in opposition to SCELC's motion. Cox first argued he was not required to exhaust his administrative remedies because the Act's grievance procedure was not applicable to his claim. He asserted his amended complaint did not allege there was an error in the system that produced the duplicate lottery tickets and therefore, section 59-150-230(C)(3)(a), which prohibits SCELC from paying unissued or erroneously issued lottery tickets, was inapplicable to his claim. Cox avers that because there

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[6] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2022).

[7] S.C. Code Ann. § 59-150-230(C)(3)(a) ("A prize must not be paid if it . . . arises from claimed lottery game tickets that are . . . unissued, [or] produced or issued in error . . . .").

was no alleged error, there was no need for him to file a complaint with SCELC or appeal to the SCELC board or the ALC. In addition, Cox contended SCELC's administrative remedy argument was moot because he initiated an administrative review that was denied by SCELC. Second, Cox argued sovereign immunity did not bar his equitable claims against SCELC. He asserted SCELC was not acting in, or serving a discretionary function by running the lottery. Cox maintained running the lottery was a commercial venture not protected by sovereign immunity under the TCA. Finally, Cox conceded his claims under SCUTPA should be dismissed.

At the motion hearing,[8] Respondents addressed the arguments raised in their motions to dismiss, while Cox addressed the arguments raised in his memorandum in opposition in addition to raising new arguments. Cox argued he was not required to exhaust his administrative remedies because the Act used permissive language when addressing the administrative procedures. In addition, Cox asserted the administrative process would be futile; however, his argument only addressed the related case. He generally stated, "[O]ut of an abundance of caution, we filed—for all of our clients, we submitted complaints to [SCELC]. . . . I believe, we have now received formal responses on all of those stating they reject or deny our claim for payment . . . ." He further argued SCELC was not entitled to claim sovereign immunity under the TCA because the lottery could not be considered "a quintessential government function." As to Intralot, Cox argued he was in privity with Intralot because lottery players were third-party beneficiaries of SCELC's contract with Intralot. He conceded his claim against Intralot for promissory estoppel should be dismissed because he could not identify an express promise made by Intralot.

The circuit court granted Respondents' motions to dismiss on the ground Cox failed to exhaust his administrative remedies. In its order granting SCELC's motion to dismiss, the circuit court determined that under the Act and SCELC regulations, any person aggrieved by an action or decision of SCELC must first file a written complaint with the SCELC executive director. If the aggrieved person is dissatisfied with the executive director's decision, they could then appeal the decision to the SCELC board and then to the ALC. The circuit court acknowledged the Act permitted, but did not mandate, an exclusive administrative remedy; however, the court noted our supreme court has required exhaustion when

[8] The circuit court held a joint hearing to consider Respondents' motions to dismiss in this case and a related case. The hearing primarily concerned the parties' arguments in the related case.

there is an adequate administrative remedy even though the statute did not expressly require it. Further, the circuit court determined Cox failed to allege the exhaustion of the entire administrative process would be futile. Finally, the circuit court found the requirement to exhaust the entire administrative review process applied to putative classes of claimants. Because Cox failed to allege he followed the procedures for administrative review or that doing so would be futile, the circuit court dismissed Cox's complaint for failure to exhaust his administrative remedies. In its order granting Intralot's motion to dismiss, the circuit court restated its findings on whether Cox was required to exhaust his administrative remedies. Cox did not file a Rule 59(e), SCRCP motion to reconsider. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in granting Respondents' motions to dismiss?

STADARD OF REVIEW

"Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994). "An abuse of discretion occurs where the [circuit court] was controlled by an error of law or where [the circuit court's] order is based on factual conclusions that are without evidentiary support." *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (quoting *Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992)).

LAW AND ANALYSIS

Cox first argues his claims for breach of contract, unjust enrichment, promissory estoppel, and negligence were not subject to the requirement of exhaustion of administrative remedies. Specifically, he asserts there is no administrative exhaustion requirement for tort claims brought against a third-party and therefore, the requirement did not apply to his claims against Intralot. Further, Cox contends his claims were not based on a statutory violation that mandated the pursuit of an administrative remedy. Lastly, Cox asserts the SCELC board had not notified him of a decision prior to the filing of the amended complaint and therefore, the administrative procedure did not apply to him.

We find these exhaustion arguments are not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Cox did not raise these arguments in his memorandum in opposition to SCELC's motion to dismiss or at the motion hearing and he failed to file a Rule 59(e) motion to alter or amend. *See Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review."); *Ness v. Eckerd Corp.*, 350 S.C. 399, 403-04, 566 S.E.2d 193, 196 (Ct. App. 2002) ("If a [circuit court] grants 'relief not previously contemplated or presented to the [circuit] court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.'" (quoting *In re Est. of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 923 (Ct. App. 1998))); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 (holding that imposing preservation requirements on an appellant "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"). Accordingly, we find these arguments are unpreserved.

Next, Cox argues the Act's grievance procedure was inapplicable to his claims because he did not allege his lottery tickets were erroneously issued. Cox contends the prohibition under section 59-150-230(C)(3)(a) preventing SCELC from paying winnings on tickets unissued or erroneously issued was inapplicable, or in the alternative, presented a question of fact. We disagree.

"[T]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trs*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (quoting *Ward v. State*, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000)). "[T]he failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." *Id.* (quoting *Ward*, 343 S.C. at 17 n.5, 538 S.E.2d at 246 n.5).

> Exhaustion is generally required as a matter of
> preventing premature interference with agency processes,

> so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). "Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts." *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583. "[The circuit court] must have a sound basis for excusing the failure to exhaust administrative relief." *Id.* at 209, 442 S.E.2d at 583.

We hold the circuit court did not abuse its discretion in finding Cox was required to exhaust his administrative remedies under the Act and SCELC regulations. Initially, Cox did not argue to the circuit court that the administrative process under the Act and SCELC regulations was not applicable to claims concerning the determination of whether a prize should be paid on a lottery ticket. Thus, we find this argument is not preserved. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."). Instead, Cox argued the administrative process was only applicable to tickets that were alleged to have been produced or issued in *error*. We conclude Cox's argument misconstrues the Act.

The Act and SCELC regulations provide an administrative remedy to determine whether a prize should be paid on a lottery ticket. *See Hyde*, 314 S.C. at 208, 442 S.E.2d at 583 ("Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts."). Section 59-150-230(C) provides, "[SCELC] shall promulgate regulations and adopt policies and procedures to establish a system of verifying the validity of lottery games tickets or shares claimed to win prizes and to effect payment of prizes." Regulations 44-70(E)-(F) (2011) of the South Carolina Code of Regulations state the SCELC executive director may deny awarding a prize to a claimant if the ticket was issued or produced in error and the executive director's decision is subject to an appeal to SCELC. Section 59-150-300(A) provides that any "lottery game ticket holder aggrieved by an action of the [SCELC] board may appeal that decision to the [ALC]." A final decision of the ALC involving SCELC must be appealed to the circuit court. *See* S.C. Code Ann. § 59-150-300(D). Although section 59-150-230(C)(3)(a)

provides, "A prize must not be paid if it . . . arises from claimed lottery game tickets that are . . . unissued, [or] produced or issued in error," we find the administrative procedure was applicable to all claims concerning the payment of a prize on a lottery ticket regardless of whether *the claimant alleged* there was an error. The determination of whether the ticket was issued or printed in error was a factual determination to be made by SCELC through the administrative process. Furthermore, we reject Cox's assertion that the circuit court accepted Respondents' claim the lottery tickets were printed in error in determining Cox was required to exhaust his administrative remedies. Accordingly, we hold the circuit court did not abuse its discretion in finding Cox was required to exhaust his administrative remedies under the Act and SCELC regulations. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) (holding if "the language of a statute or regulation directly speaks to the issue. . . . the court must utilize the clear meaning of the statute or regulation").

Cox further argues an administrative review of his claims would be futile because SCELC refused to offer any relief to him and the SCELC board's decision "was certain to be unfavorable." Similarly, Cox argues Respondents' administrative remedy argument is moot because SCELC denied his claims for payment and was a matter of statutory construction.[9] We disagree.

"South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Id. (*quoting *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006)); *see also Stanton*, 309 S.C. at 128, 420 S.E.2d at 503 (holding the party seeking to avoid the exhaustion requirement has the burden of showing "that as a matter of law, he was not required to exhaust administrative remedies or that the [circuit court]'s ruling was based upon facts for which there is no evidentiary support").

[9] Cox does not explain what aspect of Respondents' administrative remedy argument raises a question of statutory construction. We construe his argument to refer to the issue of whether the Act's grievance procedure was inapplicable to his claims because he did not allege his lottery tickets were erroneously issued.

We hold the circuit court did not abuse its discretion in finding Cox's failure to exhaust his administrative remedies was not excused by the futility exception. Cox failed to provide any evidence showing SCELC had made *any* decision on his claim, much less a "hard and fast decision." The record does not contain evidence of any decision made by SCELC and it is unclear from the hearing transcript whether Cox's assertion at the motion hearing regarding SCELC's formal response denying a claim pertained to this case. Thus, Cox failed to satisfy his burden to show the futility exception applied. Accordingly, we hold the circuit court did not abuse its discretion in finding Cox's failure to exhaust his administrative remedies was not excused by the futility exception.

As to Cox's mootness argument regarding statutory construction, we find this issue is not preserved for appellate review because it was not raised to or ruled upon by the circuit court. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.").

Lastly, Cox argues he should be excused from exhausting his administrative remedies because class actions are not permitted in the ALC. We find this issue is not preserved for appellate review. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Although the circuit court found in its orders of dismissal that the requirement to exhaust the entire administrative review process applied to putative classes of claimants, Cox did not raise this argument in his memorandum in opposition to SCELC's motion to dismiss or at the motion hearing and he failed to file a Rule 59(e) motion to alter or amend. *See Doe*, 370 S.C. at 212, 634 S.E.2d at 55 ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review."); *Ness*, 350 S.C. at 403-04, 566 S.E.2d at 196 ("If a [circuit court] grants 'relief not previously contemplated or presented to the [circuit] court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.'" (quoting *In re Est. of Timmerman*, 331 S.C. at 460, 502 S.E.2d at 923)); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724

(holding that imposing preservation requirements on an appellant "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"). Accordingly, we find this argument is unpreserved.

CONCLUSION

Based on the foregoing, the circuit court's orders granting SCELC's and Intralot's motions to dismiss are

AFFIRMED.

HEWITT, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated, Appellants,

v.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery, and Intralot, Inc., Respondents.

Appellate Case No. 2019-000502

Appeal From Sumter County
Kristi F. Curtis, Circuit Court Judge

Opinion No. 6013
Heard November 9, 2022 – Filed August 9, 2023

AFFIRMED

Joseph Clay Hopkins, of Charleston, for Appellants.

William Stevens Brown, V, and Miles Edward Coleman, both of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent South Carolina Education Lottery Commission.

Joseph Preston Strom and Bakari T. Sellers, both of Strom Law Firm, LLC, of Columbia; and Mario Anthony

Pacella, of Strom Law Firm, LLC, of Brunswick, Georgia, all for Respondent Intralot, Inc.

VINSON, J.: Appellants, on behalf of themselves and all others similarly situated, appeal the circuit court's orders granting the South Carolina Education Lottery Commission's (SCELC's) and Intralot, Inc.'s[1] (Intralot's; collectively, Respondents') motions to alter or amend and motions to dismiss for failure to exhaust administrative remedies. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellants filed a summons and putative class action complaint in February 2018 and an amended class action complaint in May 2018, alleging they were not issued cash prizes on a $1 "terminal-generated instant game" (the Holiday Game). The Holiday Game awarded a cash prize if a ticket contained three Christmas tree symbols in any vertical, horizontal, or diagonal line. Appellants alleged SCELC suspended the Holiday Game on Christmas Day 2017 after receiving reports of multiple winners. Players who tried to redeem their winning tickets received a slip stating "transaction not allowed." SCELC asked players with winning tickets to "have patience" and refused to pay prizes. Appellants further alleged "many players who purchased tickets on Christmas Day did not receive a winning ticket." Appellants estimated the purported class included at least 100,000 individuals who had incurred at least $100 in damages as a result of Respondents' alleged misconduct.[2] The amended complaint raised the following four causes of action against Respondents: unjust enrichment, breach of contract and breach of implied contract, promissory estoppel, and violation of the South Carolina Unfair Trade Practices Act[3] (SCUTPA). Under Appellants' causes of action for unjust enrichment and promissory estoppel, they sought damages for the purchase of winning tickets. The amended complaint also raised a cause of action for negligence and gross negligence against Intralot, although Appellants noted they specifically denied there was a printing error on the tickets.

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[1] Intralot is a private company that provided administrative and technical services to SCELC.

[2] It is unclear from the record on appeal whether the circuit court certified the class.

[3] S.C. Code Ann. §§ 39-5-10 to -730 (2023).

In April 2018, Respondents filed motions to dismiss Appellants' complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.[4] In SCELC's motion to dismiss, it included information available online regarding the particulars of the Holiday Game and press releases from SCELC addressing a programming error that allegedly caused the issuance of invalid winning tickets, including a press release stating SCELC was conducting an independent review. SCELC argued, inter alia, the circuit court lacked jurisdiction over Appellants' claims because they failed to exhaust their administrative remedies, some or all of Appellants' claims were barred by the doctrine of sovereign immunity, Appellants' claims were not ripe for judicial disposition, and the amended complaint failed to assert a cause of action upon which relief could be granted. Specifically, SCELC argued the South Carolina Education Lottery Act (the Act)[5] and SCELC regulations required any lottery player aggrieved by an action or decision of SCELC to first file a formal written complaint with SCELC's executive director. A player wishing to challenge the executive director's decision must appeal to the SCELC board and may appeal the board's decision to the administrative law court (the ALC). SCELC asserted that an appeal to the ALC may not be brought on behalf of a class. Accordingly, because Appellants failed to allege they had exhausted their administrative remedies through this procedure, SCELC contended the suit was premature and should be dismissed on that ground. Next, SCELC argued Appellants' suit was not ripe because it had not yet decided whether to pay prizes on the winning Holiday Game tickets issued on Christmas Day. Further, SCELC argued the doctrine of sovereign immunity barred Appellants' unjust enrichment and promissory estoppel claims. It asserted the Tort Claims Act (the TCA)[6] did not include a waiver of sovereign immunity for such equitable claims. Lastly, SCELC stated in a footnote that under section 59-150-230(C)(3),[7] it might have been prohibited from paying the Holiday Game tickets at issue pending the independent investigation.

Intralot argued Appellants' complaint should be dismissed because they failed to exhaust their administrative remedies and failed to state a claim for which relief may be granted against it. Specifically, Intralot argued Appellants failed to

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[4] SCELC also moved to dismiss Appellants' complaint pursuant to subsections (1) and (3) of Rule 12(b), SCRCP.

[5] S.C. Code Ann. §§ 59-150-10 to -410 (2020 & Supp. 2022).

[6] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2022).

[7] S.C. Code Ann. § 59-150-230(C)(3)(a) ("A prize must not be paid if it . . . arises from claimed lottery game tickets that are . . . unissued, [or] produced or issued in error . . . .").

exhaust their administrative remedies under the Act and SCELC regulations and failed to plead the administrative process would be futile. Second, Intralot argued Appellants' unjust enrichment claim failed because the amended complaint failed to allege any facts showing Intralot received payment from Appellants or establishing a contractual relationship with Intralot, either express or implied. Third, it argued Appellants' breach of contract and breach of implied contract claims failed for lack of standing when Appellants did not allege Intralot was involved in the approval of lottery ticket retailers, the sale of lottery tickets, or that they were in privity with Intralot. Furthermore, Intralot asserted Appellants failed to allege any facts establishing they were third-party beneficiaries of the contract between it and SCELC. Fourth, Intralot argued Appellants' promissory estoppel claim failed because they failed to allege a negligent misrepresentation regarding payments for winning lottery tickets made by Intralot on which Appellants relied. Lastly, Intralot argued Appellants' negligence cause of action failed because they did not include any factual allegations in the amended complaint demonstrating Intralot owed Appellants a duty of care. Intralot filed an answer in February 2019; however, SCELC did not.

In response to Respondents' motions to dismiss, Appellants filed a memorandum in opposition to only SCELC's motion. Appellants included an argument in a footnote asserting SCELC's motion to dismiss contained "an absurdly enormous amount of facts" that were not set forth in the amended complaint and therefore should not be considered by the circuit court. However, Appellants included in their statement of facts that SCELC engaged a company to conduct an audit that determined the winning tickets were issued erroneously. As to SCELC's argued grounds for dismissal, Appellants first argued they were not required to exhaust their administrative remedies because the Act's grievance procedure was inapplicable to their claims. They asserted their amended complaint did not allege there was an error in the system that produced the winning lottery tickets and therefore, section 59-150-230(C)(3)(a), which prohibits SCELC from paying unissued or erroneously issued lottery tickets, was inapplicable to their claims. Appellants aver that because there was no alleged error, there was no need for them to file a complaint with SCELC or appeal to the SCELC board or the ALC. In addition, Appellants contended SCELC's administrative remedy argument was moot because they initiated an administrative review that SCELC denied, determining it would limit relief to the issuance of a refund of the ticket price. Second, Appellants argued sovereign immunity did not bar their equitable claims against SCELC. They asserted SCELC was not acting in or serving a discretionary function by running the lottery. Appellants maintained running the lottery was a

commercial venture not protected by sovereign immunity under the TCA. Finally, Appellants conceded their claims under SCUTPA should be dismissed.

At the motion hearing,[8] Respondents addressed the arguments raised in their motions to dismiss. SCELC stated that "a group of the [Appellants]" submitted administrative complaints to SCLEC and an initial decision to deny the complaints had been made. It later noted this group of Appellants failed to submit any information to SCELC as part of their complaints. Intralot stated that after investigation and audit, SCELC determined the Holiday Game tickets at issue had been produced or issued in error.

In addition to addressing the arguments raised in their memorandum in opposition, Appellants raised several new arguments at the hearing. Appellants first argued they were not required to exhaust their administrative remedies because the Act used permissive language when addressing the administrative procedures. Appellants further argued exhausting their administrative remedies would be futile when they had submitted initial complaints to SCELC that were denied. They then reiterated SCELC was not entitled to claim sovereign immunity under the TCA because the lottery could not be considered "a quintessential government function." As to Intralot, Appellants argued they were in privity with Intralot because lottery players were third-party beneficiaries of SCELC's contract with Intralot. They conceded their claim against Intralot for promissory estoppel should be dismissed because they could not identify an express promise made by Intralot.

The circuit court denied Respondents' motions to dismiss. In its order denying SCELC's motion to dismiss, the circuit court held Appellants' exhaustion of their administrative remedies would be futile because SCELC had taken a "hard and fast" position on Appellants' claims. The circuit court found that subsequent to Appellants filing suit, SCELC issued a press release stating that after conducting an independent investigation, it would not pay the prize on the winning Holiday Game tickets because they were produced or issued in error. The circuit court noted that both Appellants and Respondents referred to matters outside of the pleadings in their memoranda. It further found exhaustion of administrative remedies would be futile when there were at least 100,000 people aggrieved by SCELC's misconduct and included a citation that stood for the proposition that plaintiffs in a class action need not exhaust administrative remedies when the administrative remedies do not provide for class relief. The circuit court also held

[8] The circuit court held a joint hearing to consider Respondents' motions to dismiss in this case and a related case.

SCELC's claim of sovereign immunity raised questions of fact that could not be resolved by reference to the pleadings alone.

In its order denying Intralot's motion to dismiss, the circuit court repeated its holding as to exhaustion of administrative remedies set forth in its order denying SCELC's motion to dismiss. The circuit court further found Appellants were not required to exhaust their administrative remedies as to Intralot because tort and implied contract actions were not statutory violations for which the legislature had provided an administrative remedy. The circuit court also held Appellants alleged sufficient facts to support their cause of action for unjust enrichment and dismissal of their causes of action for breach of contract and negligence was not appropriate at the Rule 12(b)(6), SCRCP stage.

Respondents filed motions to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP. SCELC attached several exhibits to its motion, including Appellants' initiation of grievance procedures with SCELC dated May 25, 2018[9]; a report created by an independent forensic consulting firm concluding the Holiday Game tickets were issued or produced in error; a letter from SCELC to Appellants notifying them of the SCELC board's decision and advising them of three options to pursue; and a letter from SCELC to Appellants advising them they could seek review of SCELC's decision to the ALC. SCELC argued the circuit court erred in finding Appellants' exhaustion of administrative remedies would be futile. It argued Appellants could not circumvent the administrative process by merely alleging a putative class action. SCELC further argued Appellants failed to show exhaustion of the entire administrative process would be futile.

Intralot argued the circuit court erred in finding Appellants' exhaustion of administrative remedies would be futile. It asserted Appellants failed to show exhaustion of the entire administrative process would be futile. Further, Intralot asserted Appellants were not precluded from exhausting their administrative remedies because they were pursuing a class action and none of the class members had exhausted their administrative remedies.

The circuit court granted Respondents' Rule 59(e) motions on the ground Appellants failed to exhaust their administrative remedies. In its order granting SCELC's motion to dismiss, the circuit court referenced SCELC's exhibits in its recitation of the facts. The circuit court determined the Act permitted, but did not

[9] Appellants initiated their grievance procedure subsequent to Respondents' filing of their motions to dismiss.

mandate, an exclusive administrative remedy; however, the court noted our supreme court has required exhaustion when there is an adequate administrative remedy even though the statute did not expressly require it. Further, the circuit court determined Appellants failed to allege the exhaustion of the entire administrative process would be futile by relying on the press release Appellants included in their memorandum in opposition to SCELC's motion to dismiss. Finally, the circuit court found the requirement to exhaust the entire administrative review process applied to putative classes of claimants. Concluding Appellants failed to allege they followed the procedures for administrative review or that doing so would be futile because the ALC would not analyze the matter impartially and fairly, the circuit court dismissed Appellants' amended complaint for failure to exhaust administrative remedies. In its order granting Intralot's motion to dismiss, the circuit court restated its findings on whether Appellants were required to exhaust their administrative remedies. Appellants did not file a Rule 59(e) motion to alter or amend. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in granting Respondents' Rule 59(e) motions to alter or amend and motions to dismiss?

STANDARD OF REVIEW

"Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994). "An abuse of discretion occurs where the [circuit court] was controlled by an error of law or where [the circuit court's] order is based on factual conclusions that are without evidentiary support." *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (quoting *Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992)).

LAW AND ANALYSIS

Appellants first argue the circuit court erred in relying on facts not contained in the pleadings in ruling upon Respondents' motions to dismiss. They assert the exhibits attached to SCELC's motion to reconsider, alter, or amend were new evidence and the circuit court converted Respondent's Rule 12(b)(6) motions to summary judgment motions by considering these materials.

We find this procedural argument is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Appellants never raised this argument to the circuit court in a response to Respondents' motions to reconsider, alter, or amend and they failed to file a Rule 59(e) motion in response to the circuit court's orders granting Respondents' motions. *See Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review."); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 (holding that imposing preservation requirements on an appellant "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"). Accordingly, we find this argument is not preserved.

Second, Appellants argue their claims for breach of contract, unjust enrichment, promissory estoppel and negligence were not subject to the requirement of exhaustion of administrative remedies. Specifically, they assert there is no administrative exhaustion requirement for claims brought against a third-party and therefore, the requirement did not apply to their claims against Intralot. Further, Appellants contend their claims were not based on a statutory violation that mandated the pursuit of an administrative remedy. Appellants additionally assert the SCELC board had not notified them of a decision prior to the filing of the amended complaint and therefore, the administrative procedure did not apply to them.

We find these exhaustion arguments are not preserved for appellate review. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). In its order denying Intralot's motion to dismiss, the circuit court found Appellants were not required to exhaust their administrative remedies as to Intralot as a third-party because tort and

implied contract actions were not statutory violations for which the legislature had provided an administrative remedy. However, Appellants never raised these arguments in their memorandum in opposition to SCELC's motion to dismiss or at the motion hearing. Appellants subsequently failed to file a Rule 59(e) motion to alter or amend the circuit court's order granting Intralot's motion to dismiss, which did not address exhaustion requirements as they related to third-party tort and implied contract actions. *See Doe*, 370 S.C. at 212, 634 S.E.2d at 55 ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review."); *Ness v. Eckerd Corp.*, 350 S.C. 399, 403-04, 566 S.E.2d 193, 196 (Ct. App. 2002) ("If a [circuit court] grants 'relief not previously contemplated or presented to the [circuit] court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.'" (quoting *In re Est. of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 923 (Ct. App. 1998))); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 (holding that imposing preservation requirements on an appellant "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"). Further, Appellants' argument that they were not subject to the exhaustion requirements because the SCELC board had not issued an opinion was neither raised to nor ruled upon by the circuit court. Accordingly, we find these arguments are not preserved.

Next, Appellants argue the Act's grievance procedure did not apply to their claims because they did not allege the lottery tickets were erroneously issued. Appellants contend the prohibition under section 59-150-230(C)(3)(a) preventing SCELC from paying winnings on tickets unissued or erroneously issued did not apply, or in the alternative, presented a question of fact. We disagree.

"[T]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trs*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (quoting *Ward v. State*, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000)). "[T]he failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." *Id.* (quoting *Ward*, 343 S.C. at 17 n.5, 538 S.E.2d at 246 n.5).

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it

> may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). "Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts." *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583. In *Hyde*, our supreme court found the circuit court abused its discretion "in finding as a matter of law that [plaintiff] did not have to exhaust administrative remedies simply because the . . . [s]tatute d[id] not expressly require it." *Id.* at 209, 442 S.E.2d at 583. The court held, "[The circuit court] must have a sound basis for excusing the failure to exhaust administrative relief." *Id.*

We hold the circuit court did not abuse its discretion in finding Appellants were required to exhaust their administrative remedies under the Act and SCELC regulations. Initially, Appellants did not argue to the circuit court that the administrative process under the Act and SCELC regulations was not applicable to claims concerning the determination of whether a prize should be paid on a lottery ticket. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733. ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."). Instead, Appellants argued the administrative process was only applicable to tickets that were alleged to have been produced or issued in *error*. We conclude Appellants' argument misconstrues the Act.

The Act and SCELC regulations provide an administrative remedy to determine whether a prize should be paid on a lottery ticket. *See Hyde*, 314 S.C. at 208, 442 S.E.2d at 583 ("Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts."). Section 59-150-230(C) provides, "[SCELC] shall promulgate regulations and adopt policies and procedures to establish a system of verifying the validity of lottery games tickets or shares claimed to win prizes and to effect payment of prizes." Regulations 44-70(E)-(F) of the South Carolina Code of Regulations (2011) state the SCELC executive director may deny awarding a prize to a claimant if the ticket was issued or produced in error and the executive director's decision is subject to an appeal to SCELC. Section 59-150-300(A) provides that any "lottery game ticket holder aggrieved by an action of the [SCELC] board may appeal that decision to the [ALC]." A final decision of the

ALC involving SCELC must be appealed to the circuit court. *See* S.C. Code Ann. § 59-150-300(D). Although section 59-150-230(C)(3)(a) provides, "A prize must not be paid if it . . . arises from claimed lottery game tickets that are . . . unissued, [or] produced or issued in error," we find the administrative procedure applied to all claims concerning the payment of a prize on a lottery ticket regardless of whether *the claimant alleged* there was an error. The determination of whether the ticket was issued or printed in error was a factual determination to be made by SCELC through the administrative process. Furthermore, we reject Appellants' assertion that the circuit court accepted Respondents' claim the lottery tickets were printed in error in determining Appellants were required to exhaust their administrative remedies. Accordingly, we hold the circuit court did not abuse its discretion in finding Appellants were required to exhaust their administrative remedies under the Act and SCELC regulations. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) (holding if "the language of a statute or regulation directly speaks to the issue. . . . the court must utilize the clear meaning of the statute or regulation").

Appellants further argue an administrative review of their claims would be futile because SCELC refused to offer any relief to them and the SCELC board's decision "was certain to be unfavorable." Similarly, Appellants argue Respondents' administrative remedy argument is moot because SCELC denied their claims for payment and was a matter of statutory construction.[10] We disagree.

"South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Id.* (quoting *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006)); *see also Stanton*, 309 S.C. at 128, 420 S.E.2d at 503 (holding the party seeking to avoid the exhaustion requirement has the burden of showing "that as a matter of law, he was not required to exhaust

[10] Appellants do not explain what aspect of Respondents' administrative remedy argument raises a question of statutory construction. We construe this argument to refer to the issue of whether the Act's grievance procedure was inapplicable to their claims because they did not allege their lottery tickets were erroneously issued.

administrative remedies or that the [circuit court]'s ruling was based upon facts for which there is no evidentiary support").

We hold the circuit court did not abuse its discretion in finding Appellants' failure to exhaust their administrative remedies was not excused by the futility exception. Appellants' futility argument relies on SCELC's initial denial of their complaint and the press release stating relief would be limited to the purchase price of the Holiday Game tickets. We find this evidence fails to show SCELC had made a final decision or took a "hard and fast position" on their claims. *See Brown*, 389 S.C. at 54, 697 S.E.2d at 611 ("Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" (quoting *Law*, 368 S.C. at 438, 629 S.E.2d at 650)). As to Appellants' mootness argument regarding statutory construction, we find this issue is not preserved for appellate review. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *see also I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Accordingly, we hold the circuit court did not abuse its discretion in finding Appellants' failure to exhaust their administrative remedies was not excused by the futility exception.

Lastly, Appellants argue they should be excused from exhausting their administrative remedies because class actions are not permitted in the ALC.[11] We disagree.

We hold Appellants were not relieved of the requirement to exhaust their administrative remedies merely because they asserted putative class action claims. Rule 23, SCRCP, which relates to class actions, does not apply to appeals before the ALC. *See Allen v. S.C. Pub. Emp. Benefit Auth.*, 411 S.C. 611, 621, 769 S.E.2d 666, 672 (2015). However, we find this does not preclude Appellants from exhausting their administrative remedies when, as we discussed, an administrative remedy under the Act is available to them. Similarly, in *Brackenbrook North Charleston, LP v. County of Charleston*,[12] our supreme court held a group of tax

[11] The issue of whether Appellants' argument is preserved for appellate review was raised during oral argument; however, we decline to address the issue of preservation.

[12] 360 S.C. 390, 602 S.E.2d 39 (2004).

payers that brought a putative class action seeking refunds of real property taxes from Charleston County were required to exhaust their administrative remedies prior to bringing their action directly in circuit court when the taxpayers had an administrative remedy available to them. Although the statute at issue in *Brackenbrook* included a specific provision mandating that the circuit court must dismiss an action if a taxpayer brings a circuit court action when she should have pursued administrative remedies, we believe the holdings in *Video Gaming Consultants, Inc.* and *Hyde* prevent Appellants from evading the exhaustion requirement even though the Act does not contain a similar statutory provision. *See id.* at 396, 602 S.E.2d at 43. Moreover, Appellants assertion that there are tens of thousands of potential plaintiffs is speculative. Based on the foregoing, we hold the circuit court did not err in granting Respondents' motions to dismiss because Appellants were not relieved of the requirement to exhaust their administrative remedies merely because they asserted putative class action claims.

CONCLUSION

Based on the foregoing, the circuit court's orders granting SCELC's and Intralot's motions to dismiss are

AFFIRMED.

HEWITT, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jefferson Davis, Jr., Appellant,

v.

South Carolina Educational Credit for Exceptional Needs Children Fund, Respondent.

Appellate Case No. 2019-001231

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

Opinion No. 6014
Heard November 7, 2022 – Filed August 9, 2023

AFFIRMED

Jefferson Davis, Jr., *pro se*.

Geoffrey Kelly Chambers, of Green Cove Springs, Florida, for Respondent.

GEATHERS, J.: In this Freedom of Information Act (FOIA) litigation, Appellant Jefferson Davis, Jr. (Davis) appeals the circuit court's order granting summary judgment to Respondent South Carolina Educational Credit for Exceptional Needs Children Fund (the Fund). Davis contends the circuit court erred in (1) finding that the Fund is not covered by state law defining a "public body"; (2) finding that the Fund was not supported by public funds; (3) finding that reporting requirements for the Department of Revenue could replace any FOIA obligations the Fund might

have; (4) finding that reporting requirements in a 2016–2017 budget proviso were sufficient to replace any FOIA obligations the Fund might have; (5) finding that reporting requirements in a 2017–2018 budget proviso were sufficient to replace any FOIA obligations the Fund might have; (6) taking into account later legislation when considering the intent behind the budget provisos governing the Fund; and (7) misconstruing legislation that made the Fund permanent. We affirm.

FACTS/PROCEDURAL HISTORY

In 2017, Davis began filing FOIA requests with the Fund, which was created by a proviso in the 2016–2017 General Appropriations Act.[1] The program provides funding for children defined as "exceptional needs children" to attend private schools; in return, those who donate to the Fund receive a state tax credit. The proviso specifically stated that "[t]he [F]und may not receive an appropriation of public funds." The proviso also stated that monies raised by the Fund "do not constitute public funds," and provided that the state could not be obligated by the Fund's contracts or other agreements. It allowed five directors to be appointed by lawmakers and the governor, though it provided that those selections would be made "based upon" recommendations from certain school organizations. The Department of Revenue (the Department), "[i]n concert with the [F]und directors" was instructed to "administer the fund, including, but not limited to, the keeping of records, the management of accounts, and disbursement of the grants awarded pursuant to this proviso." Additionally, the proviso required an accounting of the money on June 30, 2017. Approximately one year later, a virtually identical proviso was passed as part of the 2017-2018 General Appropriations Act. The program was permanently codified by the General Assembly in 2018.

Davis's first two FOIA requests to the Fund were sent on December 14, 2016. He asked for "notifications of any and all meetings involving the ECENC Fund." Davis also requested:

> 1. Copies of all invoices and payments made on behalf of [the Fund].
>
> 2. Copies of all board meetings and/or actions for [the Fund].

[1] Specifically, Proviso 109.15 established the program.

> 3. Copies of all brokerage statements for [the Fund].
>
> 4. Copies of any employment or contractor agreement with or for the services of [an individual not directly involved in the current litigation].

He sent the requests by mail and emailed them to Tom Persons, who served on the Fund's board. Additionally, on July 10, 2017, Davis sent a request for a copy of the report that the Fund is required to submit to the Department.

On July 25, 2017, attorney Geoffrey K. Chambers responded on behalf of the Fund to Davis's July 10 request. He wrote:

> South Carolina Educational Credit for Exceptional Needs Children Fund is a 501(c) charitable organization. Pursuant to the South Carolina Freedom of Information Act, S[.]C[.] Code Annotated 30-4-10 *et seq.*, and the South Carolina Solicitation of Public Funds Act, []33-56-10 *et seq.*, South Carolina Educational Credit for Exceptional Needs Children Fund is not subject to FOIA.
>
> I believe the documents you seek are public documents. I do not have the documents to provide a courtesy copy. I recommend you request these documents from the proper public body records custodian.

Undeterred, on August 31, 2017, Davis requested documents related to the Fund's "funding formula" for the previous and then-current fiscal year. On September 12, 2017, Chambers responded again, reiterating that the Fund did not believe it was subject to the FOIA and adding:

> Due to pending litigation you have brought regarding Freedom of Information Act requests sent to [the Fund], I have instructed my client not to respond. In the future, I recommend you direct FOIA requests to government entities. As an opposing party in litigation, I ask that you do not send any correspondence directly to parties who have representation.

Indeed, on July 31, Davis had filed a *pro se* complaint for FOIA enforcement in Greenville County, seeking declaratory and injunctive relief. In an order filed November 7, 2017, the circuit court in Greenville County transferred venue to Richland County in a Form 4 order.[2]

The Fund filed its answer in Richland County on November 20, 2017, essentially denying the substantive portions of Davis's complaint. Davis filed a motion for summary judgment on January 24, 2018. The motion included allegations that that the Fund was created by the legislature; that its board was appointed "by elected government officials"; that the Department helped set up and is authorized to help administer the Fund; that the Department helped the Fund in raising donations through email and social media; that contributions to the Fund could be routed through the state's internet presence; and that the Fund "is publicly listed as a 'State Board and Commission'" on the Secretary of State's website.

In his written summary judgment motion, Davis noted precedent from our supreme court suggesting that some private nonprofits could be subject to the FOIA. He also cited an opinion from the South Carolina Attorney General's Office stating that "a court would likely find the grant [and tax credits][3] authorized by the ECENC proviso likewise constitute 'public funds.'" (quoting *Op. S.C. Atty. Gen.*, January 18, 2018).

In addition, Davis filed an affidavit and multiple exhibits. In the affidavit, Davis complained that he had not received responses to his FOIA requests,[4] had not been notified about board meetings that he believed had occurred since his initial FOIA request, and had reached a state employee's voicemail when he called a number provided for certain donations to the Fund that Davis had found on the internet.

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[2] Initial hearings under FOIA are generally supposed to be scheduled "within ten days of the service on all parties." S.C. Code Ann. § 30-4-100 (Supp. 2022). According to the Fund, one reason this FOIA litigation persisted so long in the circuit court is that Davis incorrectly filed his suit as "complex litigation."

[3] The bracketed words appear in the opinion from the Attorney General's Office, but are omitted by ellipsis in Davis's motion.

[4] According to a memorandum in support of the motion to dismiss filed by the Fund on June 14, 2018, Davis "has received copies of [the Fund's] reports." These statements are not mutually exclusive.

Among the attachments to Davis's affidavit were: (1) the articles of incorporation for the Fund, signed by Rick Reames III[5] as the agent, with the address listed as 300A Outlet Pointe Boulevard in Columbia; (2) the Fund's registration with the Public Charities Division of the Secretary of State's office, listing Reames as the "contact person" for the Fund, listing his title as "President," and giving the address of P.O. Box 125 in the 29214 ZIP code in Columbia, as well as listing Reames as the registered agent and providing the same street address as listed on the articles of incorporation;[6] (3) a receipt reflecting a $50.00 payment from the Fund on July 8, 2016;[7] (4) an image of a web page directing potential Fund donors with certain financial instruments to "have your account manager contact" a phone number that Davis said led to the state employee's voicemail;[8] (5) internet communications highlighting the Fund on the Department's website, Facebook page, and Twitter feed; (6) a web page for contributions to the fund at https://ssl.sc.gov/checkout/exceptionalsc/; and (7) results from an internet search of the Secretary of State's Boards and Commissions website showing the members of the Fund's board, and listing the Fund as a board, commission, or committee.

Davis also attached an email chain between Reames and an individual at the South Carolina Chamber of Commerce. Davis characterized the email as support for his allegation that state officials helped raise money for the Fund.[9] The emails indicated that Reames and the individual at the chamber had previously discussed the Fund, and that Reames was hoping the individual could send an "introduction" to members "that might have local decision making and have SC tax liabilities they want to abate." The individual then requested a draft of a potential email from Reames. Reames responded:

> Exceptional SC is the new face of South Carolina's Educational Credit for Exceptional Needs Children. It is

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[5] Reames was director of the South Carolina Department of Revenue at the time.

[6] Additionally, Reames signed spaces for the Chief Financial Officer/Treasurer of the charity and Chief Executive Officer/President of the charity.

[7] The filing fee for a registration with the Public Charities Division is $50.00.

[8] The number was to be called "for delivery instructions." The same page instructed those who wanted to mail their checks to send them to the Fund at a post office box in Columbia.

[9] At times, because of markings on the emails, they are difficult to make out in the record.

> an organization established under Internal Revenue Code Section 501(c)(3) that is dedicated to supporting exceptional needs students and families in South Carolina by providing scholarships to attend private schools that meet their needs.
>
> Donors making financial contributions to Exceptional SC not only help these exceptional needs children but also receive significant tax benefits, including a state income tax credit. The total statewide credit is limited to $10M on a first come, first serve basis - and it is already filling up fast. Potential donors should act fast so they don't lose this opportunity. Click on www.exceptionalsc.org for more information.

In the email, Reames indicated that the individual at the chamber should "[e]dit as [they] need to." Reames's signature block in the emails identified him as director of the Department and included a P.O. Box address provided on some of the Fund's paperwork. At least one of the emails Reames sent originated from a dor.sc.gov account.[10]

The circuit court[11] held a hearing on April 17, 2018. Counsel for the Fund did not appear, so the court took Davis's arguments under advisement. The circuit court held another hearing on May 15, 2018. There, the Fund argued that it was a "regulated charity" rather than a public body. It contended that the appointments to its board, while made by elected officials, were essentially ratifications of nominees from the named school organizations. The Fund also argued that the Secretary of State's decision to include the Fund on its list of state boards was incorrect and that the South Carolina Legislative Manual did not list the Fund as a state board.

[10] It is likely both did. An affidavit sworn May 11, 2018 by Thomas Persons, the chairman of the Fund's board, states that currently "[t]here is no assistance from any government entity in contacting potential donors and soliciting donations." Persons refers to the Fund as a "highly regulated" organization. Additionally, he states that the Department "monitors incoming funds much like a turnstile would monitor passengers entering a train station."

[11] At least four different circuit court judges were involved in this litigation in Richland County. For ease of understanding, we will not refer to each of the judges by name.

Additionally, the Fund argued virtually all of its activities were covered by the FOIA-related provisions of legislation making the Fund permanent that the governor was considering. The court denied Davis's motion for summary judgment, saying that it "believe[d] that a genuine issue of material fact exist[ed] . . . ."

On June 14, 2018, the Fund filed a motion to dismiss and a motion for a protective order. In a memorandum supporting the motion to dismiss, the Fund argued that our supreme court's holding in *DomainsNewMedia.com v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 814 S.E.2d 513 (2018) was controlling.[12]

The Fund's motion also mentioned a development outside the courtroom: legislation signed by the governor the previous month (the Act) permanently codifying the Fund and providing:

> In concert with the public charity directors, the department shall administer the public charity including, but not limited to, the keeping of records, the management of accounts, and disbursement of the grants awarded pursuant to this section. The public charity may expend up to two percent of the fund for administration and related costs. The department and the public charity may not expend public funds to administer the program. *Information contained in or produced from a tax return, document, or magnetically or electronically stored data utilized by the Department of Revenue or the public charity in the exercise of its duties as provided in this section must remain confidential and is exempt from disclosure pursuant to the Freedom of Information Act. Personally identifiable information, as described in the Family Educational Rights and Privacy Act and individual health records, or the medical or wellness needs of children applying for or receiving grants must remain*

[12] We discuss this case in greater detail in our analysis.

> *confidential and is not subject to disclosure pursuant to the Freedom of Information Act.*[13]

(Emphasis added in the memo). The Fund argued that this provision was "explicit instruction from the legislature that FOIA does not apply to the normal operations of [the Fund]." The Fund also contended that, under the FOIA, meetings related to scholarship decisions "are . . . closed to the public" under section 30-4-70(a)(1) of the South Carolina Code (2007).[14]

The circuit court held its third hearing on the matter on August 9, 2018. The court denied the Fund's motion to dismiss. It also ordered the Fund to comply with Davis's discovery requests to the extent possible.

On August 17, 2018, the Fund filed a motion for summary judgment, a memorandum on the motion for summary judgment, and a motion for judgment on the pleadings with an accompanying memorandum. In these filings, the Fund largely reiterated its arguments from the motion to dismiss.[15]

Davis filed an emergency motion for contempt and sanctions on August 22, 2018. In it, he argued that the Fund had failed to produce certain discovery. At a hearing on September 4, 2018, the circuit court held a status conference. Scheduling and discovery issues were discussed. This was followed by a motion to compel

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[13] The legislation also made some other changes. For example, the Act did not include the requirement that elected officials consult with school organizations for their appointments to the board.

[14] *See* S.C. Code Ann. § 30-4-70(a) (2007) ("A public body may hold a meeting closed to the public for . . . [d]iscussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body . . . .")

[15] The Fund filed a revised memorandum in support of its motion for judgment on the pleadings on September 29, 2018, again elaborating on its arguments. In addition to its previous theories, the Fund contended that it could not be a public body because state law does not allow it to "receive, have or spend public funds." Further, it noted that state law described the Fund as an independent entity, and "provide[d] that the Department of Revenue and [the Fund] may not expend public funds to administer" the Fund. It also argued that the legislative intent of provisions setting up the fund supported its motions.

discovery and for sanctions on September 10, 2018. Additionally, Davis filed a renewal of his motion for summary judgment on September 10, 2018.

The circuit court held another hearing on October 3, 2018. On December 21, 2018, in a Form 4 order, the circuit court granted the Fund's motions for judgment on the pleadings and summary judgment. In its later written order, the circuit court noted the *DomainsNewMedia.com* decision. The circuit court found the Fund was similarly situated to the chamber of commerce in our supreme court's decision:

> Educational Credit for Exceptional Needs Children Fund registers with the Secretary of State as a public charity under Section 509 and reports to the Secretary of State as contemplated for entities not subject to FOIA. The funding is not state funding, but rather private donations. Exceptional SC receives no support from state funding. The State has provided an avenue for Exceptional SC to exist, and for that reason this program is highly regulated and reporting intensive, like the Chamber of Commerce.

Additionally, the circuit court interpreted the adoption of the Act as "explicit instruction from the legislature that FOIA does not apply to the normal operations of [the Fund]." The circuit court added: "Likewise, according to the South Carolina Freedom of Information Act, public meetings in which applications for scholarships are reviewed and scholarships are awarded are exempt from FOIA disclosure and can be closed meetings."

On July 8, 2019, the circuit court denied Davis's motion for reconsideration with a Form 4 order. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in finding that the Fund is not a "public body" for the purposes of FOIA even though it was created by the General Assembly, is governed by a board appointed by state officials, and can be administered by the Department?

II. Did the circuit err in granting summary judgment based in part on a finding that no public funds were expended by the Department, despite the evidence provided by Davis?

III. Did the circuit court err in finding that reporting requirements on the part of the Department could serve as a replacement for the Fund's alleged FOIA obligations?

IV. Did the circuit court err in holding that the reporting requirements in the 2016 budget proviso were sufficient to satisfy the standards of *DomainsNewMedia.com*?

V. Did the circuit court err in holding that the reporting requirements in the 2017 budget proviso were sufficient to satisfy the standards of *DomainsNewMedia.com*?

VI. Did the circuit court err in basing its interpretation of the legislative intent of the earlier budget provisos partially on the later legislation approved by the General Assembly and the governor?

VII. Did the circuit court err in construing the Act as a broad FOIA exemption rather than a "belt and suspender" provision regarding already exempt information?

STANDARD OF REVIEW

"Declaratory judgments are neither legal nor equitable. The standard of review for a declaratory judgment action is, therefore, determined by the nature of the underlying issue." *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015) (citations omitted). "The interpretation of a statute is a question of law." *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 300, 814 S.E.2d 513, 516 (2018) (quoting *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). "Th[e appellate c]ourt may interpret statutes, and therefore resolve the case, 'without any deference to the court below.'" *Id.* (quoting *Brock v. Town of Mt. Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016)). "When the circuit court grants summary judgment on a question of law, we review the ruling de novo." *Stoneledge Lake Keowee Owners' Ass'n, Inc., v. Builders FirstSource–Se. Grp.*, 413 S.C. 630, 634–35, 776 S.E.2d 434, 437 (2015). To the extent that Davis's request for injunctive relief proves relevant, we note that "[a]ctions for injunctive relief are equitable in nature. In equitable actions, the appellate court may review the record and make

findings of fact in accordance with its own view of a preponderance of the evidence." *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001) (citations removed).

LAW/ANALYSIS

I. PUBLIC BODIES AND THE FOIA

The South Carolina Freedom of Information Act has a far-reaching definition of what constitutes a public body subject to its terms. According to the FOIA, a "public body" is defined as

> any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency *supported in whole or in part by public funds or expending public funds*, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. . . .

S.C. Code Ann. § 30-4-20(a) (2007) (emphasis added). The broad sweep of that definition has left room for judicial interpretation.

Perhaps the most far-reaching construction of the term "public body" comes from our supreme court's decision in *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991). In that case, the court considered the status of a foundation linked to the University of South Carolina that had received transfers of funding and real estate on behalf of university projects and research. *Id.* at 401–03, 401 S.E.2d at 163–64. The court rejected arguments that the foundation's status

as a "private corporation" insulated it from the state's FOIA. *Id.* at 403, 401 S.E.2d at 164.

> The Foundation's argument that the FOIA only applies to governmental and quasi-governmental bodies would rewrite the statutory definition of "public body" by deleting the phrase, "or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds." According to the Foundation's position, a corporation that cannot be labeled governmental or quasi-governmental would be exempt from the FOIA, regardless of whether it received support from public funds or expended public funds. Such a construction would obliterate both the intent and the clear meaning of the statutory definition.
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> . . . . [T]he unambiguous language of the FOIA mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body. The common law concept of "public" versus "private" corporations is inconsistent with the FOIA's definition of "public body" and thus cannot be superimposed on the FOIA.

Id. At the same time, the *Weston* court laid out a limiting principle that has become increasingly important to FOIA jurisprudence in the years since.

> [T]his decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms[-]length basis. In that situation, there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent. However, when a block of public funds is diverted *en masse* from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the

> records and affairs of the organization receiving and spending the funds.

Id. at 404, 401 S.E.2d at 165.

Our supreme court returned to that caveat several years later in *Disabato v. S.C. Ass'n of School Adm'rs*, 404 S.C. 433, 746 S.E.2d 329 (2013). There, the court did not directly address whether the term "public body" was broad enough to include the South Carolina Association of School Administrators. *Id.* at 443, 746 S.E.2d at 334. However, in discussing whether the obligation of some organizations to comply with the FOIA constituted a violation of those organizations' First Amendment rights, the *Disabato* court placed a renewed emphasis on the degree of state involvement with the organization at issue.

> [T]he application of the FOIA beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds. . . . We previously recognized in *Weston* that the FOIA is ineffectual if it does not extend to such bodies, explaining that when an entity receives public funds *en masse* or manages the expenditure of public funds, "the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds." If public bodies were not subject to the FOIA, governmental bodies could subvert the FOIA by funneling State funds to nonprofit corporations so that those corporations could act, outside the public's view, as proxies for the State. . . .
>
> . . . . The dissent would read the FOIA as applying to a private organization that receives even a negligible amount of public funding for a discrete purpose. We made clear in *Weston* that the FOIA only applies to private entities who receive government funds *en masse*. The FOIA would not apply to a private entity that receives public funds for a specific purpose. For example, the FOIA would not apply to a private organization that receives public funds to operate a childcare center or

> healthcare clinic. However, the FOIA does apply to any private organization that is generally supported by public funds.

Id. at 433, 454–56, 746 S.E.2d at 340–41 (citations omitted) (quoting *Weston*, 303 S.C. at 404, 401 S.E.2d at 165).[16]

Our supreme court returned again to this issue in *DomainsNewMedia.com*. There, the court dealt with accommodations tax revenues used to fund marketing ventures by a local chamber of commerce. *See DomainsNewMedia.com*, 423 S.C. at 298, 814 S.E.2d at 514–15. The court found that a literal interpretation of the FOIA could lead to the conclusion that the transfer of tax proceeds to the chamber of commerce was enough to open the chamber's records. *Id.* at 304, 814 S.E.2d at 518. At the same time, though, the court focused on the fact that portions of the pieces of legislation setting up the system "provide a specific and comprehensive approach for the receipt, expenditure, and oversight of these funds." *Id.* The court held:

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[16] This interpretation of the reach of the FOIA was one of the dividing lines between the majority opinion and the dissent.

> The clear language of the statute, we said in *Weston,* mandates that an organization receiving public funds in even one transaction is a "public body" for purposes of FOIA requirements, and construing the statute to reach only governmental or quasi-governmental organizations would "obliterate both the intent and the clear meaning of the statutory definition." Thus, the statute may reach an otherwise private organization that receives even a negligible amount of public funding for a discrete purpose.

Disabato, 404 S.C. at 460, 746 S.E.2d at 343 (quoting *Weston*, 303 S.C. at 403, 401 S.E.2d at 164) (Pleicones, J., concurring in part and dissenting in part) (footnote omitted). Justice Pleicones added later that the law "applies solely by virtue of the fact that the organization has received public funds, regardless of any relationship between the organization's publicly and privately funded activities." *Id.* at 464, 746 S.E.2d at 345.

> Moreover, even in the absence of a specific statute, this [c]ourt has recognized that the applicability of FOIA to a non-governmental entity is more involved than classification as a public body due to the receipt of public funds.
>
> . . . . [In *Weston*, the supreme court] rejected the suggestion that the mere receipt or expenditure of public funds automatically and categorically transformed an otherwise private entity into a public body triggering the full panoply of FOIA requirements. We made clear that the mere receipt or expenditure of public funds did not mean "that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms[-]length basis." . . . . Significantly, in that case, there was not a statute or proviso governing the procedure and oversight for the expenditure of the specific funds at issue or mandating the public reporting and accountability as exists with respect to [the funds at issue in *DomainsNewMedia.com*].
>
> Here, as noted, there is a specific statute (or proviso) that directs the local governments to select a DMO[17] to manage the expenditure of certain tourism funds and requires the governments to maintain oversight and responsibility of the funds by approving the proposed budget and receiving an accounting from the DMO. Thus, this is not the situation found in *Weston* wherein the funds were intended to be given to a public body and, instead, were diverted to a private organization to be spent without oversight. Through [the relevant legislation] there are accountability measures in place[,] and the public has access to information regarding how the funds are spent. Therefore, the concern in *Weston* regarding the lack of a legislatively sanctioned process mandating oversight, reporting, and

[17] "DMO" stands for the designated marketing organization. *DomainsNewMedia.com*, 423 S.C. at 298, 814 S.E.2d at 515.

> accountability is not present in the expenditure of these funds.

Id. at 304–06, 814 S.E.2d at 518–19 (citations omitted) (quoting *Weston*, 303 S.C. at 404, 401 S.E.2d at 165). Justice Few dissented, arguing that the *Weston* court "applied that plain language [of the FOIA] to transactions that are factually indistinguishable from the Chamber's receipt and expenditure of accommodations sales tax revenues in this case[] and held the FOIA applies." *Id.* at 311, 814 S.E.2d at 521 (Few, J., dissenting). Additionally, Justice Few argued that the limiting principle in *Weston* "was never intended to create any additional requirement—or a "more involved" analysis—to determine the applicability of the FOIA." *Id*. at 311, 814 S.E.2d at 522.

The *DomainsNewMedia.com* decision was handed down May 23, 2018—before the circuit court decided this case, but days after the governor approved the legislation making the Fund permanent.

II. STATUS OF THE FUND (Davis's Issues I–V)

Davis's first five issues—the core of the case—can all be reasonably reduced to one overarching question: Is the Fund a public body for the purposes of the FOIA? The issues of the meaning of the term "public body"; whether tax revenues support the Fund; and the correct interpretation of our supreme court's ruling in *DomainsNewMedia.com* are all focused on this threshold question. We also do not and should not go beyond answering that question in our consideration of the Fund's operations. Because of the unique structure of the Fund, this is a close call. However, we find that the Fund is not a public body for the purposes of the state's FOIA.

The parties have devoted a great deal of energy to arguing over the meaning of *Weston*, *Disabato*, and *DomainsNewMedia.com*. All three decisions are, of course, relevant. However, we must consider that *DomainsNewMedia.com* is the most recent of the three cases decided by our supreme court, and we can hardly contravene the most recent precedent. *See* S.C. CONST. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court."), *aff'd as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014).

Our inquiry cannot proceed as though there are not significant factual distinctions between the chamber of commerce in *DomainsNewMedia.com* and the Fund. There clearly are. For example, there is no indication in *DomainsNewMedia.com* that state government had a cooperative role in administering the chamber of commerce's marketing program. The chamber of commerce in that case was not set up by the General Assembly and had been around for decades when the marketing program was set up. *See* 423 S.C. at 298, 814 S.E.2d at 515. To our knowledge, local chambers do not have access to the state's online credit card system, do not have state employees answering the phone, and usually cannot count on promotion from state agencies on social media. Finally, a chamber of commerce carries out other activities beyond distributing public dollars. Here, the Fund's major purpose is deciding who receives scholarships indirectly supported by the state. After all, our supreme court said in its conclusion in *DomainsNewMedia.com* that "the General Assembly enacted the more narrow and targeted [accommodations tax] statute . . . to provide what it determined were the necessary accountability safeguards with regard to the expenditure of these specific funds while simultaneously protecting *the private nature of the organizations* selected to perform this marketing function." *Id.* at 307, 814 S.E.2d at 519 (emphasis added).

Nor can we ignore how closely the structure of the Fund resembles a concern our supreme court raised in *Disabato*. *See* 404 S.C. at 455, 746 S.E.2d at 340 ("If public bodies were not subject to the FOIA, *governmental bodies could subvert the FOIA by funneling State funds to nonprofit corporations so that those corporations could act, outside the public's view, as proxies for the State*. . . ." (emphasis added)). It is hard to see how the Fund is not a nonprofit corporation acting as a proxy for the state; that seems to be its entire reason for existing. At least one of our sister courts in another state has found that its state's requirement that a public body be one that is "receiving or expending and supported in whole or in part by public funds" could be fulfilled under similar—though not precisely analogous—circumstances. *See Associated Press v. Sebelius*, 78 P.3d 486, 491–92 (Kan. Ct. App. 2003) (holding that a volunteer "team" set up by the governor-elect was not a public body for other reasons, but first finding the public funding requirement satisfied when "there were 12 state employees assigned to" the team, and "state employees continued to receive their salary while assisting [the team]").

Nonetheless, we hold that, under *DomainsNewMedia.com*, the Fund is not a public body for the purposes of the FOIA. The support that the Fund receives in the

form of likely fleeting assistance from state officials and use of the state fundraising platform is *de minimis* rather than the diversion of "a block of public funds . . . *en masse*" or "the management of the expenditure of public funds." *Weston*, 303 S.C. at 404, 401 S.E.2d at 165. *See also Disabato*, 404 S.C. at 454–55, 746 S.E.2d at 340 ("[T]he application of the FOIA beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds."); *id.* at 456, 736 S.E.2d at 341 ("[T]he FOIA does not apply to a recipient of public funds as a condition of the receipt of the funds. Rather, the general support of an entity through public funds brings it within the class of entities to which the FOIA applies."). Furthermore, the legislation creating the Fund includes a reporting and accountability mechanism not unlike the measures considered relevant by the *DomainsNewMedia.com* court.[18] *See* 423 S.C. at 304, 814 S.E.2d 518 (noting statutes that "provide a specific and comprehensive approach for the receipt, expenditure, and oversight of these funds," and stating those "play the lead role in our disposition of this case"). *See also Wilder v. S.C. State Highway Dep't*, 228 S.C. 448, 454, 90 S.E.2d 635, 638 (1955) ("It is well settled that where there is a statute dealing with a subject in general terms and another statute dealing with a part of the same subject in a more minute and definite way, the special statute will be considered as an exception to, or qualification of, the general statute and given effect."). Finally, the Fund is at least technically independent of the state. *See Disabato*, 404 S.C. at 454–55, 746 S.E.2d at 340 (limiting the reach of FOIA "beyond traditional governmental entities").

Even if we were to hold that the Fund is a public body under the FOIA, that would not require the Fund to release many or perhaps most of its documents. The Legislature has been clear on that:

> Information contained in or produced from a tax return, document, or magnetically or electronically stored data utilized by the Department of Revenue or the public charity in the exercise of its duties as provided in this section must remain confidential and is exempt from disclosure pursuant to the Freedom of Information Act.

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[18] *See* S.C. Code Ann. § 12-6-3790(B)(5) (Supp. 2022) (requiring annual reports on the Fund's operations, including "the number and total amount of grants issued to eligible schools in each year" and "a copy of a compilation, review, or audit of the fund's financial statements, conducted by a certified public accounting firm").

> Personally identifiable information, as described in the Family Educational Rights and Privacy Act and individual health records, or the medical or wellness needs of children applying for or receiving grants must remain confidential and is not subject to disclosure pursuant to the Freedom of Information Act.

S.C. Code Ann. § 12-6-3790(B)(4) (Supp. 2022). We must interpret this statute as it comes to us, and the plain meaning prevails.

That does not mean that the status of the Fund would be an academic point. Rather, there is at least one aspect of Davis's challenge that would be unaffected by this: whether the Fund's meetings must be at least partially open to the public.

We categorically disagree with the circuit court's conclusion that the meetings of a public body "can be closed meetings" if aspects of the discussion at those meetings—even all aspects—are exempt from the FOIA. That is not what FOIA says. *See* S.C. Code Ann. § 30-4-60 (2007) ("*Every meeting of all public bodies* shall be open to the public unless closed pursuant to Section 30-4-70 of this chapter." (emphasis added)). Instead, the General Assembly has provided that certain issues may be discussed in closed session. *See* § 30-4-70(a) (listing reasons that may justify executive sessions). And the FOIA lays out a procedure for going into executive session that requires a public vote to do so and prohibits a vote in executive session to take action. *See* S.C. Code Ann. § 30-4-70(b) (2007) ("No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.").

In any event, we need not address that issue directly, because under our precedents, the Fund is not a public body for the purposes of the FOIA. That outcome is dictated by the majority opinion in *DomainsNewMedia.com* because (1) the legislative enactment discussed in that opinion is similar enough in nature to the legislative enactment concerning the Fund in the present case in that both have independent reporting and accountability requirements, which was a key factor in the majority's analysis in *DomainsNewMedia.com*; and (2) the legislative enactment concerning the Fund expressly states that the funds are not public funds. The occasional and relatively minor activities undertaken by the Department's employees do not represent the *en masse* diversion of state resources required by *DomainsNewMedia.com* to hold otherwise.

Davis contends that this line of analysis is wrong. He notes that "the South Carolina Attorney General's Office has . . . specifically conclud[ed] that there exists no '*de minimis*' exception to [FOIA's] applicability for public funding which is indirect or insignificant." We respect the Attorney General's Office and its work, but we need not determine whether it has endorsed a *de minimis* exception, because our supreme court has. *See DomainsNewMedia.com*, 423 S.C. at 305, 814 S.E.2d at 518 (holding that the *Weston* court "rejected the suggestion that the mere receipt or expenditure of public funds automatically and categorically transformed an otherwise private entity into a public body triggering the full panoply of FOIA requirements").

Additionally, Davis argues that the scholarship dollars at issue here are public money. We disagree. Davis's sole authority for this contention is an opinion of the Attorney General's Office characterizing the funds as public. However, one of the cases cited in that opinion stands for the opposite proposition; the quoted parenthetical from that case, *Elliott v. McNair*, refers to a portion of the court's ruling laying out the view that our supreme court *was rejecting*. *See* 250 S.C. 75, 90, 156 S.E.2d 421, 429 (1967) (quoting a Florida Supreme Court case as a "leading" example of "decisions contrary to the view hereinbefore expressed"). Considering the status of industrial revenue bonds used to help a manufacturing project and paid off by a manufacturer, our supreme court distinguished those funds from public funds. *See id.* ("It is our view, however, that the money which will be received by the [c]ounty [b]oard in this case is impressed with *a trust that it be used for the purpose for which it was obtained*, the construction of a project, for which reason *the money does not become public money* whose expenditure would otherwise be confined to the general public good."). Likewise, the private funds contributed to the Fund are used for specified purposes—the scholarships—and would not become public funds even if they were directly held by the Department or an indisputably public body. The other authorities cited by the Attorney General's opinion are an appeals court decision from Arizona, a South Carolina statutory provision concerning funds of the Department of Commerce, and a quote from *American Jurisprudence* that appears to be outdated.[19]

[19] We also believe it is possible that Davis abandoned this argument in his reply brief, where he states: "Respondent also wants to rely upon its belief that the scholarship funds distributed are not public funds. That finding is not necessary as *it is irrelevant*." (emphasis added).

We emphasize that this court has not been called upon to evaluate any other policy or legal aspect of the Fund's establishment or structure. While we offer no opinion on those questions, they would in some cases present more difficult considerations. We are instead answering the far narrower issue presented to us: Whether, under the current circumstances, the Fund is a public body for the purposes of the FOIA. Given our precedents, it is not.

III. EFFECT OF THE ACT

A related question is Davis's contention that the circuit court erred in using the Act to interpret the General Assembly's original intent in the proviso. We do not need to address this issue, because Davis abandoned it on appeal.

Davis cites no legal authority for his argument that the circuit court could not consider a subsequent act of the General Assembly as clarifying the intent of the budget provisos. The only citations of any kind are to the record and to the act itself.

IV. 'BELT AND SUSPENDER' ARGUMENT

Davis argues that the Act is "nothing more than a restatement of FOIA exemptions," and thus should be read as a "belt and suspender" provision. Davis abandoned this argument on appeal, but it has no merit in any event.

Again, Davis cites no authority to support his argument that the General Assembly intended nothing more than a reiteration of current law. Even so, without some cursory evidence, interpreting the statute this way would run contrary to our canons of statutory construction. *See Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." (quoting *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)); *id.* at 145, 750 S.E.2d at 72 (noting that "the legislature is presumed to be aware of prior legislation and does not perform futile acts").

CONCLUSION

For the foregoing reasons, the circuit court's order is **AFFIRMED**.

MCDONALD, J., and LOCKEMY, A.J., concur.