The Supreme Court of South Carolina

Request for Written Comments

The South Carolina Bar has proposed amending Rule 45(b)(1) of the South Carolina Rules of Civil Procedure concerning the service of a subpoena seeking the production of documents. The Bar's proposed amendment is intended to clarify that notice and a copy of the subpoena itself, rather than "prior notice in writing" of the issuance of the subpoena, must be served on each party prior to serving the subpoena on the person to whom it is directed.

After a review of the Bar's submission, the Court is considering modifying the Bar's proposed amendment and including a Note to the amendment for submission to the General Assembly in accordance with Article V, Section 4A of the South Carolina Constitution. The proposed changes are set forth in the attachment.

Persons or entities desiring to submit written comments should submit their comments to the following email address, rule45comments@sccourts.org, on or before November 22, 2019. Comments should be submitted as an attachment to the email as either a Microsoft Word document or an Adobe PDF document.

Columbia, South Carolina
November 6, 2019

RULE 45
SUBPOENA

(a) Form; Issuance.

. . .

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

. . .

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made in the same manner prescribed for service of a summons and complaint in Rule 4(d) or (j). If the person's attendance is commanded, then that person shall, upon his arrival in accordance with the subpoena, be tendered fees for each day's attendance of $25.00 and the mileage allowed by law for official travel of State officers and employees from his residence to the location commanded in the subpoena. When the subpoena is issued on behalf of the State of South Carolina or an officer or agency thereof, fees and mileage need not be tendered. ~~Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance.~~

. . .

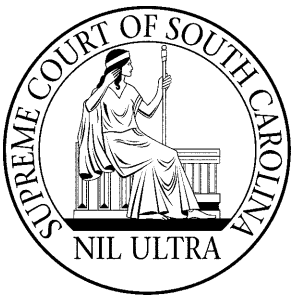
(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend a deposition, permit an inspection,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

45~~(b)(1)~~(a)(4); or if service is made upon an individual under Rule 4(d)(1) and the individual did not receive or acknowledge the subpoena.

. . .

Note to 2020 Amendment:

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
November 6, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

2018-001253 - Steven Barnes v. SCDC Pending

2019-000304 - JP Morgan Chase Bank v. Robert W. Wazney Pending

PETITIONS FOR REHEARING

27904 - Crystal Wickersham v. Ford Motor Co. Pending

27917 - Commissioners of Public Works of the City of Laurens v. City of Fountain Inn Denied 10/31/19

27920 – Scott Ledford v. SC Department of Public Safety Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5673-Cricket Store 17 v. City of Columbia	Pending
5680-Steven Newbern v. Ford Motor Company	Pending
5681-Richard Ralph v. Paul D. McLaughlin	Pending
5683-State v. Ontario Stefon Patrick Makins	Pending
5684-Lucille Ray v. City of Rock Hill	Pending
5685-Nationwide v. Kristina Knight	Pending
5686-Courtland J. Eggleston v. United Parcel Service	Pending
5687-Faye P. Croft v. Town of Summerville	Pending
2019-UP-283-Kathlenn Kelly v. James Rachels	Denied 11/01/19
2019-UP-284-Bank of New York Mellon v. Cathy Lanier	Pending
2019-UP-287-Rosemary Connelly v. Winsor Custom Homes	Pending
2019-UP-299-Seeahray Brailsford v. Piggly Wiggly	Pending
2019-UP-304-China Constr. America v. MS Production Solutions	Pending
2019-UP-306-Alicia Rudick v. Brian Rudick	Pending
2019-UP-318-State v. Ronald Y. Hyatt	Denied 11/01/19
2019-UP-323-Richard L. Hirschi and Linda Elzey v. SCDSS	Pending
2019-UP-333-State v. Edward Terrell Chandler	Pending
2019-UP-338-Beverly Gilchrist v. Florence Miles	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5606-George Clark v. Patricia Clark	Pending
5625-Angie Keene v. CNA Holdings	Granted 11/01/19

5637-Lee Moore v. Debra Moore	Pending
5639-Hugh Dereede v. Courtney Feeley-Karp	Pending
5641-Robert Palmer v. State et al.	Pending
5643-Ashley Reeves v. SC Municipal Insurance	Pending
5660-Otis Nero v. SCDOT	Pending
5666-Ex parte: The Travelers Home and Marine Ins. Co,	Pending
2018-UP-432-Thomas Torrence v. SC Department of Corrections	Pending
2019-UP-100-State v. Rhajon Sanders	Granted 11/01/19
2019-UP-146-State v. Justin Antonio Butler	Pending
2019-UP-172-Robert Gillman v. Beth Gillman	Pending
2019-UP-178-Arthur Eleazer v. Leslie Hughey	Pending
2019-UP-209-State v. Terrance Stewart	Pending
2019-UP-219-Adele Pope v. Alan Wilson (James Brown Legacy Trust)	Pending
2019-UP-270-Deep Keel, LLC v. Atlantic Private Equity Group, LLC	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Bradford Alexander Rawlinson,
Respondent

Appellate Case No. 2019-001513

Opinion No. 27926
Submitted October 17, 2019 – Filed November 6, 2019

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Ericka M. Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

John Magruder Read, IV, of The Read Law Firm, of Greenville, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension not to exceed three years. We accept the Agreement and suspend Respondent from the practice of law in this state for eighteen (18) months, retroactive to July 23, 2018, the date of his interim suspension. *In re Rawlinson*, 424 S.C. 15, 817 S.E.2d 632 (2018). The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

On April 18, 2018, Respondent was placed on administrative suspension for failing to file a report showing his compliance with the continuing legal education (CLE) requirements pursuant to Rule 408, SCACR, for the reporting year ending in February 2018. On June 15, 2018, the Commission on CLE informed the Chief Deputy Clerk of the Supreme Court Respondent was in compliance with the CLE requirements; however, Respondent never filed a petition with the Court seeking reinstatement from his administrative suspension.

Matter II

On May 1, 2018, Respondent contacted an assistant solicitor and a circuit court judge on behalf of a client Respondent believed was wrongfully arrested on a bench warrant. On a three-way call between Respondent, the assistant solicitor, and the judge, the judge informed Respondent he could not entertain Respondent's proposal regarding the client given Respondent's administrative suspension. Respondent contacted a colleague who assisted the client in lifting the bench warrant and being released from jail.

On June 14, 2018, the assistant solicitor emailed Respondent regarding the same client and requested Respondent have another attorney cover the case and bring the client to court on June 18, 2018. On June 18, 2018, Respondent emailed the assistant solicitor and stated he would be in court with the client as he (Respondent) "finally got clearance." At the time Respondent sent the email, he remained administratively suspended. Respondent did not appear with the client on June 18, 2018.

On June 22, 2018, Respondent again emailed the assistant solicitor and included the June 15, 2018 compliance letter from the Commission on CLE. In the email, Respondent informed the solicitor, "I included an email below I received last week that made me think I was good to go as far as CLEs. Unfortunately[,] I am still waiting [on] the approval (never going through this again)." Respondent further stated, "I need to meet with [the client] and another attorney who can try the case in my absence should I still be awaiting approval."

ODC mailed Respondent a Notice of Investigation (NOI) on May 15, 2018, requesting a response to the complaint regarding this matter within fifteen days. When Respondent failed to respond, he was served with a letter pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982). On July 6, 2018, ODC mailed Respondent a Supplemental NOI. In what would prove to be a pattern, Respondent did not respond to the NOI or the Supplemental NOI until January 2, 2019.

Matter III

Complainant retained Respondent in December 2017 to represent her in a domestic matter. Respondent quoted Complainant a total fee of $1,500, plus a $150 filing fee. Complainant paid Respondent $1,250 of the quoted fee for the representation. Respondent failed to maintain reasonable communication with Complainant regarding her case. Respondent prepared the pleadings in the case, but did not file the documents because Complainant had not paid the full fee or the filing fee.

Respondent fell into a state of depression during his representation of Complainant that affected his ability to communicate with her regarding the case. However, he failed to withdraw from the representation when his mental condition materially impaired his ability to represent Complainant. The fee agreement between Respondent and Complainant was for a flat, non-refundable fee; however, the written agreement did not have the necessary advance-fee language required by Rule 1.5(f), RPC, Rule 407, SCACR.

Respondent did not respond to ODC's June 13, 2018 NOI and subsequent July 10, 2018 *Treacy* letter until January 2, 2019.

Matter IV

The Complainant in this matter was an assistant solicitor assigned to prosecute a case involving one of Respondent's clients. On June 5, 2018, the client appeared in court and was questioned by the circuit court judge regarding his legal representation. The client indicated Respondent was representing him.

Respondent was paid a total of $7,200 over a period of time for the representation. Some of the fee payments were paid to Respondent prior to his administrative suspension, while other payments were made subsequent to his suspension. While on administrative suspension, Respondent visited the client at the county detention

center on three separate occasions. Respondent did not submit a notice of representation in the matter but told ODC he would have entered his appearance once his fee was paid in full, which he anticipated would have occurred after his administrative suspension was lifted. The circuit court eventually appointed a public defender for the client.

After the appointment of the public defender, Respondent failed to refund any portion of the fee to the client. Respondent claimed his fee agreement with the client was a flat, non-refundable fee; however, the written fee agreement did not contain the necessary advance-fee language required by Rule 1.5(f), RPC, Rule 407, SCACR.

Respondent did not respond to ODC's July 6, 2018 NOI and a subsequent August 10, 2018 *Treacy* letter until January 2, 2019.

Matter V

Complainant, a circuit court judge, was presiding over a term of general sessions when a defendant appeared before him on a motion to have his public defender relieved in favor of private counsel. The defendant advised the judge he had retained Respondent; however, Respondent's administrative suspension was brought to the judge's attention. The defendant informed the judge Respondent told him Respondent would have an attorney with whom Respondent shared office space handle the defendant's case if Respondent could not handle it himself. However, Respondent was on administrative suspension at the time he was retained by the defendant.

Respondent failed to return any portion of the fee to the defendant, claiming it was a flat, non-refundable fee; however, the written fee agreement did not have the necessary advance-fee language required by Rule 1.5(f), RPC, Rule 407, SCACR.

Additionally, Respondent did not respond to ODC's July 6, 2018 NOI and subsequent August 10, 2018 *Treacy* letter until January 2, 2019.

Matter VI

On May 17, 2018, while on administrative suspension, Respondent appeared with a client at a mediation conference in a domestic matter. Respondent was engaged

in the conference and provided advice and guidance to the client during the mediation. At the conclusion of the mediation, a written agreement was signed by all parties, including Respondent.

Respondent did not respond to ODC's July 13, 2018 NOI and subsequent August 10, 2018 *Treacy* letter until January 2, 2019.

Matter VII

Complainant retained Respondent on November 20, 2017, to represent him in a criminal matter. After Respondent's administrative suspension, he ceased communicating with Complainant and failed to inform Complainant he could not communicate with him due to the administrative suspension. Respondent also failed to refund any portion of the fee to Complainant, claiming their fee agreement was for a flat, non-refundable fee. However, the written fee agreement did not have the necessary advance fee language required by Rule 1.5(f), RPC, Rule 407, SCACR.

Respondent did not respond to ODC's August 7, 2018 NOI and subsequent September 7, 2018 *Treacy* letter until January 2, 2019.

Matter VIII

Respondent was retained to represent a client in a criminal matter in January 2018. At the time he was retained, Respondent was paid $3,000 of his quoted $6,000 fee. Respondent informed the client's mother the client would appear before a judge to offer a plea on July 12, 2018. Respondent received the final payment of his fee on July 11, 2018. Respondent then informed the client's mother the client's plea would be on the docket for the week of July 23, 2018. However, at the time he made the statements regarding the date of the client's plea to the client's mother, Respondent did not have a confirmed plea date for the client. Further, Respondent was on administrative suspension at the time he accepted the balance of his fee and communicated the unconfirmed plea dates to the client's mother.

Respondent failed to return any portion of the fee to the client or the client's mother, claiming their agreement was for a flat, non-refundable fee. However, the written fee agreement did not have the necessary advance fee language required by Rule 1.5(f), RPC, Rule 407, SCACR.

Further, Respondent did not respond to ODC's August 7, 2018 NOI or subsequent September 7, 2018 *Treacy* letter until January 2, 2019.

Matter IX

Respondent agreed to represent Complainant pro bono in a criminal matter. After his administrative suspension, Respondent ceased communicating with Complainant and failed to advise her he could not communicate with her due to his administrative suspension.

Respondent failed to respond to ODC's September 5, 2018 NOI until January 2, 2019.

Matter X

Respondent was retained to represent Complainant in a criminal matter in January 2018, and was paid $2,200 for the representation. After his administrative suspension, Respondent stopped communicating with Complainant and failed to advise Complainant he could not communicate with him due to his administrative suspension. Further, Respondent failed to return any portion of the fee to Complainant, claiming it was a flat, non-refundable fee. However, the written fee agreement did not include the necessary advance fee language required by Rule 1.5(f), RPC, Rule 407, SCACR.

Law

Respondent admits that by his conduct he violated Rules 1.2 (scope of representation and allocation of authority); 1.3 (diligence); 1.4 (communication); 1.5(f) (requirements of written fee agreements for advanced fees); 1.16(a) (declining or withdrawing from representation); 1.16(d) (required duties of lawyer on termination of representation); 3.4(c) (fairness to opposing party and counsel); 4.1 (truthfulness in statements to others); 5.5(a) (prohibition on the unauthorized practice of law); 8.1(b) (knowingly failing to respond to a lawful demand for information from a disciplinary authority); and 8.4(e) (misconduct), RPC, Rule 407, SCACR.

Respondent also admits his conduct constitutes grounds for discipline under Rules 7(a)(1) (violating the Rules of Professional Conduct); 7(a)(3) (willfully violating a valid order of the Supreme Court, Commission, or panels of the Commission; knowingly failing to respond to a lawful demand from a disciplinary authority, including a request for a response); and 7(a)(5) RLDE (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), Rule 413, SCACR.

Conclusion

We find Respondent's misconduct warrants a definite suspension from the practice of law in this state for eighteen (18) months. Accordingly, we accept the Agreement and suspend Respondent for a period of eighteen (18) months, retroactive to the date of his interim suspension.

Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission), or enter into a reasonable payment plan with the Commission, within sixty (60) days of the date of this opinion. Additionally, Respondent shall enter into a restitution agreement with the Commission within sixty (60) days of this opinion for the payment of restitution to former clients Michelle Knox in the amount of $1,250; Robert Outen in the amount of $7,200; Drayton Lowry in the amount of $1,000; Brandon Trapp in the amount of $2,200; Brenda Adams and Codaris Burris in the amount of $6,000; and Jerry Wayne in the amount of $2,200.

Further, for a period of two years Respondent shall submit quarterly reports from his medical treatment provider to the Commission regarding his treatment compliance. An investigative panel will review this matter at the end of the two-year period beginning with the date of this opinion. The panel may unilaterally extend the monitoring terms for an additional period of one year if the panel deems additional time appropriate or necessary

We also take this opportunity to remind Respondent that, prior to seeking reinstatement, he must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension of nine months or more), including completion of the Legal Ethics and Practice Program Ethics School within one year prior to filing a petition for reinstatement.

Finally, within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR (duties following suspension).

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Zachariah Scott Cooper and Amie Rochelle Lord Cooper, Appellants,

v.

South Carolina Department of Social Services, Shanice Carter, and Michael Jones, Respondent.

AND

Arlene Annett Palazzo, Appellant,

v.

South Carolina Department of Social Services, Shanice Carter, and Michael Jones, Respondent.

In the interest of minors under the age of eighteen.

Appellate Case No. 2018-001151

Appeal from Lexington County
Peter R. Nuessle, Family Court Judge

Opinion No. 27927
Heard September 26, 2019 – Filed November 6, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Larry Dale Dove, of Dove Law Group, LLC, of Rock Hill, for Appellants Zachariah Scott Cooper and Amie Rochelle Lord Cooper.

Robert J. Butcher and Deborah J. Butcher, both of The Camden Law Firm, PA, of Camden, for Appellant Arlene Annett Palazzo.

Scarlet Bell Moore, of Greenville, for Respondent South Carolina Department of Social Services.

Amanda Mange Scott, of Parnell & Parnell, P.A., of White Rock, for Respondent Shanice Carter.

Earnest Deon O'Neil, of Columbia, for Respondent Michael Jones.

JUSTICE JAMES: Zachariah Scott Cooper, Amie Rochelle Lord Cooper, and Arlene Annett Palazzo are foster parents of three sibling children placed in their care by the South Carolina Department of Social Services (DSS). The Coopers foster one of the children, and Palazzo fosters the other two children. DSS initiated removal actions in the family court. The Coopers and Palazzo (collectively, Foster Parents) filed private actions seeking termination of parental rights (TPR) and adoption of their respective foster children. This consolidated appeal stems from the family court's order denying several motions made by Foster Parents. We affirm in part, reverse in part, and remand this matter to the family court for further proceedings consistent with this opinion.[1]

---

[1] Two weeks before oral argument, Foster Parents moved to supplement the record with correspondence between counsel for the Coopers (Mr. Dove) and DSS General Counsel Anthony Catone. The correspondence consists of two letters, one from Mr. Dove to Mr. Catone, and a letter in response from Mr. Catone to Mr. Dove. The letters have nothing to do with this case, and they will in no way aid this Court in evaluating and deciding the issues in this appeal. We find the motion to supplement is completely without merit.

FACTUAL AND PROCEDURAL BACKGROUND

Michael Jones (Father) and Shanice Carter (Mother) are the biological parents of four children. Child 1 was born in 2013, Child 2 was born in 2014, and Child 3 was born in 2016. Child 1, Child 2, and Child 3 (collectively, the Children) are the focus of this appeal. The fourth child's interests are not an issue in this litigation.

DSS removed Child 1 and Child 2 from Father and Mother's care in 2015 and placed them in foster care with Palazzo. DSS removed Child 3 from Father and Mother's care shortly after his birth and placed him in foster care with the Coopers in July 2016, and Child 3 has continuously resided with the Coopers since then. At the time of oral argument, this Court was under the impression that Child 1 and Child 2 had been residing with Palazzo since their placement with Palazzo in 2015; however, this Court learned through collateral filings made after oral argument that DSS removed Child 1 and Child 2 from Palazzo's home in February 2019 and placed them with the Coopers. This removal was prompted by an abuse complaint made against Palazzo, and proceedings relative to that complaint are reportedly still pending. Palazzo strenuously denies the complaint.

DSS commenced two separate removal actions in the family court, one involving Child 1 and Child 2, and the other involving Child 3. Foster Parents assert DSS repeatedly informed them the permanent plan for the Children was TPR and adoption. However, in January 2018, Foster Parents received word that DSS was considering changing the permanent plan to relative placement with a maternal great uncle. A DSS caseworker subsequently sent Mrs. Cooper a text message informing her that the great uncle's home study was favorable. After Mrs. Cooper inquired as to what the placement plan was and as to whether there would be any transitional arrangements for the Children, the DSS caseworker replied, "Good morning, the agency has decided that there will not be any transitional visits. . . So if everything goes as planned on [March] 5th, I will be moving all of the children on the 6th."

On January 29, 2018, Palazzo filed a complaint seeking TPR and adoption for Child 1, Child 2, and Child 3. After learning the Coopers wanted to adopt Child 3, Palazzo amended her complaint seeking TPR and adoption for only Child 1 and Child 2. On February 12, 2018, Palazzo moved to (1) intervene in the DSS removal action concerning Child 1 and Child 2, (2) consolidate her TPR and adoption action with DSS's removal action, and (3) have physical placement of Child 1 and Child 2. DSS opposed each motion.

On March 1, 2018, the Coopers sent a letter to DSS objecting to Child 3's removal and appealing DSS's intended removal of Child 3. On March 2, 2018, the Coopers filed a complaint seeking TPR and adoption for Child 3. The Coopers also moved to (1) intervene in the DSS removal action concerning Child 3, (2) consolidate their TPR and adoption action with the removal action, (3) request discovery in the consolidated action, (4) require DSS to join their TPR and adoption action, and (5) have temporary custody of Child 3. DSS opposed each motion.

Palazzo submitted several affidavits from professionals and friends endorsing her parenting skills and supporting the continued placement of Child 1 and Child 2 in her home. Child 1 and Child 2's therapist, Dr. Warren Umansky Ph.D., LPC, spoke highly in his affidavit of Palazzo's parenting skills and stated that disrupting Child 1 and Child 2's placement again "would be irresponsible and do further damage to these impressionable children at a time where they are experiencing success, enjoyment in their lives, and security." Licensed Professional Counselor Pam Stafford performed an assessment of Palazzo, Child 1, and Child 2 and stated in her affidavit that Ms. Palazzo is clearly a central figure in these two children's lives and that their relationship is creating a solid foundation for empathy, control, trust, and overall emotional well-being. Stafford further stated the relationship should not be interrupted unless absolutely necessary, as breaking the bond would re-traumatize the children.

The Coopers submitted affidavits from two professionals supporting the continued placement of Child 3 in their home. Stafford performed an assessment of the Coopers and Child 3 and found the attachment relationship between the Coopers and Child 3 is secure and apparent and that this attachment helps a toddler learn basic trust, enhances intellectual development, and creates a foundation for a sense of identity. Stafford further stated healthy attachment forms the foundation for emotional well-being and that it would be incomprehensible for such a child to be removed from the only home he has ever known unless it was absolutely necessary.

Dr. Philip G. Steude, MD, found Child 3 was bonded to the Coopers and stated, "Removal of this Child from [the] ongoing presence of Mrs. Cooper and, secondarily, Mr. Cooper and the older children would be exceptionally disruptive and traumatic. [Child 3's] basic response would tend to be shutting down relationships with other people, withholding and avoiding, causing probable disruption of his personality development into being a loner, angry, and untrusting."

On March 5, 2018, the family court held a permanency planning hearing in the DSS removal actions. At the hearing, DSS sought relative placement with the maternal great uncle, even though Mother lived with great uncle. Mother and Father supported this placement. DSS recommended the Children be placed with the great uncle as soon as possible. The Children's volunteer guardian ad litem (GAL) in the DSS actions did not "feel comfortable making a recommendation because everything ha[d] changed so quickly." Foster Parents objected to the permanency planning hearing going forward until their administrative appeal and motions could be heard. The family court continued the hearing, noting Foster Parents' pending motions would have to be heard and that there was no need to rush the Children's removal from Foster Parents' homes.

On March 19, 2018, the family court heard Foster Parents' motions. DSS, Mother, and Father opposed Foster Parents' motions. At this hearing, DSS announced to the family court it was no longer pursuing TPR and adoption or placement with the great uncle and stated the permanent plan for the Children was reunification with Mother. DSS noted Mother was seven months into a twelve month treatment plan and that Mother had to that point successfully completed the plan, with the exception of the duration requirement for stable housing. DSS argued that intervention, consolidation, and granting discovery rights to Foster Parents would unnecessarily complicate the case. DSS argued Foster Parents' intervention rights were strictly permissive and not mandatory. DSS also argued the volunteer GAL could protect the Children's interest and that Foster Parents had a right to attend the permanency planning hearing and to proceed with their private TPR and adoption actions.

The volunteer GAL stated her position on the motions. She recognized this case was complicated but noted it was not complicated due to Foster Parents' conduct. The GAL noted the length of time the Children had been with Foster Parents and that Foster Parents had not caused any delay in the removal actions. She noted the need for permanency and stated her belief that intervention by Foster Parents would allow the court to hear all the facts before making decisions in the removal actions that would be in the best interests of the Children. The Foster Care Review Board advised the family court that it believed intervention was appropriate and that the permanent plan for the Children should be TPR and adoption.

The family court took Foster Parents' motions under advisement. Foster Parents submitted briefs and documents to the family court to support their arguments. The volunteer GAL submitted a memorandum reiterating her agreement

with Foster Parents' arguments regarding intervention. The GAL expressed concern about allowing consolidation because different statutes govern the role of a volunteer GAL in a DSS action and the role of a GAL in a private action, and the GAL stated a volunteer GAL should not "be expected to serve in protracted litigation involving contests primarily between private parties." The GAL requested that if the actions were consolidated, a private GAL be appointed at Foster Parents' expense. The GAL did not object to Foster Parents' motions for discovery and supported Foster Parents' motions for temporary custody and placement of the Children.

On April 13, 2018, the family court issued an order summarily denying all of Foster Parents' motions. Foster Parents filed motions for reconsideration, which the family court also summarily denied. Foster Parents timely appealed the family court's decision, and the court of appeals consolidated the two appeals. The court of appeals requested certification, and this Court granted the motion pursuant to Rule 204(b) of the South Carolina Appellate Court Rules. Neither Mother, Father, nor DSS filed briefs with the court of appeals or this Court. On July 23, 2019, counsel for DSS sent a letter to this Court formally withdrawing its opposition to, and joining in, the relief sought by Foster Parents.

DISCUSSION

As we stated above, the family court summarily denied all of Foster Parents' motions without setting forth any findings in support of its denial of the motions. In their motions for reconsideration, Foster Parents requested the family court to set forth specific findings of fact and conclusions of law; however, the family court summarily denied the motions for reconsideration.

We stress that the family court must set forth pertinent findings of fact and conclusions of law when ruling upon motions to intervene and to consolidate, especially when the best interests of children are at stake. The unique facts of each case make it all the more important for the family court to fully set forth its findings when ruling on such motions. *See* Rule 26(a), SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision."). We review a family court's evidentiary or procedural rulings under an abuse of discretion standard. *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018). The absence of any factual findings to support the family court's denial of Foster Parents' motions makes our review of the family court's decision difficult. In many instances, a remand to the family court would be appropriate; however, to avoid

further delay in establishing permanency for the Children, we have examined the record and will address the merits of each motion.

I. Foster Parents' Motions

A. Intervention

Foster Parents argue the family court erred in denying their motions to intervene in the underlying DSS removal actions. Foster Parents contend their interest in TPR, adoption, custody of the Children, and the Children's welfare give them the right to intervene. They assert the disposition of the DSS removal action without their full participation may impair or impede their ability to maintain the Children in their custody and their ability to adopt the Children if they are ever available for adoption.

"Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *Ex Parte Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007). Section 63-7-1700(J) of the South Carolina Code (Supp. 2019) discusses permanency planning and provides in pertinent part, "Any other party in interest may move to intervene in the case pursuant to the rules of civil procedure and if the motion is granted, may move for review. Parties in interest include . . . the foster parent." Rule 24 of the South Carolina Rules of Civil Procedure governs intervention and allows for (1) intervention of right and (2) permissive intervention. Rule 24 provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

> When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24, SCRCP.

Foster Parents argue Rule 24 entitles them to both intervention of right and permissive intervention. DSS opposed intervention before the family court but now joins Foster Parents' motions to intervene; however, DSS asserts a foster parent's right to intervene is strictly permissive. We agree with DSS. The right of foster parents to intervene in a DSS removal action does not arise out of their status as foster parents but arises, if at all, through the evolution of a special relationship illustrated to the family court via the underlying facts of each individual case. Indeed, a plain reading of section 63-7-1700(J) indicates the intervention rights of a foster parent in a DSS removal action are permissive. Section 63-7-1700(J) provides that a foster parent is a "party in interest" in a DSS removal action. Section 63-7-1700(J) further provides that a "party in interest may move to intervene in the case pursuant to the rules of civil procedure and *if* the motion is granted, may move for review." (emphasis added). By using the word "if" in the emphasized portion of the statute, the General Assembly recognized a foster parent's right to intervene in a removal action is not absolute.

A family court should therefore apply Rule 24(b)(2) when analyzing whether or not to grant a foster parent's motion to intervene. *See* Rule 24(b)(2), SCRCP (permitting intervention upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common" and upon consideration of "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties").

Here, the family court erred in denying Foster Parents' motions to intervene. First, there is no dispute that Foster Parents timely moved to intervene, as required

under Rule 24(b)(2).[2] Further, while foster parent intervention will not be appropriate in every removal action, here, Foster Parents have demonstrated their private TPR and adoption actions and the DSS removal actions have questions of law and fact in common. The best interests of the Children are certainly a consideration the private actions and the DSS actions have in common, especially when considering the length of time the Children have been with Foster Parents. Expert testimony indicates the Children are bonded with Foster Parents and that alternative placement would be severely detrimental to the Children.[3]

Under these circumstances, intervention will allow the family court to receive input from Foster Parents that will aid the family court in reaching a timely decision on the merits of both removal actions. We further conclude intervention will not unduly delay or prejudice the adjudication of the rights of the parties to these actions. We therefore hold the family court erred in denying the motions to intervene.

We stress that our decision in this case should not be interpreted as a signal to the family court bench and bar that intervention should be granted to foster parents in every case. The decision to grant intervention remains in the discretion of the family court following its analysis of the facts and procedural posture of each case.

B. Consolidation

Foster Parents argue the family court erred in denying their motions to consolidate the DSS removal actions with their private TPR and adoption actions.

---

[2] "Courts have adopted a four-part test for determining timeliness: '(1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial.'" *Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (quoting *Mokhiber v. Davis*, 537 A.2d 1100, 1104 (D.C. 1988)).

[3] Before the family court, DSS objected to intervention. However, we cannot ignore the fact that DSS now joins in the motions to intervene. Consent of DSS in any given case would not, in and of itself, require a family court judge to grant a foster parent's motion to intervene; however, DSS's consent and its reasons for such consent would certainly be factors the family court should consider.

Rule 42(a) of the South Carolina Rules of Civil Procedure addresses consolidation and provides:

> **(a) Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42(a), SCRCP.

We remand this issue to the family court and instruct it to reconsider Foster Parents' motions to consolidate in light of DSS's change in position and any changes in the underlying facts to this case since the family court's original ruling. The Children's GAL raised legitimate concerns regarding the consolidation of Foster Parents' private actions with the DSS removal actions. We conclude it is appropriate for the family court to promptly resolve the consolidation issue after hearing from the parties and the GAL.

C. Joinder

Rule 19(a) of the South Carolina Rules of Civil Procedure governs the joinder of persons needed for just adjudication and provides:

> **(a) Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

Rule 19(a), SCRCP.

i. Joining Foster Parents to the DSS Removal Actions

Foster Parents argue the family court should have been required to join them as parties in the DSS removal actions. We decline to address this issue because our reversal of the family court's denial of Foster Parents' motions to intervene in the DSS removal actions moots this issue. *See Sloan v. Dep't of Transp.*, 379 S.C. 160, 167-68, 666 S.E.2d 236, 240 (2008) (providing that when there is no actual controversy, this Court will not rule on moot or academic issues). We find none of the exceptions to the mootness doctrine apply.[4]

ii. Joining DSS to the Coopers' Private TPR and Adoption Action

The Coopers argue the family court erred by not requiring DSS be joined to their private TPR and adoption action.

Section 63-7-1710(A) of the South Carolina Code (Supp. 2019) provides in pertinent part:

> (A) When a child is in the custody of the department, the department shall file a petition to terminate parental rights or shall join as party in a termination petition filed by another party if:
>
> (1) a child has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months[.]

Child 3 was in foster care for over fifteen of the most recent twenty-two months at the time the Coopers filed their motion. Thus, the plain language of the statute indicates DSS "shall join as party" in the Coopers' TPR petition. However, there was no need for the family court to join DSS as a party in the Coopers' TPR action because the Coopers had already included DSS as a defendant in that action. Therefore, we affirm the family court's denial of the Coopers' motion to join DSS as a party to their private TPR and adoption action.

---

[4] *See Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001) (providing there are three exceptions to mootness in the civil context: (1) if the issue is capable of repetition, yet evading review; (2) if the issue is of "imperative and manifest urgency to establish a rule for future conduct in matters of important public interest"; and (3) "if a decision by the trial court may affect future events, or have collateral consequences for the parties").

II. Best Interests of the Children

Foster Parents argue the family court failed to consider the best interests of the Children when ruling on their motions. We do not know whether the family court considered the Children's best interests in ruling on Foster Parents' motions because the order includes no discussion of the issue. However, Foster Parents are correct that in every ruling made by the family court impacting the rights of children, including those procedural in nature, the family court must consider the best interests of the subject children. As noted above, allowing Foster Parents to intervene in the DSS removal actions will allow the family court to receive input from Foster Parents that will aid the family court in reaching a timely decision on the merits of both removal actions.

CONCLUSION

We affirm the family court's denial of Foster Parents' motions for joinder. We reverse the family court's denial of Foster Parents' motions to intervene. We remand for further consideration of Foster Parents' motions for consolidation. As of the date of this opinion, the Children are placed with the Coopers. Unless circumstances arise adversely affecting the safety and well-being of Child 3, Child 3 shall remain in his current placement with the Coopers during the pendency of these actions. Unless circumstances arise adversely affecting the safety and well-being of Child 1 and/or Child 2, Child 1 and/or Child 2 shall remain in their current placement with the Coopers pending resolution of the abuse complaint against Palazzo. If the complaint against Palazzo is determined to be unfounded while these actions remain pending, Child 1 and Child 2 shall be returned to Palazzo. Thereafter, unless circumstances arise adversely affecting the safety and well-being of Child 1 and/or Child 2, they shall remain with Palazzo during the pendency of these actions. The family court shall address any circumstances adversely affecting the safety and well-being of the Children that may arise during the pendency of these actions.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of Robbie F. Gardner, III, Respondent

Appellate Case No. 2019-001813

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Robbie F. Gardner, III, Esquire, died on October 26, 2019, and requesting the appointment of a Special Receiver pursuant to Rule 31(b), RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Elizabeth B. York, Esquire, is hereby appointed to assume responsibility for Mr. Gardner's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Gardner maintained. Ms. York shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Gardner's clients. Ms. York may make disbursements from Mr. Gardner's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Gardner maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Gardner, shall serve as notice to the bank or other financial institution that Elizabeth B. York, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Elizabeth B. York, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Gardner's mail and the authority to direct that Mr. Gardner's mail be delivered to Ms. York's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

November 4, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Dale Kosciusko, Appellant,

v.

Alice Witherspoon Wilson Parham, Respondent.

In Re:

Alice Witherspoon Wilson Parham n/k/a Alice Witherspoon Parham Casey, Respondent,

v.

Robert Dale Kosciusko, Appellant.

Appellate Case No. 2017-000016

Appeal From Richland County
Robert S. Armstrong, Family Court Judge

Opinion No. 5690
Heard October 14, 2019 – Filed November 6, 2019

AFFIRMED

John O. McDougall, of McDougall, Self, Currence & McLeod, LLP, of Columbia, and Katherine Carruth Goode, of Winnsboro, both for Appellant.

Whitney Boykin Harrison, of McGowan Hood & Felder, LLC, of Columbia, for Respondent.

GEATHERS, J.: In this family court action, Robert Kosciusko ("Father") sought a finding of contempt against Alice Witherspoon Parham Casey ("Mother") for alleged violations of an order confirming an arbitration award concerning child custody and visitation. Father argues the family court erred in dismissing his contempt action by: 1) finding that it lacked subject-matter jurisdiction to enforce the family court's prior order confirming the arbitration award; 2) failing to find that Mother was estopped from challenging the award and waived any objection to the enforceability of the order confirming the award; 3) refusing to enforce the unappealed order of a different family court judge confirming the arbitration award; and 4) refusing to enforce the order confirming the arbitration award when South Carolina's public policy favors alternative dispute resolution and the widespread practice in the state includes voluntary arbitration of children's issues. As an additional sustaining ground, Mother argues Father failed to meet his burden of proof in the underlying rule to show cause motion. We affirm.

FACTS

Mother and Father were married on October 6, 2001.[1] During their marriage, the parties had two children. As a result of the breakdown of the marriage, Mother and Father separated and entered into a property settlement, support, and custody agreement that established "true joint custody" of the children; and, on July 15, 2011, the family court entered an order approving the agreement. The agreement was later modified by an addendum, which was approved by a supplemental order of the family court on December 19, 2011. The parties were divorced on July 27, 2012. In the divorce order, the family court determined that all of the matters within its jurisdiction, including child custody and visitation, had been resolved by the final order approving the parties' settlement agreement.

Despite the parties' settlement agreement, child custody and visitation became contentious issues between Mother, Father, and Father's new wife, Deena Dill. On July 7, 2015, and August 20, 2015, Mother and Father attempted to mediate issues

---

[1] Mother is an attorney and a member of the South Carolina Bar who is in good standing. Father is an emergency room physician.

involving child custody and visitation, but both attempts were unsuccessful. After the failed mediations, the parties agreed to submit the issues of "right of first refusal, holidays, visitation schedule, vacations, and transfers/transportation" to binding arbitration and obtained a consent order incorporating the agreement. However, the parties did not seek to alter the original joint-custody award established in the settlement agreement. The consent order was issued by the Honorable Monet S. Pincus on October 14, 2015.

Under the terms of the consent order, the parties agreed to present the arbitration award to the family court for confirmation pursuant to section 15-48-120 of the South Carolina Code (2005),[2] part of the Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 to -240 (2005). The order provided that "[t]he parties further agree[d] that such confirmation shall not require a [h]earing, but may be accomplished based on written application of either party." Additionally, the order provided that the family court would retain continuing jurisdiction to modify the arbitration award or any order of the court.

The parties proceeded to binding arbitration, and the arbitrator issued an award on November 23, 2015. Two provisions of the award are relevant to Father's contempt action. First, pursuant to the parties' settlement agreement, the arbitrator determined custody would follow a "week on/week off" schedule. However, the arbitrator clarified that "[t]he week period shall begin on Monday morning (at school drop-off or if there is no school at 10:00 a.m.)." Second, the arbitrator determined "[t]he parent having the children in their custody at the conclusion of their time when the children are to be returned to school shall have the obligation to timely return the child/children to school at the conclusion of their time with the child/children if school is in session." On November 30, 2015, Judge Pincus issued an order confirming the arbitration award without a hearing. Neither party appealed the order confirming the award.

On July 5, 2016, Father, acting *pro se*, filed a complaint before the Honorable Robert S. Armstrong seeking to hold Mother in contempt for alleged violations of the arbitration award. In his complaint, Father asserted Mother was in violation of the provision requiring that the children be timely returned to school because the

[2] Section 15-48-120 states, "Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 15-48-130 and 15-48-140."

children had accumulated five tardies and two absences over the course of a school year. A rule to show cause was issued by the family court on July 12, 2016. On September 21, 2016, Mother served Father with her return, in which she argued the arbitration award was invalid and could not be enforced because it constituted an improper delegation of the family court's authority. Mother also asserted Father's contempt action was frivolous and part of a pattern of uncooperative and harassing behavior directed at Mother by Father and Ms. Dill. Mother filed her return with the court prior to the hearing on September 22, 2016.

At the outset of the hearing, Mother moved to dismiss the contempt action, arguing there was not a valid order to enforce. In considering the validity of the order confirming the arbitration award, the family court noted the law regarding arbitration of children's issues is not clear but indicated that case law "has been consistent that the court cannot [delegate] its authority on matters concerning children and custody." The family court ultimately found the order to be unenforceable because no statute provides the family court with jurisdiction to submit issues of child custody and visitation to binding arbitration and case law precludes the family court from delegating such authority to a third party. On October 6, 2016, the family court entered an order finding there was no valid order to enforce, dismissing the contempt action with prejudice, and discharging the rule to show cause.

On October 17, 2016, Father filed a motion to reconsider, alter, or amend the family court's order. Mother filed a return to the motion on October 28, 2016, and Father filed a reply. On October 31, 2016, the family court conducted a telephone conference with the parties regarding the motion to reconsider and entered an order denying the motion on December 5, 2016. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err in finding that it lacked subject-matter jurisdiction to enforce the family court's prior order confirming the arbitration award?

2. Did the family court err in failing to find that Mother was estopped from challenging the award and waived any objection to the enforceability of the order confirming the award?

3. Did the family court err in refusing to enforce the unappealed order of a different family court judge confirming the arbitration award?

4. Did the family court err in refusing to enforce the order confirming the arbitration award when South Carolina's public policy favors alternative dispute resolution?

5. Did Father meet his burden of proof in the underlying rule to show cause motion?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "Our standard of review, therefore, is *de novo*." *Id.*; *see also Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) ("[W]e reiterate that the proper standard of review in family court matters is de novo, rather than an abuse of discretion . . . ."). Accordingly, "[o]n appeal from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *S.C. Dep't of Soc. Servs. v. Polite*, 391 S.C. 275, 279, 705 S.E.2d 78, 80 (Ct. App. 2011). However, "*de novo* review neither relieves an appellant of demonstrating error nor requires [an appellate court] to ignore the findings of the family court." *Lewis*, 392 S.C. at 389, 709 S.E.2d at 654. Rather, an appellate court "will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by th[e appellate] court." *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012).

LAW/ANALYSIS

I. Subject-matter jurisdiction and binding arbitration of children's issues

Father argues the family court erred in finding that it lacked subject-matter jurisdiction to enforce the order confirming the arbitration award because sections 15-48-10 and 63-3-530(A)(39) of the South Carolina Code authorize the arbitration of domestic matters without providing an exception for issues involving children. Mother argues the family court properly determined it did not have subject-matter jurisdiction to enforce the order because binding arbitration of children's issues is precluded by court rules and laws of the state, rendering the order void *ab initio*. We agree with Mother.

"Contempt results from the willful disobedience of an order of the court." *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.2d 754, 759 (Ct. App. 2007) (quoting *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975)). However, it is well settled that a party may not be held in contempt for violation of a void order. *See Arnal v. Fraser*, 371 S.C. 512, 522, 641 S.E.2d 419, 424 (2007) ("[A party] cannot be held in contempt for violating an order [that] was void *ab initio* for a lack of jurisdiction."); *State ex rel. McLeod v. Holcomb*, 245 S.C. 63, 66, 138 S.E.2d 707, 708 (1964) (noting that it is a "settled principle that disobedience of a void order or one issued without jurisdiction is not contempt"); *Long v. McMillan*, 226 S.C. 598, 609, 86 S.E.2d 477, 482 (1955) ("[D]isobedience of a void Order, Judgment, or Decree, or one issued without jurisdiction of subject matter and parties litigant, is not 'contempt[.]'"). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect . . . ." *Katzburg v. Katzburg*, 410 S.C. 184, 187, 764 S.E.2d 3, 5 (Ct. App. 2014) (quoting *Gainey v. Gainey*, 382 S.C. 414, 424, 675 S.E.2d 792, 797 (Ct. App. 2009)). "A judgment of a court without subject[-]matter jurisdiction is void . . . ." *Id*. (quoting *Gainey*, 382 S.C. at 424, 675 S.E.2d at 797).

"Subject[-]matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *S.C. Dep't of Soc. Servs. v. Meek*, 352 S.C. 523, 530, 575 S.E.2d 846, 849 (Ct. App. 2002) (quoting *Pierce v. State*, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000)). In other words, "subject[-]matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). As such, "[t]he jurisdiction of a court is determined by the sovereign creating it, and thus the question of the specific court in which an action is to be brought is determined in the first instance by reference to local law." *Katzburg*, 410 S.C. at 187, 764 S.E.2d at 4 (quoting *Peterson v. Peterson*, 333 S.C. 538, 548, 510 S.E.2d 426, 431 (Ct. App. 1998)). "The family court is a statutory court created by the legislature and, therefore, is of limited jurisdiction." *State v. Graham*, 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000); *see also* S.C. Const. art V, § 12 ("Jurisdiction . . . in matters appertaining to minors . . . shall be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this article."). Thus, the family court's "jurisdiction is limited to that expressly or by necessary implication conferred by statute." *Graham*, 340 S.C. at 355, 532 S.E.2d at 263. Accordingly, our supreme court has consistently provided that "[t]he jurisdictional authority of the [family] court is set forth in the Children's

Code.[3]" *Id.*; *Riggs v. Riggs*, 353 S.C. 230, 236 n.3, 578 S.E.2d 3, 6 n.3 (2003) ("[The precursor to section 63-3-530] determines the family court's subject[-]matter jurisdiction . . . ."), *cited with approval in In re Shaquille O'Neal B.*, 385 S.C. 243, 247, 684 S.E.2d 549, 552 (2009); *see also Theisen v. Theisen*, 394 S.C. 434, 441, 443 n.4, 716 S.E.2d 271, 274, 275 n.4 (2011) (distinguishing the family court's *subject-matter jurisdiction* to hear actions for separate support and maintenance, established in section 63-3-530(A)(2) of the Children's Code, from the family court's *authority* to award separate support and maintenance emanating from section 20-3-130(B)(5) (emphases added)).

There are two statutes relevant to the family court's jurisdiction to allow parties to voluntarily engage in binding arbitration. First, pursuant to section 15-48-10(a), part of the Uniform Arbitration Act,

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

However, section 15-48-10(b) excepts from the Act

> (1) Any agreement or provision to arbitrate in which it is stipulated that this chapter shall not apply or to any arbitration or award thereunder;
>
> (2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply; provided, however, that . . . workmen's compensation claims, unemployment compensation claims and collective bargaining disputes shall [not] be subject to the provisions of this chapter . . . .

---

[3] The Children's Code comprises sections 63-1-10 through 63-21-30. The family court's jurisdiction in domestic matters is controlled by S.C. Code Ann. § 63-3-530 (2010 & Supp. 2019).

> (3) A pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client or doctor-patient and the term "doctor" shall include all those persons licensed to practice medicine . . . .
>
> (4) Any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract.

Second, section 63-3-530(A)(39) of the Children's Code provides

> The family court has exclusive jurisdiction: to require the parties to engage in court-mandated mediation pursuant to Family Court Mediation Rules or to issue consent orders authorizing parties to engage in any form of alternate dispute resolution [that] does not violate the rules of the court or the laws of South Carolina . . . .

Father argues neither statute precludes the family court from issuing a consent order authorizing parties to engage in binding arbitration regarding children's issues. Moreover, Father argues that, between the two statutes, section 15-48-10 is controlling, and the statute allows for any existing controversy to be submitted to binding arbitration without exception for children's issues. Mother argues section 63-3-530(A)(39) controls and, thus, the family court's jurisdiction to issue consent orders regarding alternate dispute resolution (ADR) is limited to forms of ADR that do not violate court rules or the laws of the state. We agree with Mother.

We find two rationales support the notion that section 63-3-530(A)(39) is controlling in regard to the family court's jurisdiction to allow parties to voluntarily engage in binding arbitration. First, the act codifying section 63-3-530(A)(39) was passed after the enactment of the Uniform Arbitration Act. The Uniform Arbitration Act was enacted in 1978. Act No. 492, 1978 S.C. Acts 1478–1486. In 1992, the precursor to section 63-3-530 was amended to provide the family court with jurisdiction to issue consent orders submitting disputes to ADR. Act. No. 441, 1992 S.C. Acts 2326. This section was recodified into the Children's Code in 2008. Act No. 361, 2008 S.C. Acts 3637. In enacting section 63-3-530(A)(39), the legislature did not indicate that the Uniform Arbitration Act controlled. Rather, the statutory provision explicitly provides that the family court's jurisdiction is limited to issuing consent orders to engage in forms of ADR that do not violate court rules or the laws

of South Carolina. Therefore, we find the legislature intended section 63-3-530(A)(39) to control the family court's jurisdiction regarding ADR. *See Berkebile v. Outen*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) ("A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject.").

As to the second rationale, section 63-3-530(A)(39) is more specific than section 15-48-10. Section 15-48-10 is a general arbitration statute that establishes the types of controversies that may be submitted to arbitration. The statute does not have any language regarding the jurisdiction of the family court. On the other hand, section 63-3-530(A)(39) specifically establishes the family court's jurisdiction regarding ADR and the limitations on such jurisdiction. Therefore, section 63-3-530(A)(39) is controlling. *See Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Whe[n] there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."); *see also Graham*, 340 S.C. at 355, 532 S.E.2d at 263 ("The jurisdictional authority of the [family] court is set forth in the Children's Code.").

Thus, we find the family court's jurisdiction to authorize parties to engage in ADR is limited by court rules and the laws of the state as provided in section 63-3-530(A)(39) ("The family court has exclusive jurisdiction: to . . . issue consent orders authorizing parties to engage in any form of alternate dispute resolution [that] does not violate the rules of the court or the laws of South Carolina . . . ."). Therefore, in determining whether the family court had subject-matter jurisdiction to sanction or approve binding arbitration of issues involving custody and visitation, we must determine whether binding arbitration of such issues violates court rules or established law. We will address each question in turn.

a. Court rules

Father argues the family court erred in finding it did not have subject-matter jurisdiction to enforce the order because no rule of court prohibits the submission of children's issues to binding arbitration. Specifically, Father argues 1) Rule 3(a), SCADR expressly authorizes parties to consent to voluntary, binding arbitration of any class of issue in domestic relations cases; and 2) Rule 4(d)(5), SCADR does not expressly prohibit issues related to children from being arbitrated. Mother argues

Rule 4(d)(5) authorizes the family court to submit only issues of property and alimony to binding arbitration. We agree with Mother.

"In interpreting the meaning of [procedural rules], the [c]ourt applies the same rules of construction used to interpret statutes." *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Id*. "Courts should consider not only the particular clause in which a word may be used, but the word and its meaning in conjunction with the purpose of the whole rule and the policy of the rule." *Id*. "In construing a rule, language in the rule must be read in a sense [that] harmonizes with its subject matter and accords with its general purpose." *Id*.

We disagree with Father's contention that Rule 3, SCADR and its exceptions apply exclusively to binding arbitration. The procedures for mediation and arbitration are controlled by the South Carolina Rules of Alternative Dispute Resolution.[4] *See* Rule 24, SCADR ("These rules shall apply to cases filed in . . . family court . . . ."). Rule 3 provides which actions are subject to ADR. Pursuant to Rule 3(a), SCADR,

> all contested issues in domestic relations actions filed in family court, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules unless the parties agree to conduct an arbitration. The parties may . . . mediate, arbitrate or submit to early neutral evaluation at any time.

Rule 3(b), SCADR provides nine types of cases, matters, and proceedings that are not subject to any form of ADR. Additionally, Rule 3(c), SCADR provides that any action not subject to ADR may be ordered to mediation by the chief administrative judge of the court. Therefore, Rule 3 generally pertains to mediation and arbitration, but does not expressly authorize the arbitration of children's issues.

[4] While the ADR rules have recently been updated, we refer to the version of the rules in place at the time the consent order was filed.

Moreover, while Rule 3 generally provides which actions are subject to or exempt from ADR, Rule 4(d) specifically provides which "neutrals"[5] may be selected or appointed in family court litigation. Pursuant to Rule 4(d)(2), "[i]f issues are in dispute . . . the parties *must mediate those issues* prior to the scheduling of a hearing on the merits; provided, however, parties may submit the issues of *property and alimony* to binding arbitration in accordance with subparagraph (5)." (emphases added). Rule 4(d)(5) provides, "In lieu of mediation, the parties *may elect to submit issues of property and alimony to binding arbitration* in accordance with the Uniform Arbitration Act, S.C. Code § 15-48-10 et seq., *or submit all issues to early neutral evaluation[6] pursuant to these rules*."[7] (emphases added). Notably and counter to Rule 4(d)(2), which expressly permits the submission of property and alimony issues to binding arbitration, Rule 4(d)(1), SCADR provides "[i]f there are unresolved issues of *custody or visitation*, the court may . . . order an early mediation of those issues upon motion of a party or upon the court's own motion." (emphasis added).

We do not agree that Rule 4(d)(5)'s silence regarding binding arbitration of children's issues is a permissive grant of authority for the family court to submit such issues to binding arbitration, as Father asserts. First, we note Rule 4(d)(2) provides that, if there are disputed issues in family court cases subject to ADR, the parties *must* mediate those issues prior to scheduling a hearing on the merits. Thus, Rule 4(d)(2) establishes a general requirement that such cases be mediated before proceeding to formal litigation. *See Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("[U]se of words such as 'shall' or 'must' indicates the []intent to enact a mandatory requirement."). However, Rules 4(d)(2) and 4(d)(5) provide an exception to this requirement for issues of property and alimony by indicating that parties *may* submit such issues to binding arbitration *in lieu of mediation*. Accordingly, we find the use of the word may in this context is a grant of permission

---

[5] A "Neutral" is defined as "[a] mediator, arbitrator or evaluator." Rule 2(g), SCADR.

[6] "Early Neutral Evaluation" is "[a]n informal process in which a third-party evaluator provides a non-binding evaluation of the matters in controversy, assists the parties in identifying areas of agreement, offers case planning suggestions, and assists in settlement discussions." Rule 2(e), SCADR.

[7] We note the language in Rule 4(d)(5) regarding the submission of issues involving property and alimony to binding arbitration is consistent with the analysis in *Swentor v. Swentor*, 336 S.C. 472, 520 S.E.2d 330 (Ct. App. 1999), discussed further *infra*.

to engage in binding arbitration rather than mediation, which is limited to the two issues specifically referenced. *See Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001) ("The use of the word 'may' signifies *permission* and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute." (emphasis added)). Therefore, issues of alimony and property are the only issues which may be submitted to binding arbitration in lieu of mandatory mediation.

Second, we do not agree that Rule 4(d)(5)'s silence as to children's issues is an implicit grant of authority, as the rule drafters could have included such issues in their grant of authority had they intended such issues to be subject to binding arbitration. Notably, Rule 4(d)(1) specifically provides that unresolved issues of *custody or visitation* may be ordered to early mediation. Moreover, the second part of Rule 4(d)(5) provides that the parties may elect to submit *all issues* to early neutral evaluation. Conversely, Rule 4(d)(5) provides that issues of *property and alimony* may be submitted to binding arbitration. We believe had the rule drafters intended to subject children's issues to binding arbitration, they would have used the term "all issues" as they did in regard to early neutral evaluation in Rule 4(d)(5), or included specific language as they did in regard to early mediation in Rule 4(d)(1). Therefore, we find Rule 4(d)(5)'s silence regarding the submission of children's issues to binding arbitration is intended to preclude such issues from being submitted to binding arbitration. *See Riverwoods, LLC v. Cty. of Charleston*, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000))).

Based on the foregoing, we find the submission of children's issues to binding arbitration is precluded by the South Carolina Rules of Alternative Dispute Resolution.

b. State law

Father argues the family court erred in finding that binding arbitration of children's issues constitutes a delegation of authority to a third party regarding issues of child welfare, which is precluded by precedent. Rather, Father argues, the parties voluntarily agreed to submit their dispute to binding arbitration and the court properly exercised its authority in authorizing the arbitration. Mother argues the

family court correctly determined that binding arbitration amounted to an improper delegation of the family court's authority. We agree with Mother.

We find the submission of children's issues to binding arbitration would be an improper delegation of the family court's authority and violative of South Carolina law because the procedures mandated by the Uniform Arbitration Act would prevent the family court from determining whether an award is in the child's best interest. Under the Uniform Arbitration Act, courts have limited powers when presented with an arbitration award. Pursuant to section 15-48-120, "Upon application of a party, the court *shall* confirm an [arbitration] award, unless . . . grounds are urged for vacating or modifying or correcting the award, in which case the court *shall proceed as provided in §§ 15-48-130 and 15-48-140*." (emphases added). Section 15-48-130[8] exclusively provides five grounds regarding the fairness of the arbitration proceedings under which a binding arbitration award may be vacated. Additionally, under section 15-48-140,[9] a court may modify or correct miscalculations, mistakes, awards on matters not submitted to arbitration, or the form of an award, so long as the modification does not affect the underlying merits of the award. However, neither statute provides any merit-based grounds, such as a child's best interest, for modifying or vacating an award.

In *Swentor v. Swentor*, this court explained the limited powers of the family court when presented with an arbitration award regarding alimony and equitable apportionment of property obtained pursuant to the Uniform Arbitration Act. 336 S.C. at 481–83, 520 S.E.2d at 335–36. The court noted, "the general rule is that agreements regarding alimony, child support, or property issues must be presented to the family court for approval." *Id*. at 481, 520 S.E.2d at 335. However, the court concluded that the family court's "traditional power to approve property and separation agreements, which includes the power to consider the substantive fairness of the agreement, simply does not extend to arbitration agreements and awards presented to the family court[,]" because "[a]n inquiry into the substantive fairness of an agreement . . . *would be inconsistent* with the Arbitration Act[]" and "would *severely undermine the finality of arbitration agreements*." *Id*. at 482–83, 520 S.E.2d at 336 (emphases added). The court further explained,

> Given [the court's] determination that the Arbitration Act and the family court's general power to review and

[8] S.C. Code Ann. § 15-48-130 (2005).
[9] S.C. Code Ann. § 15-48-140 (2005).

> approve agreements in domestic relations cases are fundamentally incompatible, [the court] conclude[s] that the Arbitration Act prohibits the family court from exercising this power when presented with arbitration agreements. This [c]ourt must presume that, at the time the Arbitration Act was enacted, the legislature was aware of the family court's power to review and approve property and separation agreements. If the legislature had intended family courts to exercise this power over arbitration agreements and awards, it would have either exempted domestic relations matters from the scope of the Act, or it would have expressly provided that arbitration awards involving domestic relations matters could be set aside if the family court determined that the award was unfair. Instead, we conclude that the purpose and framework of the Arbitration Act, as well as the limited grounds upon which the Act permits an arbitration award to be set aside, reveal the legislature's intention that the agreements to arbitrate and the resulting arbitration awards be treated the same in family court as in any other court.

Id. at 484–85, 520 S.E.2d at 337 (footnote and citations omitted).

Thus, the court held that the family court may 1) modify or correct an award only under section 15-48-140; 2) vacate the award under section 15-48-130; or 3) vacate the award under the non-statutory ground of "manifest disregard or perverse misconstruction of the law." *Id*. at 485–86, 520 S.E.2d at 338 (quoting *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985)). "Otherwise, the family court must confirm the arbitration award." *Id*. at 486, 520 S.E.2d at 338. However, in a footnote, the court indicated its "holding . . . is limited to arbitration agreements resolving issues of property or alimony, and *does not apply to agreements involving child support or custody*." *Id*. at 486 n.6, 520 S.E.2d at 338 n.6 (emphasis added).

Consistent with *Swentor*, we do not believe the limited powers of a court in regard to a binding arbitration award can be reconciled with our state's precedent requiring that the family court decide children's issues in the best interest of the children. Our courts have consistently held the "[f]amily [c]ourt is vested with the exclusive jurisdiction to ensure that, in all matters concerning a child, the best

interest of the child is the paramount consideration." *Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992); *see also In re Doran*, 129 S.C. 26, 31, 123 S.E. 501, 503 (1924) ([T]he fundamental principle [is] that the controlling consideration is the best interests of the child . . . ."); 67A C.J.S. *Parent & Child* § 55, Westlaw (database updated September 2019) ("It is the child's best interests that are paramount."). Accordingly, the family court is charged with making "the final custody determination in the best interest of the child based upon the evidence presented." S.C. Code Ann. § 63-15-230 (Supp. 2019); *see also* 67A C.J.S. *Parent & Child* § 60, Westlaw (database updated September 2019) ("A court errs if it merely follows an agreement of the parties as to the custody of the children without receiving evidence that it would, in fact, be in the best interests of the children."). Similarly, "[t]he welfare and best interests of the child are the primary considerations in determining visitation." *Smith v. Smith*, 386 S.C. 251, 272, 687 S.E.2d 720, 731 (Ct. App. 2009). As such, this court has held, "[i]n the final analysis[,] it is the family court [that] is charged with the authority and responsibility for protecting the interest of minors involved in litigation, *not the guardian or any other person whom* the court may appoint to assist it." *Stefan v. Stefan*, 320 S.C. 419, 422, 465 S.E.2d 734, 736 (Ct. App. 1995) (emphasis added); *see also* 67A C.J.S. *Parent & Child* § 60 ("[A family] court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties."). Furthermore, this court has "caution[ed] family court judges *NOT* to delegate *any* responsibility to a [third party] in regard to visitation of children with parents[,]" but "to strictly adhere to the holding in *Stefan*." *Hardy v. Gunter*, 353 S.C. 128, 138, 577 S.E.2d 231, 236 (Ct. App. 2003).

Because the family court may not delegate its authority to ensure that issues regarding children are resolved in their best interest, our supreme court has provided that family courts "have continuing jurisdiction to do whatever is in the best interests of the child regardless of what the separation agreement specifies." *Moseley v. Mosier*, 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983); *see also Lunsford v. Lunsford*, 277 S.C. 104, 105, 282 S.E.2d 861, 862 (1981) ("No agreement can prejudice the rights of children."). This court clarified the holding in *Moseley* by stating "*Moseley* makes it clear that *except for matters relating to children, over which the family court retains jurisdiction to do whatever is in their best interest*, parties to a separation agreement may 'contract out of any continuing judicial supervision of their relationship by the court.'" *Ex Parte Messer*, 333 S.C. 391, 395, 509 S.E.2d 486, 487–88 (Ct. App. 1998) (emphasis added) (quoting *Moseley*, 279

S.C. at 353, 306 S.E.2d at 627). "Therefore, parties to a separation agreement may agree to submit all disputes, *other than those involving their children*, to arbitration and thus deprive the family court of its traditional powers of enforcement over those disputes." *Id*. at 395, 509 S.E.2d at 488 (emphasis added).

Accordingly, we find that our state's precedent precludes the submission of issues involving child custody and visitation to binding arbitration as such action would constitute an improper delegation of the family court's authority to determine issues in the best interest of the child. *See Stefan*, 320 S.C. at 422, 465 S.E.2d at 736 ("In the final analysis[,] it is the family court [that] is charged with the authority and responsibility for protecting the interest of minors involved in litigation, not the guardian *or any other person whom* the court may appoint to assist it." (emphasis added)); 67A C.J.S. *Parent & Child* § 60 ("[A family] court has an *independent responsibility to determine questions of custody and visitation of minor children according to their best interests*, which responsibility cannot be controlled by an agreement or stipulation of the parties." (emphasis added)). As explained in *Swentor*, the family court has four options when presented with an award obtained under the Uniform Arbitration Act: 1) confirm the award; 2) modify or correct the award under section 15-48-140; 3) vacate the award under section 15-48-130; or 4) vacate the award on the ground of manifest disregard or perverse misconstruction of the law. Notably, section 15-48-140 permits the court to correct only miscalculations, mistakes, awards on matters not submitted to arbitration, or the form of an award, so long as the modification does not affect the underlying merits of the award. Moreover, all of the grounds for vacating an arbitration award under section 15-48-130 involve the fairness of the arbitration proceedings themselves, not the merits of the award. Therefore, if child custody and visitation were subject to binding arbitration, the family court would not have the statutory authority to vacate or modify the arbitrator's award based on a finding that it was not in the best interest of the children.[10] *See Moseley*, 279 S.C. at 351, 306 S.E.2d at 626 ("[F]amily courts

[10] It would not constitute binding arbitration if the family court could modify an arbitration award in the child's best interest. *See Swentor*, 336 S.C. at 484, 520 S.E.2d at 337 ("Given our determination that *the Arbitration Act and the family court's general power to review and approve agreements in domestic relations cases are fundamentally incompatible*, we conclude that the Arbitration Act *prohibits* the family court from exercising this power when presented with arbitration agreements." (emphases added)); *id*. at 485, 520 S.E.2d at 337 ("[T]he purpose and framework of the Arbitration Act, as well as the limited grounds upon which the Act

have continuing jurisdiction to do whatever is in the best interests of the child regardless of what the separation agreement specifies."); *Lunsford*, 277 S.C. at 105, 282 S.E.2d at 862 ("No agreement can prejudice the rights of children."). Thus, allowing an arbitrator to make the final determination regarding issues involving custody and visitation constitutes an improper delegation of the family court's authority. *See Stefan*, 320 S.C. at 422, 465 S.E.2d at 736 ("In the final analysis[,] *it is the family court [that] is charged with the authority and responsibility for protecting the interest of minors involved in litigation*, not the guardian *or any other person whom* the court may appoint to assist it." (emphases added)); *Hardy*, 353 S.C. at 138, 577 S.E.2d at 236 (cautioning "family court judges *NOT* to delegate *any* responsibility to a [third party] in regard to visitation of children with parents"); *Messer*, 333 S.C. at 395, 509 S.E.2d at 488 ("[P]arties to a separation agreement may agree to submit all disputes, *other than those involving their children*, to arbitration and thus deprive the family court of its traditional powers of enforcement over those disputes." (emphasis added)).

The problems with submitting children's issues to binding arbitration are on full display in the case at bar. Here, the arbitrator's award was confirmed by the family court without a determination that it was in the best interest of the children. *See* S.C. Code Ann. § 63-15-230 ("The court shall make the final custody determination in the best interest of the child based upon the evidence presented."); *see also* 67A C.J.S. *Parent & Child* § 60 ("A court errs if it merely follows an agreement of the parties as to the custody of the children without receiving evidence that it would, in fact, be in the best interests of the children."). As a result, the arbitrator, rather than the family court, ultimately resolved the issues of custody and visitation. *See Stefan*, 320 S.C. at 422, 465 S.E.2d at 736 ("In the final analysis[,] *it is the family court [that] is charged with the authority and responsibility for protecting the interest of minors involved in litigation*, not the guardian *or any other person whom* the court may appoint to assist it." (emphases added)); *Hardy*, 353 S.C. at 138, 577 S.E.2d at 236 (cautioning "family court judges *NOT* to delegate *any* responsibility to a [third party] in regard to visitation of children with parents").

Based on the foregoing, we find the submission of issues involving custody and visitation to binding arbitration violates the established law of South Carolina,

---

permits an arbitration award to be set aside, reveal the legislature's intention that the agreements to arbitrate and the resulting arbitration awards *be treated the same in family court as in any other court*." (emphasis added)).

which prohibits the family court from delegating its authority to determine children's issues in the best interest of the children.

c. Effect on the order

Because court rules and our state's established law preclude the submission of children's issues to binding arbitration, the family court did not have subject-matter jurisdiction to sanction binding arbitration of issues involving custody and visitation or to confirm the arbitrator's award. *See Graham*, 340 S.C. at 355, 532 S.E.2d at 263 ("The jurisdictional authority of the [family] court is set forth in the Children's Code."); *see also* S.C. Code Ann. § 63-3-530(A)(39) ("The family court has exclusive jurisdiction: to . . . issue consent orders authorizing parties to engage in any form of alternate dispute resolution *[that] does not violate the rules of the court or the laws of South Carolina* . . . ." (emphasis added)); *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197–98 (1997) ("The General Assembly is presumed to be aware of the common law[.]"). As a result, the order confirming the arbitrator's award is void *ab initio*. *See Katzburg*, 410 S.C. at 187, 764 S.E.2d at 5 ("A judgment of a court without subject[-]matter jurisdiction is void . . . ." (quoting *Gainey*, 382 S.C. at 424, 675 S.E.2d at 797)). Thus, the family court properly found that it lacked subject-matter jurisdiction to enforce the order and arbitration award through contempt proceedings. *See Arnal*, 371 S.C. at 522, 641 S.E.2d at 424 ("[A party] cannot be held in contempt for violating an order [that] was void *ab initio* for a lack of jurisdiction."); *Long*, 226 S.C. at 609, 86 S.E.2d at 482 ("[D]isobedience of a void Order, Judgment, or Decree, or one issued without jurisdiction of subject matter and parties litigant, is not 'contempt[.]'"); *Katzburg*, 410 S.C. at 187, 764 S.E.2d at 5 ("A court[] lacking subject[-]matter jurisdiction[] cannot enforce its own decrees." (quoting *Hallums v. Bowens*, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993))).

II. Preservation

We find Father's remaining issues have not been preserved for appellate review, as they were not raised to and ruled upon by the family court.[11]

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [family court]." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Issues not raised and ruled upon in the [family] court will not be considered on appeal." *Id*. at 142, 587 S.E.2d at 693–94. "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). "Instead, a litigant is only required to fairly raise the issue to the [family] court, thereby giving it an opportunity to rule on the issue." *Id*. at 502, 697 S.E.2d at 595–96. However, "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding an issue raised for the first time in a Rule 59, SCRCP motion is not preserved for appellate review). Conversely, "[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Estoppel and Waiver

First, Father argues Mother waived any challenge to the family court's subject-matter jurisdiction by voluntarily participating in the arbitration. Father

[11] Father asserts the rules of preservation should be loosely applied to his arguments because he did not have time to adequately prepare for Mother's defenses at the rule to show cause hearing, as Mother served him with her return the day before the hearing. We reject this argument as Mother served Father with her return in accordance with the South Carolina Rules of Family Court. *See* Rule 14(f), SCRFC ("If at the contempt proceeding[,] the responding party intends to seek counsel fees and costs, *or other appropriate relief permitted by law*, then *he shall serve a return to the rule to show cause prior to the commencement of the hearing*, unless a Family Court judge requires a return to be served at some other time." (emphases added)).

further argues Mother is estopped from challenging the validity of the order confirming the award because she procured and accepted the benefits of arbitration. Mother argues this issue has not been preserved for appellate review because Father raised it for the first time in his Rule 59(e), SCRCP motion. Father argues this issue is preserved because Father articulated the basis for estoppel—that Mother agreed to the arbitration—at the hearing before the family court.

At the outset, we note that Father argues only that he articulated the basis for estoppel before the family court, but does not contend that he articulated the basis for waiver.[12] Regarding estoppel, as Father notes in his brief, to be estopped from challenging the validity of an order or judgment, a party must accept the benefits of the void judgment. *See Edwards v. Edwards*, 254 S.C. 466, 470, 176 S.E.2d 123, 125 (1970) ("Since he proposed the transfer of the property and *has accepted the benefits accruing to him therefrom*, he is now estopped to assert the invalidity of the judgment." (emphasis added)); *Scheper v. Scheper*, 125 S.C. 89, 105, 118 S.E. 178, 184 (1923) ("Even whe[n] one who did not procure it *accepts the benefits of a void judgment*, he is estopped to assert its invalidity." (emphasis added)). Here, while he was before the family court, Father never argued that Mother had accepted the benefits of the order. Rather, Father first raised this precise argument in his Rule 59(e) motion. *See Sonoco Prods. Co.*, 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."). Accordingly, this issue has not been preserved for appellate review.

Law of the Case

Second, Father argues the family court erred in refusing to enforce the unappealed order confirming the arbitration award because it became the law of the case. Mother argues this issue has not been preserved for appellate review because Father raised it for the first time in his Rule 59(e), SCRCP motion. Father argues this issue is preserved because he argued to the family court that the arbitration award had been approved by another judge.

---

[12] Regardless, subject-matter jurisdiction cannot be waived. *See Johnson*, 372 S.C. at 284, 641 S.E.2d at 897 ("[L]ack of subject[-]matter jurisdiction in a case may not be waived and ought to be taken notice of by an appellate court."); *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can *never* be forfeited or waived." (emphasis added) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002))).

At the hearing, Father indicated the agreement to arbitrate and the arbitration award had both been adopted as orders of the family court. However, Father did not provide that the orders were unappealed or argue that they were binding. As such, Father's reference to the prior orders was likely viewed by the family court in the context of providing the procedural posture for the action, not as an argument regarding the law of the case. Consequently, we do not find that Father raised this issue with "sufficient specificity" to allow the family court to rule on it. *See Brannon*, 388 S.C. at 502, 697 S.E.2d at 595–96 ("[A] litigant is only required to fairly raise the issue to the [family] court, *thereby giving it an opportunity to rule on the issue*." (emphasis added)); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (noting that an issue must be raised with "sufficient specificity" to be preserved for appellate review). Thus, the issue has not been preserved for appellate review.[13]

Public Policy

Finally, Father argues the family court erred in refusing to enforce the arbitration award because South Carolina's public policy strongly favors resolving issues through ADR and the validity of arbitration agreements. Mother argues this issue has not been preserved for appellate review because Father raised it for the first time in his Rule 59(e), SCRCP motion. Father argues he preserved the issue for appeal by invoking policy considerations in his argument that the arbitration award should not be set aside, specifically, the length of time and monetary expense, the need to not undo the results, and the best interest of the children. We disagree with Father.

Because the family court did not rule on any public policy considerations, Father was required to raise these issues in his Rule 59(e) motion. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("If the losing party has raised an issue in the lower court, *but the court fails to rule upon it*, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." (emphasis added)); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file such a motion when an issue or argument has been raised, *but not ruled on*, in order to preserve it for appellate review." (second emphasis added)).

---

[13] Regardless, a judge is not bound to enforce a prior order that is void a*b initio* for want of subject-matter jurisdiction. *See Katzburg*, 410 S.C. at 187, 764 S.E.2d at 5 ("A *court*[] lacking subject[-]matter jurisdiction[] *cannot* enforce its own decrees." (emphases added) (quoting *Hallums*, 318 S.C. at 3, 428 S.E.2d at 895)).

However, Father's Rule 59(e) motion made no mention of South Carolina's public policy favoring alternative dispute resolution and the validity of arbitration agreements. Rather, Father baldly asserted that a ruling precluding parties from submitting issues of custody and visitation to binding arbitration "would dramatically reshape [f]amily [c]ourt practice in this state" and cause a backlog of cases with an abundance of issues that must be decided on the record. We do not find that this assertion equates to an argument that the family court's ruling was contrary to South Carolina's public policy favoring ADR. Accordingly, this issue has not been preserved for appellate review.

III. Burden of proof for contempt

As an additional sustaining ground, Mother argues the family court's order should be affirmed because Father did not satisfy his burden of proof. However, we need not address this issue as our finding that the family court did not have subject-matter jurisdiction to enforce the order confirming the arbitration award is dispositive in this case. *See I'On*, 338 S.C. at 420, 526 S.E.2d at 723 ("It is within the appellate court's discretion whether to address any additional sustaining grounds."); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we hold that the family court does not have subject-matter jurisdiction to sanction or approve binding arbitration of children's issues. Accordingly, we find the family court properly determined that it did not have subject-matter jurisdiction to enforce the arbitration award. Therefore, we affirm the family court's order dismissing the contempt action.

AFFIRMED

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amy Garrard and Lee Garrard, Guardians Ad Litem for R.C.G., A Minor; and Dean Frailey and Kathryn Frailey, Guardians Ad Litem for C.F., A Minor, Richard Nelson and Cheryl Nelson, Guardians Ad Litem for D.G.N., A Minor; Adam Olsen Ackerman; and A.E.P., III,
Plaintiffs,

v.

Charleston County School District, Kevin Clayton, Axxis Consulting Company, and Jones Street Publishers, LLC,
Defendants,

And

Eugene H. Walpole, Plaintiff,

v.

Charleston County School District, Kevin Clayton, Axxis Consulting Company, and Jones Street Publishers, LLC,
Defendants,

Of Whom Eugene H. Walpole, Amy Garrard and Lee Garrard, Guardians Ad Litem for R.C.G., A Minor; and Dean Frailey and Kathryn Frailey, Guardians Ad Litem for C.F., A Minor, Richard Nelson and Cheryl Nelson, Guardians Ad Litem for D.G.N., A Minor; Adam Olsen Ackerman; and A.E.P., III, are the Appellants,

And

Of Which Jones Street Publishers, LLC, is the Respondent.

Appellate Case No. 2016-002525

Appeal From Charleston County
Jean H. Toal, Circuit Court Judge

Opinion No. 5691
Heard April 1, 2019 – Filed November 6, 2019

AFFIRMED

John E. Parker and William F. Barnes, III, of Peters, Murduagh, Parker, Eltzroth, & Detrick, P.A., of Hampton, for Appellants.

Wallace K. Lightsey and Meliah Bowers Jefferson, of Wyche, PA, of Greenville, for Respondent.

GEATHERS, J.: In this defamation action, Appellants—six members of the 2014-2015 Academic Magnet High School (AMHS) football team and their head coach, Eugene Walpole (Coach Walpole)—appeal the circuit court's order granting summary judgment to Respondent Jones Street Publishers. Appellants contend the circuit court erred in (1) finding the statements of fact in certain articles published by Jones Street Publishers are protected by the fair report privilege, (2) finding the opinions expressed in the articles are not actionable, (3) finding Appellants have not shown proof of injury to reputation, (4) finding the alleged defamatory statements were not "of and concerning" the students, and (5) finding Coach Walpole has not shown that Jones Street Publishers acted with actual malice. We affirm.

FACTS/ PROCEDURAL HISTORY

Appellants initiated this defamation action against Jones Street Publishers following its publication of two opinion editorials in the *Charleston City Paper* (*City*

Paper)[1] concerning a post-game watermelon ritual performed by the AMHS football team. News regarding the watermelon ritual began on October 21, 2014, when the superintendent of Charleston County School District (the School District), Dr. Nancy McGinley, issued a press release stating,

> There was an allegation related to inappropriate post game celebrations by the Academic Magnet High School (AMHS) Football Team. An investigation was conducted and, as a result of the investigation, the head football coach will no longer be serving as a coach for Charleston County School District.

Following this press release, Superintendent McGinley held a press conference in which she described the post-game ritual that prompted the investigation. Superintendent McGinley stated that "allegations" were brought to her attention by one of the School District's board members who indicated AMHS's football team was practicing a watermelon ritual that involved students making "monkey sounds" as part of their post-game celebration. She expressed that the board member was concerned about the "racial stereotypes related to this type of ritual." Superintendent McGinley contacted AMHS's principal to investigate the matter. The principal indicated that "the coaches were aware of the ritual following the victories[,] but they did not observe any cultural insensitivities." The principal reported back to Superintendent McGinley that it was an "innocent ritual." However, Superintendent McGinley decided that further investigation was necessary because the board member stated that the football team engaged in a "tribal-like chant that [was] animalistic or monkey-like."

Superintendent McGinley asked the School District's diversity consultant, Kevin Clayton and Associate Superintendent Louis Martin to conduct the investigation. Mr. Clayton and Mr. Martin interviewed the students on the football team and the coaches. The investigation revealed that "players would gather in a circle and smash the watermelon while others were either standing in a group or locking arms and making chanting sounds that were described as 'Ooo ooo ooo,' and several players demonstrated the motion." Superintendent McGinley stated the

[1] Jones Street Publishers owns and publishes the *City Paper*.

AMHS team named the watermelons "Bonds Wilson"[2] and drew a face on each watermelon "that could be considered a caricature." A copy of the caricature that was drawn on the watermelons was shown at the press conference.[3] Superintendent McGinley concluded the press conference by stating that it was "our conclusion that the accountability lies with the adults" and that the Charleston County School District (the School District) had "taken action to relieve the head coach of his responsibilities." No students were named during the press conference.

After the press conference, several news media outlets ranging from national publications to the AMHS's newspaper reported on the firing of Coach Walpole, and numerous commentators expressed their opinions concerning the post-game ritual.

City Paper's editor, Chris Haire, watched Superintendent McGinley's press conference by a live television broadcast from the School District's public hearing room. After viewing the press conference, Mr. Haire wrote an opinion editorial about the events described entitled, "Melongate: Big toothy grins, watermelons, and monkey sounds don't mix," which was published in the *City Paper* on October 21, 2014. The article, in its entirety, provided,

> Today, Charleston was consumed by one story and one story only: the removal of Academic Magnet football coach Bud Walpole amid allegations that his players more or less behaved like racist douchebags. And if there's one lesson to be learned from all of this[,] it's this: big toothy grins, watermelons, and monkey noises don't mix. Any sensible person can see that.
>
> Apparently not. And apparently not the coaching staff and the players on the Academic Magnet Raptors.
>
> Somewhere along the way in this year's unexpectedly successful season, the Raptors took a liking to buying watermelons before their games. They apparently drew a

[2] Bonds Wilson is the name of a formerly segregated African-American school that was located at the campus where AMHS is now located and was named in honor of two prominent African-American educators from Charleston.

[3] The picture was drawn by the same football player who drew the faces on the watermelons during most of the post-game celebrations.

face on it each time—a big toothy, grinning face. The first time the watermelon was named Junior. The next time it was Bonds Wilson, the name of the campus the AMHS shares with School of the Arts. That name stuck.

But here's where the things get even worse. At the close of each game, the players smashed the watermelon on the ground while reportedly making the monkey-like sounds of 'ooh ooh ooh ooh.' Apparently, the players did this after four or five games, each time evidently after the largely white Raptor squad beat one of their opponents, each one largely an African-American team. Parents of players on one of the opposing teams reportedly brought this to the attention of African-American Board member Michael Miller last week.

That the coaching staff of the Academic Magnet Raptors and none of its players, including at least one African-American, didn't see the trouble with this toxic combination of monkey sounds, toothy grins, and watermelons is at best baffling and at worst indicative of the casual acceptance of racism in Charleston today, even among the best and brightest that the county has to offer. After all, AMHS is not only the No. 1 ranked school in the state, it's one of the tops in the nation[].

Seriously, did everyone at AMHS forget the last 100 years of American history? Did they forget about blackface, Buckwheat, and *Birth of a Nation*? Did they forget about minstrel shows? Did they forget about Coons Chicken, lawn jockeys, golliwogs, and the like? Apparently so. I don't know about you, but I think it's time to reconsider Academic Magnet's rankings because clearly they are producing nothing more than grade-A dumbas[***].

Even more troubling is the degree to which Raptor Nation has circled the wagons around Walpole and the team. Frankly, this has nothing to do with the fact that the coach

> is by all accounts a good man. Walpole's merits are meaningless.
>
> The point is that an entire team of players thought it was OK to draw a grinning face on a watermelon, smash it on the ground each time they beat a largely black team, and make monkey noises—and no one apparently told them to stop.
>
> No one said, "Hey guys, I know not a single one of you has a racist bone in your body, you know, because that's a bad thing, and well, you're an Academic Magnet kid, and you come from a good middle-class white family and you're going to college, and there's no way in hell you'd, you know, draw a racist caricature on a watermelon and make monkey noises and do it fully aware of, like, what all that stuff means, because if you did, knowing all that stuff, then yikes, people might start thinking you're racists. Hell, I'd think you're a racist, and, well, I just don't know if I can deal with the fact that Charleston's best and brightest students are racist douchebags. I mean, it's just a joke right? Right?"
>
> Actually, it's not. It's the sad truth about life here in Charleston, S.C. today.

In a reversal, Superintendent McGinley issued a press statement on October 22, 2014 indicating she was reinstating Coach Walpole as head coach and that he would resume his coaching duties on October 23, 2014. Shortly thereafter, the Charleston County School Board announced the resignation of Superintendent McGinley.[4] Following this announcement, Mr. Haire wrote a second article entitled, "Mob Rules: School district forces out superintendent who fired coach who condoned racist ritual." This article was published in the *City Paper* on November 5, 2014.

[4] The record is unclear regarding the reason for Superintendent McGinley's resignation.

Later that month, six members of the AMHS football team filed a defamation complaint against Jones Street Publishers, the School District, Kevin Clayton, and Axxis Consulting Company.[5] In December 2014, Coach Walpole also filed a defamation complaint against the same defendants. Both cases were consolidated on October 23, 2015.[6]

Appellants alleged the two opinion editorials contained defamatory statements. Specifically, as to the article "Melongate," Appellants argued the reference to the students as "racist douchebags" was defamatory, and as to the article "Mob Rules," Appellants argued the title of the article itself was defamatory because it stated Coach Walpole "condoned a racist act." Appellants also alleged Jones Street Publishers damaged their reputations "by publishing articles that accused [Appellants] of participating in racially-motivated post-game celebration rituals." Essentially, Appellants argued the articles implied that the football team and the coach were racist.

Jones Street Publishers moved for summary judgment, and a hearing was held on October 11, 2016. Jones Street Publishers argued the following facts were reported by the *City Paper* in its publications: "the fact that watermelons were smashed as part of this ritual, that there was a face drawn on them, that there was a caricature, that monkey sounds were made, [that] the ritual took place and that a watermelon was named Bonds Wilson." Jones Street Publishers maintained that these facts were protected by the fair report privilege because "all of the facts came from the press conference that the Charleston County School District held to report its finding of its investigation of the ritual." As for the remaining content in the articles, Jones Street Publishers argued that "[the] *City Paper* gave its editorial view of those facts, its view of what had happened." Specifically, Jones Street Publishers indicated the following to be its editorial viewpoint of those facts:

> That the football players had behaved like racist douchebags, that if they did not realize that their actions would be perceived as racially offensive, that that was indicative of the casual acceptance of racism in Charleston today, that the school had not taught its students about the history of the watermelon trope, and it was turning out a

[5] Mr. Clayton was an employee of Axxis Consulting Company.

[6] This appeal solely concerns Jones Street Publishers. The record does not contain any details regarding the outcome of Appellants' claims against the other defendants.

> bunch of grade A dumbas[***] and not the best and brightest and that this was a racist ritual, a racist behavior, on the part of the people [who] participated in it.

Jones Street Publishers argued the opinions were protected by the First Amendment.[7] Additionally, Jones Street Publishers produced affidavits from two of its editors indicating that they had no reason to doubt the truth of the statements made by Superintendent McGinley at the press conference.

Appellants opposed Jones Street Publishers' motion for summary judgment, arguing Jones Street Publishers acted with actual malice by "labeling" the students and coach "as racist douchebags without any investigation, without any evidence, without anything to come to that conclusion . . . ." Appellants argued Jones Street Publishers was negligent "because they made no effort to find the truth," and "made up the fact that the students and coaches are racist douchebags." Instead, Appellants asserted the players' motives were not racially based but more akin to the movie Castaway where Tom Hanks drew a face on a volleyball and named it "Wilson;" here, the football players drew a face on the watermelon and named it "Bonds-Wilson." Appellants argued the testimony in their case would prove "their intentions."

First, the circuit court found that all of the factual statements in the articles were "accurate reproductions of comments made publicly by School District officials, and thus [were] protected by the fair report privilege." Next, the circuit court found the remaining statements in the articles were "merely expressions of the writer's opinions and ideas on a matter of public concern. Under established First Amendment jurisprudence, Jones Street [Publishers] cannot be held liable for such statements." The circuit court stressed that the "subject of the Jones Street publications addressed a matter of public concern." To this point, the circuit court stated,

> The AMHS football team's ritual, the School District's investigation into the AMHS football team's ritual, and Coach Walpole's removal as head coach of the team were subjects of great interest to the Charleston Community and garnered widespread coverage from media outlets both locally and throughout the United States. The controversy

[7] U.S. Const. amend. I.

> involved allegations of racial insensitivity in a city steeped with a historical legacy of racial tension. When viewing the record as a whole, there is little doubt that the speech at issue in this case was addressed to a matter of public concern.

The court indicated that it was "settled law that expressions of opinion on matters of public concern are immune from liability for defamation." The court noted that once the factual statements in the articles that summarized the statements made by the School District are removed, none of the remaining statements "assert[] any verifiable, objectively provable fact. They are expressions of the editorial writer's ideas and opinions, using rhetorical hyperbole to emphasize his views." The court further stated,

> Whether the football players acted like "racist douchebags," whether the team's failure to perceive the negative racial connotations of their actions is "indicative of the casual acceptance of racism in Charleston today," whether the watermelon ritual was an act that "any sensible outside observer" would "perceive[] as racist," or an example of "inadvertently . . . hurtful racially offensive behavior"—these are all statements on which different persons could have different views and sentiments. In fact, many people did express different views on the matter[,] and it was a highly contested issue for the School District. None of the statements, as expressed in the Jones Street publications, are statements of fact that can be objectively proved or disproved in a court of law.

Lastly, the circuit court found that Appellants failed to produce any evidence of either special damages or general damages arising from an injury to their reputations as a result of the *City Paper* publications. Specifically, the court noted that the alleged defamatory statements were not "'of and concerning' [Appellants], in that they refer to the entire football team and not to any of [Appellants] individually." In regard to Coach Walpole, the court found that he was a public official and noted that "public school teachers and athletic coaches have been held to be public officials." Therefore, Coach Walpole was required to prove that Jones Street Publishers acted with actual malice. The circuit court determined that Coach Walpole failed to prove actual malice. The court noted that there was evidence from

Jones Street Publishers' editors indicating that "they had no reason to doubt that the reported information was anything other than completely true and accurate." The court found that Coach Walpole failed to "direct the [c]ourt to a single line of testimony in the depositions or any passage of the publications that constitutes evidence that anyone at Jones Street [Publishers] knew of any false statement in the editorials or articles or in fact entertained serious doubts as to the truthfulness of them." The circuit court granted Jones Street Publishers' motion for summary judgment and this appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding the statements of fact in the articles were protected by the fair report privilege?

2. Did the circuit court err in finding the opinions expressed in the articles were not actionable?

3. Did the circuit court err in finding Appellants did not show proof of injury to reputation?

4. Did the circuit court err in finding the alleged defamatory statements were not "of and concerning" the students?

5. Did the circuit court err in finding Coach Walpole did not show that Jones Street Publishers acted with actual malice?

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment shall be granted when "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." Rule 56(c), SCRCP. "Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860. "[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Pee Dee Stores*, 381 S.C. at 240, 672 S.E.2d at 802. "If triable issues exist, those issues must go to the jury." *BPS, Inc. v. Worthy*, 362 S.C. 319, 325, 608 S.E.2d 155, 158 (Ct. App. 2005). "A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror." *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Id*. (quoting *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)). Moreover, "[i]f evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied." *Pee Dee Stores*, 381 S.C. at 240, 672 S.E.2d at 802.

"The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "[W]hen a party has moved for summary judgment[,] the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it." *Fowler v. Hunter*, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008). "Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial." *Id.* Furthermore, "where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Thus, "the appropriate standard at the summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard." *George*, 345 S.C. at 454, 548 S.E.2d at 875. "Unless the [circuit] court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant." *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980).

LAW/ANALYSIS

I. Legal Background

"The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). "Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." *Id*. "To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm." *West v. Morehead*, 396 S.C. 1, 7, 720 S.E.2d 495, 498 (Ct. App. 2011); *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006); *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

However, there are certain communications that give rise to qualified privileges. *West*, 396 S.C. at 7, 720 S.E.2d at 498. One of the qualified privileges recognized as a common law and constitutional privilege by South Carolina courts is the "fair report" privilege. *See generally Padgett v. Sun News*, 278 S.C. 26, 38, 292 S.E.2d 30, 37 (1982) (Ness, J., dissenting) (recognizing a constitutional basis for the common law privilege of fair report).

II. Fair Report Privilege

The fair report privilege is "the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability." *West*, 396 S.C. at 7, 720 S.E.2d at 498; *Padgett*, 287 S.C. at 33, 292 S.E.2d at 34 (indicating that to hold a publisher liable for an accurate report of a public action or record would constitute liability without fault and would "make it impossible for a publisher to accurately report a public record without assuming liability for the truth of the allegations contained in such record"); *Reuber v. Food Chem. News, Inc*., 925 F.2d 703, 712 (4th Cir. 1991) (en banc) ("The fair report privilege encourages the media to report regularly on government operations so that citizens can monitor them."). Additionally, "[f]air and impartial reports in newspapers of matters of public interest are qualifiedly privileged." *Jones v. Garner*,

250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968). "It is not necessary that [the report] be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." Restatement (Second) of Torts § 611 cmt. f (Am. Law. Inst. 1977).

Furthermore, the publisher is not required to investigate the truth of the underlying matter. *See Padgett*, 278 S.C. at 33, 292 S.E.2d at 34 ("[O]ur decision in *Lybrand v. The State Co.*[8] completely refutes the contention that the publisher is required to go behind the allegations contained in the public record."); *see also Reuber*, 925 F.2d at 712 ("In return for frequent and timely reports on governmental activity, defamation law has traditionally stopped short of imposing extensive investigatory requirements on a news organization reporting on a governmental activity or document.").

As to the case at bar, Appellants contend the circuit court erred in holding the statements of fact in the articles are protected by the fair report privilege. Appellants argue Jones Street Publishers did not accurately report the statements made by Superintendent McGinley at the press conference. We disagree.

Under the defense of a qualified privilege, "one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged, and (2) the privilege is not abused." *West*, 396 S.C. at 7, 720 S.E.2d at 499 (alteration in original) (quoting *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)); *Jones*, 250 S.C. at 487, 158 S.E.2d at 913 ("[T]he privilege attending the publication of a news report arises by reason of the occasion of the communication, and a communication or statement [that] abuses or goes beyond the requirement of the occasion, loses the protection of the privilege."). "Whether the occasion is one [that] gives rise to a qualified privilege is a question of law." *West*, 396 S.C. at 7, 720 S.E.2d at 499. A qualified privilege arises when there is "good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987)). Furthermore, the fair report privilege "extends only to a report of the contents of the public record and any matter added to the report by the publisher,

[8] 179 S.C. 208, 184 S.E. 580 (1936).

which is defamatory of the person named in the public records, is not privileged." *Jones*, 250 S.C. at 487, 158 S.E.2d at 913. "Where there is conflicting evidence, 'the question [of] whether [a qualified] privilege has been abused is one for the jury.'" *West*, 396 S.C. at 8, 720 S.E.2d at 499 (second alteration in original) (footnote omitted) (quoting *Swinton Creek*, 334 S.C. at 485, 514 S.E.2d at 134).

Here, a review of the "Melongate" article reveals a fair and substantially accurate report of the statements made by Superintendent McGinley at the press conference.[9] *See Jones*, 250 S.C. at 487, 158 S.E.2d at 913 ("Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged."). Jones Street Publishers argued the following were factual statements taken from the press conference: "watermelons were smashed as part of this ritual," "there was a face drawn on them, [] there was caricature, [] monkey sounds were made, the ritual took place and that a watermelon was named Bonds Wilson." All of those statements were in fact made by Superintendent McGinley at the press conference. The article included details of how the ritual was performed, the sounds that were allegedly

---

[9] We note that at oral argument, Appellants maintained that Jones Street Publishers did not accurately report the statements made by Superintendent McGinley in an undated written statement. Superintendent McGinley's written statement provided, in pertinent part:

> [T]here was no evidence to suggest that the football players understood the negative cultural implications of their ritual that included buying a watermelon, drawing a caricature (face) on the watermelon, naming the watermelon "Bonds-Wilson," transporting the watermelon on the team bus, sitting it on the team bench and surrounding and smashing the watermelon after a victory. However, it was clear the coaches either knew or should have known about the negative racial stereotypes of this watermelon ritual.

The entirety of the statement recounts events occurring from October 13, 2014 to October 22, 2014. Thus, it appears the statement was released after the live televised press conference that occurred on October 21, 2014. Jones Street Publishers maintained that it relied on the factual statements that were released at the live press conference.

made by the players as described by Superintendent McGinley, and a description of the caricature that was shown at the press conference. Furthermore, Superintendent McGinley stated that all of the details she described were allegations that the school district was investigating, and the first paragraph of the article informs the reader that "allegations" were made against the football team.

Additionally, Jones Street Publishers submitted to the circuit court two affidavits from its editors, including Mr. Haire, indicating they had no reason to doubt the veracity of the statements made by Superintendent McGinley. *See Fleming*, 350 S.C. at 497, 567 S.E.2d at 861–62 ("The evidence shows [respondent] relied on the results and conclusions of an investigation conducted by two highly respected investigators. [Respondent] testified he had no reason to doubt the investigation was not thorough, solid, correct, and truthful. . . . The evidence shows [respondent] . . . had full faith in the veracity of their report."). Mr. Haire affirmed that he had known Superintendent McGinley for a period of time and "always considered her to be completely honest and trustworthy," and consequently relied upon the conclusion she drew from her in-depth investigations. Thus, Jones Street Publishers was not required to investigate the statements made by Superintendent McGinley. *See West*, 396 S.C. at 11, 720 S.E.2d at 500 ("[T]he mere failure to investigate an allegation is not sufficient to prove the defendant had serious doubts about the truth of the publication."); *id*. ("The media has no duty to verify the accuracy or measure the sufficiency of a party's legal allegations. The Constitution does not require that the press 'warrant that every allegation that it prints is true.'" (quoting *Reuber*, 925 F.2d at 717)).

Therefore, the circuit court correctly found that the factual statements reported in *City Paper*'s publications regarding the ritual were accurate accounts of comments made publicly by school district officials. *See McClain*, 275 S.C. at 285, 270 S.E.2d at 125 (holding summary judgment was proper where newspaper accurately reported information of a judicial proceeding). Thus, we find the statements of fact are protected by the fair report privilege. *See West*, 396 S.C. at 7, 720 S.E.2d at 499 ("Under this defense . . . one who publishes defamatory matter concerning another is not liable for the publication" as long as "the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged" and "the privilege is not abused." (alteration in original)). We further note that Appellants concede in their brief that,"[a]ny factual reporting by the *City Paper* regarding actual statements made by Academic Magnet or [Charleston County School District] officials is protected by the fair report privilege."

Appellants focus their arguments on the articles' use of the words "racist" and "racist douchebag." Appellants maintain that characterizing the student's actions as "racist" does not fall under the fair report privilege. However, Jones Street Publishers does not contend that using the word "racist" in the articles would fall under the fair report privilege. The circuit court also made no findings to suggest that Jones Street Publishers' use of the word "racist" was either protected or not protected under the fair report privilege. Instead, Jones Street Publishers argued, and the circuit court found, the remaining statements in the articles were opinions protected by the First Amendment.

III. Opinions Expressed in the Article

In order to determine the level of protection that the speech at issue is entitled to under the First Amendment, we must first address whether Jones Street Publishers reported on a matter of public or private concern.

Matter of Public Concern

Appellants contend the circuit court erred in finding the opinions expressed in the articles were not actionable because they were expressions of opinions protected under the First Amendment. Appellants argue Jones Street Publishers should not be protected "because the statements are assertions that the members of the [AMHS] football team are racists." Appellants allege Jones Street Publishers' statements "concerned the character and beliefs" of Appellants and, thus, were a matter of private, not public, concern. We disagree.

At the heart of the First Amendment's protection is speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id*. at 452 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Id*. (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). Thus, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *N.A.A.C.P. v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982)).

However, when "matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder*, 562 U.S. at 452.

> That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import[ance].

Id. (first alteration in original) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985)).

"Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id*. at 453 (citations and internal quotation marks omitted). "Whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48. "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Snyder*, 562 U.S. at 454; *see Connick*, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact.").

First, we note that Appellants conceded this issue and agreed with the circuit court that the speech was a matter of public concern. The following colloquy occurred between Appellants' counsel and the circuit court regarding whether the speech at issue was a matter of public or private concern:

> THE COURT: Tell me this. With respect to, of course, you got two different kind[s] of [plaintiffs]. You have Mr. Walpole, then you have the players, team players. Do you seriously contend this is not a matter of public interest?
>
> [APPELLANTS]: I don't contend that. For the coach it is. I don't think that as far as the kids it is. I think that the kids have a different standard. I think the coach—

> THE COURT: Why is it a public—matter of public interest as far as the coach is concerned? He may be a public figure. They may be private figures, but the event is the event. Why [isn't it] equally a matter of public interest whether a bunch of kids did it or the coach or both of them?
>
> [APPELLANTS]: I don't seriously contend that is not a matter of public interest. I think that it probably was and is.

Because Appellants conceded this issue at the summary judgment hearing, they cannot now argue the issue on appeal. *See TNS Mills, Inc. v. S.C. Dep't. of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."); *Ex parte McMillian*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding an issue procedurally barred when the appellants expressly conceded the issue at trial); *see also Erickson*, 368 S.C. at 476, 629 S.E.2d at 670 ("Moreover, a party may not complain on appeal of error or object to a trial procedure [that] his own conduct has induced.").

Nonetheless, even if this matter was not conceded below, when viewing the record as a whole, we find the speech at issue addressed a matter of public concern. *See Connick*, 461 U.S. at 147–48 ("Whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."). The School District released a press statement and held a press conference to inform the community on a matter that affected students and teachers within the district—not just at AMHS. The watermelon ritual, the School District investigation of the watermelon ritual, and Coach Walpole's removal as head coach of the football team were subjects of great interest to the Charleston community. At the press conference, Superintendent McGinley stated the board member who brought the allegations to her attention was "concerned about the racial stereotypes" related to activities like the watermelon ritual practiced by AMHS's football team. The board member informed Superintendent McGinley that a concerned parent witnessed the ritual and reported it to the board member. Thus, the content of Mr. Haire's speech about these events concerned broad issues of interest to society at large—i.e., allegations of racial insensitivity. Moreover, the events reported during the press conference gained national attention from media outlets throughout the United States. Therefore, we find the circuit court did not err in finding this was a matter of public concern. *See Holtzscheiter*, 332 S.C. at 531–

32, 506 S.E.2d at 513 (Toal, J., concurring in result) ("[M]atters of public concern are those related to the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Dun & Bradstreet*, 472 U.S. at 759)).

Fact or Expressions of Opinion

As contended by Appellants, the "central issue is whether [a person] being referred to as a 'racist douchebag' and someone [who] condones a 'racist act' is defamatory." Specifically, the statement at issue in the first article "Melongate" provides: "Today, Charleston was consumed by one story and one story only: the removal of Academic Magnet football coach Bud Walpole amid *allegations that his players more or less behaved like racist douchebags*." (emphasis added). The statement at issue in the second article is the title itself: "Mob Rules: School district forces out superintendent who fired *coach who condoned racist ritual*." (emphasis added). Thus, we must consider whether the statements are factual assertions about Appellants. *See Milkovich v. Lorain Journal Co*., 497 U.S. 1, 19–20 (1990) ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."); *see also Connick*, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact.").

"Under the First Amendment[,] there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz v. Welch*, 418 U.S. 323, 339–40 (1974). Therefore, an expression of opinion that conveys a false and defamatory statement of fact can be actionable. *See Milkovich*, 497 U.S. at 18 (noting that "a wholesale defamation exemption" was not created "for anything that might be labeled 'opinion'" because "it would . . . ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact").

There are certain "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Id*. at 20 (alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)). Statements such as opinion, satire, epithets, or rhetorical hyperbole cannot be the subject of liability for defamation. *See id.* ("This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation.").

Although the Supreme Court has not delineated a test[10] to determine whether certain statements are "fact" or "opinion," the *Milkovich* court indicated that "statement[s] on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, . . . where a media defendant is involved." 497 U.S. at 19–20. Moreover, "a statement of opinion relating to matters of public concern [that] does not contain a provably false factual connotation will receive full constitutional protection." *Id*. at 20.

We do not find that the term "racist douchebag" can "reasonably [be] interpreted as stating actual facts" about Appellants. *See Milkovich*, 497 U.S. at 20 (indicating there is protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about a person to ensure "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' [that] has traditionally added" to topics of great debate); *cf. id.* at 21–22 (finding statement written in newspaper that high school coach lied under oath was actionable because the "language [was] an articulation of an objectively verifiable event").

Additionally, whether someone "more or less behaved like [a] racist douchebag" or whether someone condoned an act that was "racist" is susceptible to varying viewpoints and interpretations. One person may view certain behavior as disrespectful and offensive, but another person might view the same behavior as non-controversial and socially acceptable. Importantly, we note that all of the

[10] We note that the Fourth Circuit has adopted a set of factors to consider when distinguishing between statements of fact and opinion. *See Potomac Valve & Fitting Inc. v. Crawford Fitting Co*., 829 F.2d 1280, 1288 (4th Cir. 1987) (noting that the threshold inquiry is whether the challenged statement can be characterized as true or false; if the statement cannot be characterized as either true or false then it is not actionable); *id.* at 1287–88 (noting that if the challenged statement can be characterized as either true or false, then three additional factors must be considered to determine whether the statement is nevertheless an opinion because "a reasonable reader or listener would recognize its weakly substantiated or subjective character—and discount it accordingly"); *id*. (noting the additional factors are "the author or speaker's choice of words;" "the context of the challenged statement within the writing or speech as a whole;" and "the broader social context into which the statement fits").

Appellants agreed during their deposition testimony that whether something is racist is a matter of opinion.[11]

Furthermore, the opinion editorials at issue were published in the "Views" section of the newspaper. This is a section of the newspaper that is dedicated to the expression of opinions by the newspaper's editors, guest editorial writers, and readers. Essentially, the article was published in a section devoted to opinions and commentary. *See Potomac Valve & Fitting Inc.*, 829 F.2d. at 1288 ("Even when a statement is subject to verification, however, it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it."). Thus, we find that the use of the term "racist" in an opinion editorial to describe a sequence of events related to a racially sensitive matter does not assert any verifiable, objectively provable fact about Appellants. We find the circuit court correctly held the use of the terms "racist" and "racist douchebag" in the articles were not actionable because they were expressions of opinion and rhetorical hyperbole.[12] *See* 3 Dan B. Dobbs et. al., *The Law of Torts* §

---

[11] Appellant Adam Ackerman was asked, "Do you believe that whether or not something is racist is a matter of opinion?" Appellant replied, "It is a matter of opinion."

Appellant R.M. was asked, "[D]o you think that people can have different opinions as to what is racist?" Appellant responded, "Absolutely."

Appellant C.F. was asked, "Do you think whether or not the watermelon ritual, the perception of the watermelon ritual, whether or not that's racist is a matter of opinion?" Appellant responded, "[I]t is a matter of opinion, but it's also—it's an opinion generated on what you've heard."

Appellant Coach Walpole was asked, "Who determines whether or not something is racist?" Appellant responded, "It's up to the—it depends on what it is, up to the individual interpretation, I don't know."

[12] We note that other jurisdictions have held that referring to someone as "racist" is an expression of one's opinion and is not actionable for defamation. *See Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (noting that calling someone a racist "is not actionable unless it implies the existence of undisclosed[] defamatory facts"); *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976) (finding that use of the word

572 (2011) ("'[R]acist' is sometimes said to be mere name-calling and not actionable in some contexts[; however,] the term can be actionable where it plainly imputes *acts* based on racial discrimination." (emphasis added)); *see also* 50 Am. Jur. 2d *Libel and Slander* § 200 (2017) ("However, general statements charging a person with being racist, unfair, or unjust, without more, such as contained in the signs carried by protestors, constitute mere name calling and do not contain a provably false assertion of fact as required for defamation.").

Accordingly, Appellants did not meet their burden of proving that Jones Street Publishers published a false and defamatory statement and thus, summary judgment was proper. *See West*, 396 S.C. at 7, 720 S.E.2d at 498 ("To establish a defamation claim, a plaintiff *must* prove: (1) a false and defamatory statement was made . . . ." (emphasis added)); *see also Milkovich*, 497 U.S. at 19–20 ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."); *see also Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001) ("The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery[,] against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof at trial." (quoting

---

"fascist" "cannot be regarded as having been proved to be [a] statement[] of fact"); *Meissner v. Bradford*, 156 So.3d 129, 133–34 (La. Ct. App. 2014) (holding statement that former president of youth football league "has a problem with people of color" was a statement of opinion in the nature of hyperbole rather than an actionable statement of fact); *Ward v. Zelikovsky*, 643 A.2d 972, 983 (N.J. 1994) (holding statement that plaintiff hated or did not like Jews was not actionable); *id*. ("[T]he statement [that plaintiff hated or did not like Jews] cannot be distinguished from characterizations that a person is a 'racist,' 'bigot,' 'Nazi,' or 'facists.'"); *Silverman v. Daily News, L.P.*, 129 A.D.3d 1054, 1055–56 (N.Y. App. Div. 2015) (holding defendant's publication that plaintiff authored "racist writings" is a statement of opinion, not fact); *Covino v. Hagemann*, 627 N.Y.S.2d 894, 899–900 (N.Y. Sup. Ct. 1995) (holding statements that characterized plaintiff's behavior as "racially insensitive" were protected expressions of opinion and did not give rise to an action for defamation); *id*. ("In daily life [the word] 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face[.]").

Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, and Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999))).

Because the qualified privilege of fair report applies to the factual statements of the articles and the remaining statements in the articles are protected under the First Amendment as opinion, ideas, and rhetorical hyperbole, the statements are not actionable. Therefore, Appellants have failed to establish the first element of defamation. *See West*, 396 S.C. at 7, 720 S.E.2d at 498 ("To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made . . . ."). Nonetheless, we will address the remaining issues.

IV. Proof of Injury

Appellants maintain the circuit court erred in finding that they have not shown proof of injury to reputation. Appellants contend they have suffered actual injury to their reputations and standing in the community as well as personal humiliation and mental anguish. Appellants argue the students are private figures and do not need to provide proof of damages to defeat summary judgment.[13] We disagree.

"[I]n a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumptions [that] the defendant acted with common law malice and the plaintiff suffered general damages do not apply." *Erickson*, 368 S.C. at 466, 629 S.E.2d at 665. "Instead, the private-figure plaintiff must plead and prove common law malice and show 'actual injury' in the form of general or special damages." *Id.* General damages include injuries such as "injury to reputation, mental suffering, hurt feelings, and other similar types of injuries [that] are incapable of definite money valuation." *Holtzscheiter,* 332 S.C. at 510 n.4., 506 S.E.2d at 502 n.4 (quoting *Whitaker v. Sherbrook Distrib. Co*., 189 S.C. 243, 246, 200 S.E. 848, 849 (1939)). "[S]pecial damages are tangible losses or injury to the plaintiff's property, business, occupation or profession, capable of being assessed monetarily, . . ." *Id*. However, special damages do not include hurt feelings, embarrassment, humiliation, or emotional distress. *Wardlaw v. Peck*, 282 S.C. 199, 205–06, 318 S.E.2d 270, 274–75 (Ct. App. 1984). Additionally, "in a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumption that the libelous statement is false is not applied." *Erickson*, 368 S.C. at 466, 629 S.E.2d at 665. "Instead, the private-figure plaintiff must prove the

[13] Jones Street Publishers conceded that the football players were private figures.

statement is false." *Id*. Appellant bears the burden of proving the defamation case by a preponderance of the evidence. *Id.* at 475, 629 S.E.2d at 670.

In viewing the evidence in the light most favorable to Appellants, Appellants did not produce evidence of either general or special damages arising from injury to their reputations as a direct result of the *City Paper*'s publications. *See Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 ("When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party."); *see also Erickson*, 368 S.C. at 466, 629 S.E.2d at 665 ("[T]he private-figure plaintiff must plead and prove common law malice and show 'actual injury' in the form of general or special damages."). Appellants could not identify individuals who read the *City Paper*'s publications and as a result of those publications, viewed Appellants in a different light. Nor did Appellants provide evidence of any lost opportunities as a result of the articles. Appellants agreed that they did not lose any friends, remained employed at their places of employment, and were accepted to the colleges they desired to attend. At most, Appellants contended they felt "more self-conscious" and that their school had been defamed. *See Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct. App. 2001) ("The focus of defamation is not on the hurt to the defamed party's feelings, but on the injury to his reputation." (quoting *Fleming v. Rose*, 338 S.C. 524, 532, 526 S.E.2d 732, 737 (Ct. App. 2000), *rev'd on other grounds*, 350 S.C. 488, 567 S.E.2d 857 (2002))); *see also Johnson v. Nickerson*, 542 N.W.2d 506, 513 (Iowa 1996) ("While a defamation suit can be viewed as serving the purpose of vindicating the plaintiff's character by establishing the falsity of the defamatory matter, if no harm can be established[,] the action must be regarded as trivial in nature."). Some Appellants indicated that they had been questioned about the watermelon incident by various people; however, Appellants were unable to identify those individuals and unable to concretely state whether those individuals were questioning them as a result of reading the *City Paper*'s publications. *See Jackson*, 383 S.C. at 17, 677 S.E.2d at 616 ("A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. 'However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury.'" (internal citation omitted) (quoting *Small*, 329 S.C. at 461, 494 S.E.2d at 841)).

As previously stated, the watermelon ritual controversy gained local and national attention resulting in reports by media outlets, including television and radio broadcasts, throughout the United States. Importantly, the *City Paper* was not the first medium to produce a story on the events. Moreover, the factual statements in

City Paper's article were a substantially accurate report of the statements made by Superintendent McGinley at the live press conference. Thus, we find that Appellants did not meet their burden of showing proof of injury. *See id*. ("Finally, assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact."); *see also Boone*, 347 S.C. at 579, 556 S.E.2d at 736 ("The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." (quoting *Carolina All. for Fair Emp't*, 337 S.C. at 485, 523 S.E.2d at 800)).

V. Whether Statements Were "Of and Concerning" the Students

Appellants argue the circuit court erred in finding the alleged defamatory statements were not "of and concerning" the students because the statements refer to the entire football team and not to any individual student. Appellants cite to *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962)[14] for the proposition that a member of a football team may be defamed even if the individual is not specifically named.

"To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred." *Burns v. Gardner*, 328 S.C. 608, 615,

[14] The case cited by Appellants is the only defamation case that our research uncovered that has held a member of a football team can prevail when the defamatory language concerns the entire team. In *Fawcett*, the Supreme Court of Oklahoma held that a fullback on the alternate squad of the University of Oklahoma football team had been defamed by an article alleging that members of the team had used amphetamines. 377 P.2d at 52. None of the players were named in the article; however, the article referred specifically to the 1956 football season. *Id*. at 47, 52. Specifically, the article stated "several *physicians observed Oklahoma players being sprayed in the nostrils with an atomizer*." *Id*. at 47. Thus, the article insinuated the players were using amphetamines. *Id*. at 44. The court held the fullback presented evidence that he was a constant player during the 1956 season; the substance administered with the atomizer was a harmless substance used to help players with mouth dryness; and he did not use amphetamines or any other narcotic drugs. *Id*. at 47. Therefore, the court determined that despite the football team consisting of sixty or seventy players, the fullback had "established his identity in the mind of the average lay reader as one of those libeled." *Id*. at 52.

493 S.E.2d 356, 359 (Ct. App. 1997). "Where a publication affects a class of persons without any special personal application, no individual of that class can sustain an action for the publication." *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 377, 9 S.E.2d 796, 800 (1940) (citation omitted). Thus, "where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action." *Id*. "Where defamatory words reflect upon a class of persons impartially, and there is nothing showing which one is meant, no action lies at the suit of a member of the class." *Id*. at 378, 9 S.E.2d at 800 (citation omitted); *see also* 50 Am. Jur. 2d. *Libel and Slande*r § 225 (2017) ("Under the 'group libel doctrine,' a plaintiff has no cause of action for a defamatory statement directed to some of, but less than, the entire group when there is nothing to single out the plaintiff; consequently, the plaintiff has no cause where the statement does not identify to which members it refers.").

However, in *Holtzscheiter*, our supreme court held that "[w]hile the general rule is that defamation of a group does not allow an individual member of that group to maintain an action, this rule is not applicable to a small group." *Holtzscheiter*, 332 S.C. at 514, 506 S.E.2d at 504. The *Holtzscheiter* court held a newspaper liable for publishing a statement that a murder victim lacked "family" support. *Id*. The murder victim's mother sued for defamation alleging the statement defamed her. *Id*. at 508, 506 S.E.2d at 500. The *Holtzscheiter* court indicated there was evidence from which a jury could find the statement was "of and about" the victim's mother. *Id*. at 514, 506 S.E.2d at 504. In the instant matter, by any measure, a football team would not constitute a small group—at least not under the analyses of *Holtzscheiter*.[15] *See Hospital Care Corp.*, 194 S.C. at 377-87, 9 S.E.2d at 800–04 (affirming the circuit court's order ruling that a small insurance company could not maintain a defamation action against defendants who published pamphlet stating that

[15] *See Evans v. Chalmers*, 703 F.3d 636, 659–60 (4th Cir. 2012) ("One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if, (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member." (quoting Restatement (Second) of Torts § 564A (1977))) (Wilkinson, J., concurring); *Church of Scientology Intern. v. Daniels*, 992 F.2d 1329, 1331 (4th Cir. 1993) ("[D]efamatory statement about a large group cannot support a libel action by a member of the group" (citing *Ewell v. Boutwell*, 121 S.E. 912, 915 (Va. 1924))).

small insurance companies that had recently entered into the insurance business were inexperienced and financially unstable); *id*. (affirming the finding that the pamphlet was not actionable because the defamation, if any, was to a class and had no specific application to the plaintiff); *see also Burns*, 328 S.C. at 615-16, 493 S.E.2d at 360 (holding two blind citizens lacked standing to maintain defamation action on behalf of blind population in general).

Here, we conclude the circuit court did not err in finding the statements were not "of and concerning" Appellants. *City Paper*'s publication made only general statements about the conduct of the AMHS's football team as a whole. The article did not reference any names nor did it include any pictures of the members of the football team. Additionally, the *City Paper* did not publish any facts or commentary specific to any particular member of the AMHS football team. Thus, there are no statements within the articles that single out any particular member of the football team. Accordingly, Appellants have not met their burden of proving the allegedly defamatory statements concerned Appellants. *See Hospital Care Corp.*, 194 S.C. at 378, 9 S.E.2d at 800 ("Where defamatory words reflect upon a class of persons impartially, and there is nothing showing which one is meant, no action lies at the suit of a member of the class."); *see also Burns*, 328 S.C. at 615, 493 S.E.2d at 359 ("To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred.").

VI. Constitutional Actual Malice

Lastly, Appellants argue the circuit court erred in finding that Coach Walpole did not show that Jones Street Publishers acted with actual malice. First, Appellants contend that Coach Walpole is a private figure and not a public official as the circuit court held. Appellants also assert the *City Paper*'s use of the word "racist" in the articles constituted actual malice. Conversely, Jones Street Publishers maintains that Coach Walpole is a public official and he must prove constitutional actual malice. Jones Street Publishers contends that Coach Walpole failed to produce evidence of actual malice. We agree with Jones Street Publishers.

"[A]n important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." *Erickson*, 368 S.C. at 468, 629 S.E.2d at 666. "This determination is a matter of law which must be decided by the court, . . ." *Id.* "In general, a public official is a person who, among the hierarchy of government employees, has or appears to the public to

have 'substantial responsibility for or control over the conduct of governmental affairs.'" *Id*. at 469, 629 S.E.2d at 666 (quoting *Holtzscheiter*, 332 S.C. at 520 n.4, 506 S.E.2d 507 n.4 (Toal, J., concurring in result)). "In considering the question of whether one is a public official, the employee's position must be one [that] would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id*. (quoting *Holtzscheiter*, 332 S.C. at 520 n.4, 506 S.E.2d 507 n.4 (Toal, J., concurring in result)). "The status of a public official may be deemed sufficient . . . not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context." *Id*. at 469, 629 S.E.2d at 666–67 (quoting *McClain*, 275 S.C. at 284, 270 S.E.2d at 125).

For purposes of a First Amendment analysis, our courts have held a variety of public school administrators and employees to be public officials. *See Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991) (finding school board members to be public officials); *Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978) (finding school trustee to be a public official). Other jurisdictions have held that public school teachers and athletic coaches are public officials for purposes of applying the *New York Times* doctrine. *See Mahoney v. Adirondack Publ. Co.*, 517 N.E.2d 1365, 1368 (N.Y. 1987) (finding a public high school football coach to be a public figure); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1102 (Okla. 1978) (finding person holding the dual positions of public school coach and physical education teacher to be a public official); *Johnson v. Sw. Newspapers Corp*., 855 S.W.2d 182, 184 (Tex. Ct. App. 1993) (finding person holding the dual position of athletic director and head football coach to be a public official).

Once it is determined that the plaintiff is a public official, pursuant to *New York Times Co. v. Sullivan*,[16] the plaintiff must show proof that the publication was made with "actual malice" or else the publication is constitutionally privileged. *See McClain*, 275 S.C. at 283, 270 S.E.2d at 124. Actual malice must be proven by clear and convincing evidence. *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). "Actual malice in this context has been defined as the publication of an article 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *McClain*, 275 S.C. at 283, 270 S.E.2d at 124 (quoting *New York Times*, 376 U.S. at 280). "Whether the evidence is sufficient to support a finding of actual malice is a question of law." *Elder,* 341 S.C. at 113, 533 S.E.2d at 901–02.

[16] 376 U.S. 254 (1964).

"When reviewing an actual malice determination, [the appellate court] is obligated to independently examine the entire record to determine whether the evidence sufficiently supports a finding of actual malice." *Id.* at 113–14, 533 S.E.2d at 902.

However, a "reckless disregard" for the truth "requires more than a departure from reasonably prudent conduct." *Id*. at 114, 533 S.E.2d at 902. "There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth* of his publication." *Id*. (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). "There must be evidence the defendant had a '*high degree of awareness of . . . probable falsity*.'" *Id.* (alteration in original) (quoting *Garrison*, 379 U.S. at 74). Thus, "[a]ctual malice may be present . . . where one fails to investigate and there are obvious reasons to doubt the veracity of the [information]." *Id.* at 114, 533 S.E.2d at 902.

Here, the circuit court correctly held that Coach Walpole is a public official for purposes of applying the *New York Times* doctrine. Coach Walpole holds many positions within the School District. He is the head football coach at AMHS, the head coach of the women's basketball team at AMHS, and a teacher at Liberty Hill Academy. Coach Walpole testified that he interacts with the parents of the athletes after each game and he participates in newspaper and television interviews. Furthermore, as head coach, he is responsible for the oversight of the teams' activities.

As a public official, Coach Walpole was required to demonstrate constitutional actual malice by clear and convincing evidence. A review of the record indicates that Coach Walpole failed to produce sufficient evidence to support such a finding. *See id.* at 114, 533 S.E.2d at 902. Coach Walpole failed to produce evidence showing Jones Street Publishers had "in fact entertained serious doubts as to the truth" of the publications. *See id*. ("[T]here must be evidence at least that the defendant purposefully avoided the truth."). Jones Street Publishers provided affidavits from its editors indicating they did not have any reason to doubt the veracity of Superintendent McGinley's statements regarding the events and circumstances surrounding the watermelon ritual. *See id*. ("Actual malice is a subjective standard testing the publisher’s good faith belief in the truth of his or her statements."). Thus, Jones Street Publishers was not required to investigate the School District's statements when it did not have reason to doubt its truth. *See id*. ("Actual malice may be present, . . . where one fails to investigate and there are obvious reasons to doubt the veracity of the [information]."); *id*. ("Failure to investigate before publishing, even when a reasonably prudent person would have

done so, is not sufficient to establish reckless disregard."). Therefore, we conclude the circuit court correctly found Coach Walpole failed to show proof of actual malice.

CONCLUSION

Accordingly, we find (1) the statements of fact in the articles are protected by the fair report privilege and (2) the remaining statements in the articles are expressions of opinion, ideas, and rhetorical hyperbole protected under the First Amendment. Because we find the statements at issue are not actionable, Appellants have failed to meet their burden of proving the first element of their defamation claim, and therefore, summary judgment was appropriate.[17] Furthermore, we find Appellants (1) have not shown proof of injury to their reputations,[18] (2) have not shown that the allegedly defamatory statements were "of and concerning" Appellants, and (3) have not shown that Jones Street Publishers acted with actual malice.

AFFIRMED.

WILLIAMS and HILL, JJ., concur.

---

[17] *See West*, 396 S.C. at 7, 720 S.E.2d at 498 ("To establish a defamation claim, a plaintiff *must* prove: (1) a false and defamatory statement was made; . . ." (emphasis added)); *see also Boone*, 347 S.C. at 579, 556 S.E.2d at 736 ("The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery[,] against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof at trial." (quoting *Carolina All. for Fair Emp't*, 337 S.C. at 485, 523 S.E.2d at 800)).

[18] *See Erickson*, 368 S.C. at 466, 629 S.E.2d at 665 ("[T]he private-figure plaintiff must plead and prove common law malice and show 'actual injury' in the form of general or special damages.").