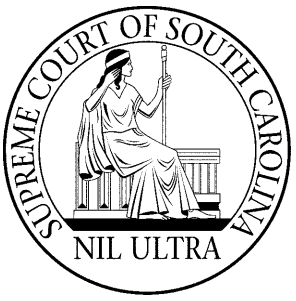

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
November 22, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Jane Doe, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001726

ORDER

After careful consideration of the Respondent's petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinions for the opinions previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ Costa M. Pleicones A.J.

Columbia, South Carolina
November 17, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane Doe, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001726

IN THE ORIGINAL JURISDICTION

Opinion No. 27728
Heard March 23, 2016 – Refiled November 17, 2017

DECLARATORY JUDGMENT ISSUED

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David Matthew Stumbo, of Greenwood and Barry J. Barnette, of Spartanburg, both for Amicus Curiae Solicitors' Association of South Carolina, Inc.

Meliah Bowers Jefferson, of Greenville, for Amicus Curiae South Carolina Coalition Against Domestic Violence and Sexual Assault.

Kevin A. Hall and M. Malissa Burnette, both of Columbia, for Amicus Curiae South Carolina Equality Coalition, Inc.

Leslie Ragsdale Fisk, of Greenwood, Tamika Devlin Cannon, of Greenville, and J. Edwin McDonnell, of Spartanburg, all for Amicus Curiae South Carolina Legal Services.

Lindsey Danielle Jacobs and Patricia Standaert Ravenhorst, both of Greenville; and Sarah Anne Ford, of Columbia, all for Amicus Curiae South Carolina Victims Assistance Network.

Alice Witherspoon Parham Casey, of Columbia, for Amicus Curiae Women's Rights and Empowerment Network.

CHIEF JUSTICE BEATTY: The Court granted Jane Doe's petition for original jurisdiction to consider whether the definition of "household member" in South Carolina Code section 16-25-10(3) of the Domestic Violence Reform Act and section 20-4-20(b) of the Protection from Domestic Abuse Act[1] (collectively "the

[1] The Acts define "household member" as:

(a) a spouse;
(b) a former spouse;
(c) persons who have a child in common; or
(d) *a male **and** female* who are cohabiting or formerly have cohabited.

Acts") is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment[2] to the United States Constitution. Specifically, Doe contends the provisions are unconstitutional because neither affords protection from domestic abuse for unmarried, same-sex individuals who are cohabiting or formerly have cohabited. In order to remain within the confines of our jurisdiction and preserve the validity of the Acts, we declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe.

I. Factual / Procedural History

This case arises out of an alleged domestic dispute between a former same-sex couple. Doe claims that she and her ex-fiancé cohabited between 2010 and 2015. Following the dissolution of the relationship, Doe moved out of the shared residence and relocated to Columbia.

On August 6, 2015, Doe contacted police to report that she was assaulted by her ex-fiancé the day before as she was leaving a Columbia hotel. On August 10, 2015, law enforcement was summoned to Doe's workplace after someone called regarding a disturbance in the parking lot. When the officers arrived, Doe claimed that her ex-fiancé and another individual followed her from her apartment to work. While no physical confrontation took place, Doe claimed that she felt threatened by her ex-fiancé's actions. Law enforcement filed incident reports for both events, the first was identified as "simple assault" and the second was identified as "assault-intimidation."

S.C. Code Ann. § 16-25-10(3) (Supp. 2017) (emphasis added); *id.* § 20-4-20(b) (2014) (defining "household member" identical to section 16-25-10(3), but designating provisions with lowercase Roman numerals rather than letters).

[2] U.S. Const. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see* S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.").

On August 12, 2015, Doe sought an Order of Protection[3] from the Richland County Family Court. The family court judge summarily denied Doe's request, citing a lack of jurisdiction pursuant to section 20-4-20(b), which defines "household member" in the Protection from Domestic Abuse Act.[4]

Doe filed an action for declaratory judgment in this Court's original jurisdiction on August 14, 2015. Doe sought for this Court to declare unconstitutional the statutory definition of "household member" because it "leaves unmarried, same-sex victims of abuse without the benefit of the same remedy afforded to their heterosexual counterparts." This Court granted Doe's petition for original jurisdiction by order dated November 5, 2015.[5]

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[3] An "Order of Protection" is defined as "an order of protection issued to protect the petitioner or minor household members from the abuse of another household member where the respondent has received notice of the proceedings and has had an opportunity to be heard." S.C. Code Ann. § 20-4-20(f) (2014).

[4] Subsequently, Doe sought a Restraining Order in a Richland County magistrate's court. On August 13, 2015, a magistrate court judge granted Doe a Temporary Restraining Order that was converted to a Restraining Order on December 17, 2015.

[5] The author of the dissenting opinion concludes there is no controversy for which the Court should exercise its original jurisdiction. For several reasons, we disagree with this conclusion. Initially, in granting Doe's petition for original jurisdiction, we found the case satisfied the requirements of our appellate court rules. *See* Rule 245(a), SCACR (authorizing Supreme Court to entertain matters in its original jurisdiction "[i]f the public interest is involved, or if special grounds of emergency or other good reasons exist"). Further, this Court has exercised its authority to grant a petition for original jurisdiction where a legitimate constitutional issue has been raised. *See, e.g.*, *Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009) (accepting matter in original jurisdiction to address Petitioners' claim that Act at issue violated the "one subject" provision of the South Carolina Constitution), *holding modified by S.C. Pub. Interest v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *Tucker v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 131, 442 S.E.2d 171 (1994) (exercising original jurisdiction to determine whether the statute at issue violated the South Carolina Constitution); *Thompson v. S.C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) (exercising original jurisdiction and holding that provisions of the Uniform Alcohol and Intoxication Treatment Act violated the Equal Protection clauses of the federal and state constitutions; noting that the "questions involved are of such wide concern,

II. Discussion

A. Arguments

In essence, Doe maintains the South Carolina General Assembly intentionally excluded her from consideration for an Order of Protection in family court "because of her sexual orientation." As a result, Doe claims she was denied a remedy that is readily accessible to similarly situated opposite-sex couples. Doe explains that by purposefully defining "household member" as "a male **and** female who are cohabiting or formerly have cohabited" rather than in the disjunctive "male **or** female," the General Assembly enacted a statutory definition that violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Specifically, Doe asserts she has been arbitrarily and capriciously deprived of the right to protect her life as she cannot obtain an Order of Protection in family court. Further, Doe contends she is being denied the same protection afforded to opposite-sex, cohabiting couples even though there is no rational reason to justify this disparate treatment.

Although Doe acknowledges that an abuser in a same-sex relationship could be charged with criminal assault and battery and that she could obtain a Restraining Order in magistrate's court, she claims that these remedies are not commensurate with the heightened penalties and protections afforded by the Acts. In particular, Doe points to the provisions of the Domestic Violence Reform Act that authorize enhanced penalties for convicted abusers who commit additional acts of violence,

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both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action").

Finally, any claim that "there is no controversy" before the Court is without merit. While the parties may agree that Doe should be protected under the Acts, the parties disagree as to whether the definition of "household member" is constitutional and the appropriate remedy. Additionally, even if the dissent's position were meritorious, it would not eliminate the existence of a controversy. *See* 1A C.J.S. *Actions* § 16, at 259 (2016) (defining "controversy" and stating, "In a limited sense, it may be defined as an allegation of fact on one side which is denied by the other side, but the element of dispute is not essential to constitute a justiciable controversy, as such a controversy may exist even if all of the facts and the law are admitted by all the parties" (footnotes omitted)).

restrictions on a convicted abuser's ability to carry a firearm, additional penalties for violations of protection orders, and more stringent expungement requirements.

To remedy the disparate treatment and avoid the invalidation of the Acts in their entirety, Doe advocates for this Court to: (1) construe the word "and" in sections 16-25-10(3)(d) and 20-4-20(b)(iv) to mean "or"; and (2) declare the definition of "household member" to include any person, male *or* female, who is currently cohabiting with someone or who has formerly cohabited with someone.

In response, the State contends that any constitutional analysis could be avoided if the Court: (1) construes the phrase "male and female" as proposed by Doe; or (2) sever those words from the definition so that it reads only "cohabiting or formerly have cohabited." The State asserts that such a construction would be consistent with and effectuate the legislative purpose of the Acts, which is to protect against violence between members of the same household.

Alternatively, if the Court strikes down the Acts based on a constitutional violation, the State submits the Court could delay implementing its decision to allow the General Assembly time to amend the statutes consistent with this Court's ruling. Ultimately, given the importance of the domestic violence statutes, the State implores this Court not to invalidate the Acts in their entirety based solely on the literal import of the word "and."

B. Constitutional Analysis

1. Legislative History[6]

[6] The author of the dissenting opinion takes issue with our reference to "legislative history." Interestingly, the dissent contends it is "improper," yet relies on the 1994 and 2005 versions of the Acts to declare that "[i]t is in fact perfectly reasonable to construe the Acts to protect unmarried, same-sex couples." Further, the dissent claims it "is not truly legislative history" because it does not "focus on some event, document, or statement separate from the amendment itself through which the Court could explain how the legislative history reflects the legislative intent." While the term "legislative history" encompasses the use of the items identified by the dissent, and is generally relied on if the text of the statute is ambiguous, it is not so limited in application and may include, as we did, the historical evolution of the statute at issue. *See* 73 Am. Jur. 2d *Statutes* § 97, at 336 (2012) ("In determining legislative intent, the court may review the earlier versions of the law. Therefore, in the

An overview of the legislative history of the Acts, particularly the term "household member," is instructive. In 1984, the General Assembly enacted the Criminal Domestic Violence Act and the Protection from Domestic Abuse Act. Act No. 484, 1984 S.C. Acts 2029. Notably, both Acts are contained within Act No. 484; however, the definition of "household member" is different in each Act.[7] Over the course of the next thirty-one years, the General Assembly amended the Acts four times, the most extensive in 2015.

In 1994, the General Assembly amended sections 16-25-10 and 20-4-20 to delete "family or" preceding "household member," add "persons who have a child in common," and add/substitute "*a male and female who are cohabiting or formerly have cohabited*" for "*and persons cohabitating or formerly cohabitating*." Act No. 519, 1994 S.C. Acts 5926, 5926-27; 5929.[8]

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construction of a statute, reference may be made to earlier statutes on the subject which are regarded as in pari materia with the later statute.").

[7] In 1984, section 16-25-10 stated: "As used in this article, 'family or household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, and *persons cohabitating or formerly cohabitating*." (Emphasis added.)

In 1984, section 20-4-20(b) stated: "'Family or household member' means spouses, former spouses, parents and children, and persons related by consanguinity or affinity within the second degree."

[8] In 1994, section 16-25-10 was amended to read: "As used in this article, 'household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, *and a male and female who are cohabiting or formerly have cohabited*." (Emphasis added.)

In 1994, section 20-4-20(b) read: "'Household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, *and a male and female who are cohabiting or formerly have cohabited*." (Emphasis added.)

In 2003, the General Assembly deleted "parents and children, persons related by consanguinity or affinity within the second degree" from sections 16-25-10 and 20-4-20. Act No. 92, 2003 S.C. Acts 1538, 1541; 1550.[9]

In 2005, the General Assembly retained the 2003 definition of "household member" in sections 16-25-10 and 20-4-20(b), but separately identified each qualifying household member with numbers in section 16-25-10 and lowercase Roman numerals in section 20-4-20(b). Act No. 166, 2005 S.C. Acts 1834, 1836; 1842.

In 2015, the General Assembly extensively amended the Criminal Domestic Violence Act to provide for the "Domestic Violence Reform Act." Act No. 58, 2015 S.C. Acts 225 (effective June 4, 2015). While the new Act retained the definition of "household member," it provided for, *inter alia*, enhanced penalties for one convicted of subsequent offenses of domestic violence, the offense of domestic violence of a high and aggravated nature, and the prohibition of possession of a firearm for one convicted of domestic violence.[10]

Although a review of the statutory evolution is not dispositive of the instant case, it is conclusive evidence the General Assembly purposefully included the phrase "male and female" within the definition of "household member" in 1994 and has retained that definition.

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[9] In 2003, section 16-25-10 was amended to read: "As used in this article, 'household member' means spouses, former spouses, persons who have a child in common, *and a male and female who are cohabiting or formerly have cohabited*." (Emphasis added.)

In 2003, section 20-4-20(b) was amended to read: "'Household member' means spouses, former spouses, persons who have a child in common, *and a male and female who are cohabiting or formerly have cohabited*." (Emphasis added.)

[10] *See*, *e.g.*, S.C. Code Ann. § 16-25-20 (Supp. 2017) (providing: (1) enhanced penalties for one convicted of subsequent domestic violence offenses; (2) degrees of domestic violence offenses; and (3) penalties for a violation of an order of protection); *id.* § 16-25-30 (prohibiting possession of a firearm by a person who has been convicted of domestic violence or domestic violence of a high and aggravated nature); *id.* § 16-25-65 (outlining offense of domestic violence of a high and aggravated nature).

2. Presumption of Constitutionality

With this background in mind, we must presume the Acts are constitutional "unless [their] repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution. *Id.* Accordingly, our scope of review is limited in cases involving a constitutional challenge to a statute "because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Hendrix v. Taylor*, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003) (internal quotation marks and citation omitted).

3. Facial versus "As-Applied" Challenge

Cognizant of the presumption of constitutionality, we must first determine the type of constitutional challenge posed by Doe. In her brief and the allegations in the declaratory judgment pleadings, it appears that Doe claims the statutes are facially invalid *and* invalid "as applied" to her. However, as will be discussed, we find that Doe can only utilize an "as-applied" challenge.

"The line between facial and as-applied relief is [a] fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." 16 C.J.S. *Constitutional Law* § 153, at 147 (2015). Further, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Rather, "[t]he distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id*.

"A facial challenge is an attack on a statute itself as opposed to a particular application." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (citing *City of Los Angeles, Calif. v. Patel*, ___U.S. ___, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015)). Consequently, in analyzing a facial challenge to the constitutional validity of a statute, a court "considers only the text of the measure itself and not its application to the particular circumstances of an individual." 16 C.J.S. *Constitutional Law* § 163, at 161 (2015).

One asserting a facial challenge claims that the law is "invalid *in toto* – and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474 (1974). This type of challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, "[u]nless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality." *Travelscape, L.L.C. v. S.C. Dep't of Revenue*, 391 S.C. 89, 109 n.11, 705 S.E.2d 28, 39 n.11 (2011) (quoting *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir. 2001)); *Renne v. Geary*, 501 U.S. 312, 323-24 (1991) (recognizing that a facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case).

In an "as-applied" challenge, the party challenging the constitutionality of the statute claims that the "application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011 (1992) (Scalia, J., Rehnquist, C.J., and White, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir. 1992). However, "finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision." *Travelscape,* 391 S.C. at 109, 705 S.E.2d at 39; *see Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 (1984) (discussing "as-applied" challenges and stating, "despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct" (internal quotation marks and citation omitted)). Instead, "[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada*, 506 U.S. at 1011.

Here, Doe contends that by failing to include unmarried same-sex couples within the definition of "household member," the statutes are not only facially invalid, but invalid "as applied" because they excluded her from consideration for an Order of Protection in family court based on her sexual orientation. We conclude that Doe has failed to establish that the statutes are facially unconstitutional.

In prefacing our analysis, we note that Doe has not launched a wholesale attack on the Acts or the definition of "household member" nor does she advocate for invalidation of the statutory provisions in their entirety. Rather, she merely seeks to be included with those eligible to receive an Order of Protection. While this fact is not dispositive of a facial challenge, as we must necessarily focus on the text of

the statutes, it is significant given our judicial preference to remedy any constitutional infirmity in the least restrictive way possible.

Turning to the text of the definition of "household member," we find that it is facially valid because it does not overtly discriminate based on sexual orientation. Though not an all-inclusive list, the statutes would be valid as to same-sex married couples, opposite-sex married couples, and unmarried opposite-sex couples who live together or have lived together. Because there are numerous valid applications of the definition of "household member," it is not "invalid *in toto*." Consequently, Doe must use an "as-applied" challenge to present her claim that she was intentionally excluded as a qualifying "household member" for an Order of Protection in family court. Thus, the question becomes whether the statutory definition of "household member" as applied denied Doe equal protection of the laws.

4. Equal Protection

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection "requires that all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (quoting *Marley v. Kirby*, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978)). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995).

"Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Id.* "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and; (3) the classification rests on some reasonable basis." *Id.* "Those attacking the validity of legislation under the rational basis test of the Equal Protection Clause have the burden to negate every conceivable basis which might support it." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 128, 712 S.E.2d 401, 403-04 (2011) (citations omitted).

Turning to the facts of the instant case, Doe has met her burden of showing that similarly situated persons received disparate treatment. Doe suggests that this case should be subject to the intermediate level of scrutiny as a result of "gender classification"; however, she seems to concede that the appropriate standard is the rational basis test. While there is some limited authority to support the application of intermediate scrutiny, we need not make that determination because the definition of "household member" as applied to Doe cannot even satisfy the rational basis test.

Defining "household member" to include "a male **and** female who are cohabiting or formerly have cohabited," yet exclude (1) a male and male and (2) a female and female who are cohabiting or formerly have cohabited," fails this low level of scrutiny. Specifically, we conclude the definition: (1) bears no relation to the legislative purpose of the Acts; (2) treats same-sex couples who live together or have lived together differently than all other couples; and (3) lacks a rational reason to justify this disparate treatment.

Based on our interpretation of the Acts, the overall legislative purpose is to protect victims from domestic violence that occurs within the home and between members of the home. *See Moore v. Moore*, 376 S.C. 467, 476, 657 S.E.2d 743, 748 (2008) ("The Protection from Domestic Abuse Act was enacted to deal with the problem of abuse between family members. The effect of the Act was to bring the parties before a judge as quickly as possible to prevent further violence." (quoting 17 S.C. Jur. *Criminal Domestic Violence*, § 14 (Supp. 2007)).

Statistics, as identified by the State, reveal that "women are far more at risk from domestic violence at the hands of men than vice versa." Thus, the State maintains the General Assembly defined "household member" as "a male *and* female who are cohabiting or formerly have cohabited" to address the primary problem of domestic violence within opposite-sex couples.

Without question, the statistics relied on by the State are accurate. However, a *victim* of domestic violence is not defined by gender, as the word is non-gender specific.[11]

Moreover, although the Acts may have been originally enacted to address traditional findings of domestic violence, new research shows that individuals within

[11] *Cf.* S.C. Const. art. I, § 24 (outlining Victims' Bill of Rights and providing that it is intended to "preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status").

same-sex couples experience a similar degree of domestic violence as those in opposite-sex couples. *See* Christina Samons, *Same-Sex Domestic Violence: The Need for Affirmative Legal Protections at All Levels of Government*, 22 S. Cal. Rev. L. & Soc. Just. 417, 430-35 (2013) (recognizing recent reform to criminal and family laws for domestic violence involving same-sex couples at the federal level and identifying need for similar reform at state level); Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 St. Thomas L. Rev. 544 (2012) (discussing similarities of domestic violence in same-sex versus opposite-sex couples; recognizing disparity in remedies afforded by the courts to victims of domestic violence in same-sex versus opposite-sex couples).

Because the Acts are intended to provide protection for all victims of domestic violence, the definition of "household member," which eliminates Doe's relationship as a "qualifying relationship" for an Order of Protection, bears no relation to furthering the legislative purpose of Acts.

Additionally, the definition of "household member" treats unmarried, same-sex couples who live together or have lived together differently than all other couples. As we interpret the definition of "household member" a person, who fits within one of the following relationships, would be eligible for an Order of Protection: (1) a same-sex married or formerly married couple;[12] (2) a same-sex couple, either married or unmarried, who have a child in common;[13] (3) an opposite-sex married or formerly married couple; (4) an opposite-sex couple, either married or unmarried, who have a child in common; and (5) an unmarried opposite-sex couple who is living together or who has lived together.

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[12] Judicial declarations have eliminated, for the most part, disparate treatment between same-sex and opposite-sex couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that states' ban on same-sex marriages violated the Equal Protection and Due Process Clauses).

[13] Sections 16-25-10(3)(c) and 20-4-20(b)(iii) identify a "household member" as including "*persons* who have a child in common." Thus, arguably an unmarried, same-sex couple who has a child in common would constitute a "qualifying relationship" for an Order of Protection. *See*, *e.g.*, *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (holding the Alabama Supreme Court erred in refusing to grant full faith and credit to a Georgia decree of adoption, which was between an unmarried, same-sex couple who had three children in common but did not reside together).

Thus, while Doe and her ex-fiancé were similarly situated to other unmarried or formerly married couples, particularly unmarried opposite-sex couples who live together, Doe was precluded from seeking an Order of Protection based on the definition of "household member." We find there is no reasonable basis, and the State has offered none, to support a definition that results in disparate treatment of same-sex couples who are cohabiting or formerly have cohabited.[14]

Because it is clear that the definition of "household member" violates the Equal Protection clauses of our state and federal constitutions, we must declare it unconstitutional. *See Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) ("A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.").[15]

5. Remedy

Having concluded that the definition of "household member" is unconstitutional as applied to Doe, we must next determine the appropriate remedy.

Clearly, in the context of the statutory scheme of the Acts, this Court cannot construe and effectively amend the statutes to change the plain language of "and" to "or" as proposed by the State. *See Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985) ("We are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words

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[14] We need not reach Doe's Due Process challenge as the Equal Protection issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (recognizing that an appellate court need not address remaining issues on appeal when the disposition of an independent issue is dispositive); *Sangamo Weston, Inc. v. Nat'l Surety Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992) (concluding that appellate courts will not issue advisory opinions that are purely academic and do not affect the outcome of the case).

[15] In contrast, the dissent finds "*the only*" reasonable interpretation is that "Doe is covered" because "an order of protection is available when domestic violence is committed upon members of unmarried, same-sex couples of *both* genders–male and female." Notably, the author of the dissenting opinion is the sole proponent of this interpretation, which not only lacks supporting authority but is based on a forced construction of the statutory language.

which the Legislature saw fit not to include."); *cf. State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) (declining to alter statutory definition of "household member" in section 16-25-10; stating, "[i]f it is desirable public policy to limit the class to those physically residing in the household, that public policy must emanate from the legislature").

Also, even though the Acts include severability clauses,[16] there is no reason to employ them as we have found the sections containing the definition of "household member" are not facially invalid. Rather, the constitutional infirmity is based on their application to Doe, i.e., not including unmarried same-sex couples in the definition of "household member." Thus, severance cannot rectify the under-inclusive nature of the definition.

Further, even if we were to attempt to remedy the constitutional infirmity through severance, we find severance of the entire phrase "a male **and** female who are cohabiting or formerly have cohabited" to be unavailing since the constitutional infirmity would remain. Protection afforded by the Acts would still be elusive to Doe and would no longer be available to opposite-sex couples who are cohabiting or formerly have cohabited. Yet, it would be available to unmarried persons such as former spouses (same-sex or not) and persons (same-sex or not) with a child in common. Absent an "as-applied" analysis, the "household member" definitional sections must be struck down. As a result, the Acts would be rendered useless. Such a drastic measure is neither necessary nor desired. *See Thayer v. S.C. Tax Comm'n*, 307 S.C. 6, 13, 413 S.E2d 810, 814-15 (1992) ("The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution." (internal quotation marks and citation omitted)). Accordingly, we reject any suggestion to sever the Acts as it is inconsistent with our rules of statutory construction and would contravene the intent of the General Assembly.

Finally, we decline to invalidate the Acts in their entirety. Such a decision would result in grave consequences for victims of domestic violence. To leave these

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[16] Act No. 58, 2015 Acts 225, 265-66 (providing a severability clause in 2015 Domestic Violence Reform Act); Act No. 166, 2005 Acts 1834, 1846 (providing a severability clause in 2005 Act amending Protection from Domestic Abuse Act, which includes definition of "household member" in section 20-4-20).

victims unprotected for any length of time would be a great disservice to the citizens of South Carolina.

III. Conclusion

In order to address the important issue presented in this case and remain within the confines of the Court's jurisdiction, we declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe. Therefore, the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection. *Cf. Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (concluding that presumption of parentage statute, which expressly referred to a mother, father, and husband, violated equal protection as applied to a married lesbian couple to whom a child was born to one of the spouses during the couple's marriage; identifying appropriate remedy by stating, "Accordingly, instead of striking section 144.13(2) from the [Iowa] Code, we will preserve it as to married opposite-sex couples and require the [Iowa Department of Public Health] to apply the statute to married lesbian couples").

Declared Unconstitutional As Applied.

KITTREDGE and HEARN, JJ., concur. Acting Justice Costa M. Pleicones, concurring in result only. FEW, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE FEW: Jane Doe, the State, and all members of this Court agree to this central point: *if* the Acts exclude unmarried, same-sex couples from the protections they provide all other citizens, they are obviously unconstitutional. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person . . . the equal protection of the laws."); S.C. CONST. art. I, § 3 ("nor shall any person be denied the equal protection of the laws"); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004) ("To satisfy the equal protection clause, a classification must . . . rest on some rational basis.").

For two reasons, I would not declare the Acts unconstitutional. First, Doe and the State agree the Protection from Domestic Abuse Act protects Doe, and thus, there is no controversy before this Court. Second, Doe and the State are correct: ambiguity in both Acts—particularly in the definition of household member—requires this Court to construe the Acts to provide Doe the same protections they provide all citizens, and thus, the Acts are not unconstitutional.

I. There is no Controversy before the Court

Our courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). In *Byrd*, we stated, "Before any action can be maintained, there must exist a justiciable controversy," and, "This Court will not [decide] . . . academic questions or make an adjudication where there remains no actual controversy." *Id.*; *see also Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy."). Doe and the State agree the Protection from Domestic Abuse Act protects Doe, and therefore, there is no controversy.

Jane Doe filed an action in the family court seeking an order of protection from a threat of domestic violence pursuant to section 20-4-40 of the Protection from Domestic Abuse Act. S.C. Code Ann. § 20-4-40(a) (2014). By its terms, the Act applies to "any household members in need of protection." *Id.* By filing the action seeking the protection of the Act, Doe necessarily took the position that the definition of "household member" includes unmarried, same-sex couples, and thus includes her. Doe argues to this Court that the definition should be interpreted to

include her.[17] Her alternative argument—that the Act is unconstitutional—is based on the family court ruling she chose not to appeal. Rather than appeal, she filed this action naming the State as the only defendant.

The State, however, agrees with the position Doe took in family court—the definition of household member includes unmarried, same-sex couples, and thus includes Doe. In its Answer, the State contends that any "constitutional problem associated with the definitions at issue . . . may be addressed through interpretation to encompass unmarried, same-sex couples." In its return to Doe's petition for original jurisdiction, the State wrote, "There is . . . no evidence that the Legislature intentionally discriminated against same-sex couples." At oral argument before this Court, the State disagreed with the statement "it is clear it is the legislative intent to exclude homosexual couples."[18] Also at oral argument, the State was asked—referring to the Protection from Domestic Abuse Act—"You're saying the statute covers Jane Doe?" to which the State responded, "Yes." In making these statements, the State asks this Court to interpret the definition of "household member" to include Doe and partners in other non-marital same-sex domestic relationships.

If Doe had appealed the family court's ruling that the Protection from Domestic Abuse Act did not apply to her, she would have presented a justiciable controversy to this Court. Doe chose not to appeal, and she filed this action. When the State agreed with Doe that the Act should be interpreted to protect her, it eliminated any controversy. The majority overlooks this important detail. When both sides agree, there is no controversy.

II. The Acts are *not* Unconstitutional

In *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999), this Court repeated the longstanding rule of law that we will not construe

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[17] As the majority explains, "Doe advocates for this Court to: (1) construe the word 'and' . . . to mean 'or'; and (2) declare the definition of 'household member' to include any person, male *or* female . . . ."

[18] A justice of the Court stated, "Following the legislative history of this statute, it is clear it is the legislative intent to exclude homosexual couples. Otherwise, they would not have changed the word 'person' to 'male and female.'" The State responded, "I respectfully disagree."

an act of the General Assembly to be unconstitutional unless there was no choice but to do so.

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.

338 S.C. at 640, 528 S.E.2d at 650; *see In re Stephen W.*, 409 S.C. 73, 76, 761 S.E.2d 231, 232 (2014) (same); *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 523 (2013) (same); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 435, 181 S.E. 481, 484 (1935) (same); *see also Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 628, 767 S.E.2d 157, 161 (2014) (reciting the principle that "we will not find a statute unconstitutional unless 'its repugnance to the Constitution is clear beyond a reasonable doubt'").

Under *Joytime Distributors*, we are constrained to interpret the Acts to include unmarried, same-sex couples unless the Acts "so clearly" exclude them "as to leave no room for reasonable doubt." In other words, if the statutory text of the definition of "household member" in the Acts is clear, and if that text so clearly excludes unmarried, same-sex couples as to leave no reasonable doubt they are excluded, then the Court is correct to find the Acts unconstitutional. That text, however, is not clear.

We originally decided this case on July 26, 2017. *Doe v. State*, Op. No. 27728 (S.C. Sup. Ct. filed July 26, 2017) (Shearouse Adv. Sh. No. 28 at 55). In this substituted opinion the Court has reversed itself in two important respects.[19] The first—now finding the Acts unconstitutional "as applied," but previously finding the applicable subsections of the Acts unconstitutional on their face—is a significant

[19] Chief Justice Beatty, who was not the author of the original majority opinion, has not been inconsistent, but from the outset has advanced the argument that is now the position of the Court. *See Doe*, Op. No. 27728 (Shearouse Adv. Sh. No. 28 at 62) (Beatty, C.J., concurring in part and dissenting in part).

reversal, but not important to my analysis. The second—reversing itself from a finding that the Acts are clear and unambiguous[20] to an analysis based on the premise that the applicable subsections of the Acts are not clear[21]—demonstrates my analysis is correct. This fundamental change in the Court's reasoning should require an explanation as to how the majority can ignore the presumption of constitutional validity we said was the law in *Joytime Distributors*. The majority recites the words, "This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution." But the requisite "clear showing" simply cannot be made based on an argument that the Acts *ambiguously* set forth the definition that violates the constitution.

The Court's new analysis pays no attention to the text of the Acts. Rather, the majority's analysis is driven by the *actions* the General Assembly took in 1994, and is based solely on what the majority calls "legislative history." This approach is improper because we have repeatedly declared we will not look beyond the text of the statute itself, and thus will not consider other indicators of legislative intent such as "history," unless the text of the statute is ambiguous.[22] *See, e.g.*, *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning." (quoting *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970))); 419 S.C. at 556, 799 S.E.2d at 483 ("Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.").

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[20] In the original decision, the majority stated, "We disagree with Justice Few that the language at issue is ambiguous," and, "The plain language is clear . . . ." *Doe*, Op. No. 27728 (Shearouse Adv. Sh. No. 28 at 59 n.6).

[21] As I will explain, the majority's finding of unconstitutional legislative intent is based on what it contends is an analysis of legislative history, which is an analysis our law does not permit when the text of the statute is clear and unambiguous.

[22] The majority's approach is improper for a second reason—this is not truly legislative history. The majority has merely looked at the amendments to the definition of "household member," and drawn inferences from those amendments to conclude what the General Assembly intended. That is called "guesswork," not the consideration of history. A proper legislative history analysis would focus on some event, document, or statement separate from the amendment itself through which the Court could explain how the legislative history reflects the legislative intent.

By turning directly to legislative history to support its analysis without any reference to the text of the definitions, the majority has necessarily conceded the text is not clear, but ambiguous. This concession should have brought the majority's analysis back to the presumption of constitutionality, and the Court's duty to try to find a way to construe the Acts as constitutional. *Abbeville Cty. Sch. Dist.*, 410 S.C. at 628, 767 S.E.2d at 161; *Stephen W.*, 409 S.C. at 76, 761 S.E.2d at 232; *S.C. Pub. Interest Found.*, 403 S.C. at 645, 744 S.E.2d at 523; *Joytime Distributors*, 338 S.C. at 640, 528 S.E.2d at 650; *Clarke*, 177 S.C. at 435, 181 S.E. at 484. If it is reasonable to do so, we should construe the Acts to protect unmarried, same-sex couples, and find the Acts constitutional. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.").

It is in fact perfectly reasonable to construe the Acts to protect unmarried, same-sex couples. In 1994, "household member" was defined in terms of pairs or groups of people, "spouses, former spouses, parents and children, persons related . . . ." *See supra* note 8. In that context, the Acts logically applied when domestic violence occurred *between* the members of a defined pair or group. In 2005, however, the definitions were amended so that the primary subsections of each definition are now framed in terms of individual people: "a spouse; . . . a former spouse." *See* Act No. 166, 2005 S.C. Acts 1834, 1836.[23] Under this current structure, the Acts apply when domestic violence is committed *upon* the members of the defined group.

The Protection from Domestic Abuse Act follows this structure. The Act "created an action known as a 'Petition for an Order of Protection' in cases of abuse *to* a household member." § 20-4-40 (emphasis added). The "petition for relief must allege the existence of abuse *to* a household member." § 20-4-40(b) (emphasis added). Under the current version of the Protection from Domestic Abuse Act, therefore, the Act operates to protect citizens from abuse "to" a person listed in the

[23] The majority incorrectly states "the General Assembly retained the 2003 definition of 'household member'" with the 2005 amendments. Rather, the 2005 amendments contain a substantive change that is important to my analysis. Before 2005, the household member was defined in terms of groups—*between* whom domestic violence might be committed. After the 2005 amendments, household member is defined in terms of individuals—*upon* whom domestic violence might be committed. The majority overlooks this substantive change in labelling my analysis "forced."

definition of "household member." Reading the Protection from Domestic Abuse Act under this structure, Doe and other partners in unmarried, same-sex relationships are protected.

To understand this point, consider the operation of the Acts regarding individuals included in the first and second subsections of the definition—"a spouse" and "a former spouse." A person may seek an order of protection under the Protection from Domestic Abuse Act "in cases of abuse to a household member." If we apply that provision using the first subsection of the definition, an order of protection is available "in cases of abuse to [a spouse]." If we apply that provision using the second subsection of the definition, an order of protection is available "in cases of abuse to [a former spouse]."

Now consider the operation of the Acts regarding individuals included in the fourth subsection—"a male and female who are cohabiting or formerly have cohabited"—the subsection the majority finds unconstitutional. An order of protection is available "in cases of abuse to [a male . . .]," or "in cases of abuse to [a female . . .]." In fact, an order of protection is available "in cases of abuse to [a male *and* a female]." In other words, an order of protection is available when domestic violence is committed upon members of unmarried, same-sex couples of *both* genders—male and female. Doe is covered.

The interpretation I have just explained is not only a reasonable interpretation, it is *the only* reasonable interpretation. The majority's interpretation that the General Assembly intended to exclude same-sex couples is based on the premise that the subsection applies only when "a male and female" are cohabiting together. This interpretation works only if the Acts are construed to apply when domestic violence occurs between members of a defined pair or group. That construction was eliminated, however, with the 2005 amendments. As discussed above, the Acts now apply when abuse is committed upon the members of the defined group. Thus, the majority's interpretation leads to an absurd result. The General Assembly clearly did not intend the Acts to apply "in cases of abuse to [a male and female]." Under such a reading the Acts would apply only when there are two victims.

The presence of the word "and" instead of "or" in the fourth subsection of the definition of household member may be troubling, but it does not require the conclusion the General Assembly intentionally excluded unmarried, same-sex couples from the Acts. Rather, it merely demonstrates the ambiguity in the definition. It is more reasonable to resolve that ambiguity in favor of constitutionality by including Doe and other members of unmarried, same-sex

couples than it is to resolve it in favor of finding a malicious motive behind the 1994 amendments.

I respectfully believe Doe and other members of unmarried, same-sex couples are covered by the Acts and the Acts are therefore constitutional.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gerald Barrett, Jr., Petitioner.

Appellate Case No. 2016-001306

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27752
Heard November 15, 2017 – Filed November 22, 2017

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Appellant Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

PER CURIAM: We granted Gerald Barrett's petition for a writ of certiorari to review the court of appeals' decision in *State v. Barrett*, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

HEARN, Acting Chief Justice, FEW and JAMES, JJ., and Acting Justices Arthur Eugene Morehead, III, and Jan B. Bromell Holmes, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Bennett Joseph Schiller, III, Respondent.

Appellate Case No. 2017-001645

Opinion No. 27753
Submitted October 24, 2017 – Filed November 22, 2017

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Thomas A. Pendarvis, of Pendarvis Law Offices, PC, of Beaufort, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Co-counsel was retained by Client, a North Carolina resident, to represent him with regards to a motor vehicle accident that occurred in North Carolina. Co-counsel subsequently associated respondent on the case. Neither co-counsel nor respondent were admitted to practice law in North Carolina.

Client signed two fee agreements. The first agreement was a fee agreement stating the attorneys' fee was 33% of any recovery and that if there was no recovery, Client would be responsible for "all actual expenses." The agreement did not specify whether the attorneys' fee would be calculated before or after litigation and other expenses were deducted. Although respondent asserted he and his co-counsel explained to Client how funds would be distributed under the agreement, respondent admits that the failure to document in writing whether litigation and other expenses are to be deducted before or after a contingent fee is calculated is a violation of Rule 1.5(c) of the North Carolina Revised Rules of Professional Conduct.[1]

After recovering the policy limit of $30,000 from the at-fault driver's insurance carrier, respondent and co-counsel pursued recovery under Client's underinsured motorist (UIM) policy. That carrier tendered $220,000 to respondent and co-counsel, which represented the policy limit of $250,000 minus a set-off of $30,000 based on the payment by the at-fault driver's carrier.

Client refused to accept the funds due to a disagreement over the disbursement statement, specifically, the disbursement of attorneys' fees. Client informed respondent and co-counsel he was terminating the "fee contract," as he believed the fees were unreasonable and he did not understand there were other fee agreement options. Client also stated he did not understand from the fee agreement that respondent and co-counsel could place a lien on the insurance proceeds for the amount of the attorneys' fees owed.

Thereafter, respondent sent letters to Client's UIM carrier informing the carrier that he and co-counsel had a lien on the $220,000 for their one-third contingency fee. In one of the letters, respondent directed the carrier not to discuss the matter with Client or Client's brother without the consent of respondent or co-counsel.

Subsequently, Client left a voice message with the carrier notifying the carrier that he had terminated respondent and co-counsel. Client also sent a letter to respondent and co-counsel asking them to notify the carrier that they were no longer representing Client.

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[1] Pursuant to Rule 8.5(b)(2) of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, because the predominant effect of the conduct at issue was in North Carolina, the North Carolina Revised Rules of Professional Conduct apply.

The carrier sent a letter to respondent informing him Client had notified the carrier that he had discharged respondent and co-counsel. The carrier requested respondent contact Client about the outstanding claim. Three weeks later, and over a month after Client requested such action, respondent and co-counsel notified the carrier they were no longer representing Client and returned the insurance proceeds to the carrier.

Client alleged respondent and co-counsel failed to withdraw as counsel after he terminated the fee agreement and that they failed to inform the UIM carrier they were no longer representing Client after he requested they do so. Respondent admits his failure to withdraw from representation after multiple communications from Client requesting respondent and co-counsel cease representation violated Rule 1.16(a)(3) of the North Carolina Revised Rules of Professional Conduct.

Finally, Client alleged respondent and co-counsel forged Client's signature on a document entitled "Settlement Agreement and Covenant Not to Enforce Judgment - North Carolina." Client stated he had never seen the document but it had a signature purporting to be his that was witnessed by respondent and notarized by respondent's paralegal.

Respondent and co-counsel explained they discussed with Client the possibility of pursuing the at-fault driver's personal assets but Client understood the only way to secure payment more quickly was to accept the limits of the driver's insurance policy by way of a covenant not to execute and accept the limits of the UIM coverage on a policy release. Respondent and co-counsel stated Client understood the difficulty of recovering from the driver's personal assets and therefore agreed to accept the insurance limits. Respondent and co-counsel stated they explained the settlement agreement and disbursement from the driver's carrier to Client and asked him to come to the office and sign the covenant not to execute and the check issued by the carrier. According to respondent and co-counsel, Client directed them to sign the items for him and send him the check.[2] Respondent signed the covenant not to execute, witnessed it himself, and had his paralegal notarize it. The document stated the person signing was affirming he had carefully read the document, understood its contents, and was signing it as his own free act. The cover letter respondent sent to Client along with the check did not reference the

[2] Respondent provided documents to support his position that Client gave him permission to sign Client's name, but the documents are not contemporaneous with the signing and notarizing of the documents.

covenant not to execute or indicate a copy was enclosed.

Respondent admits the covenant not to execute was falsely witnessed and notarized and that he did not provide a copy to Client. Respondent states the document was not relied on by the at-fault driver's insurance carrier because Client refused to sign the settlement agreement.

Respondent admits his actions with regard to the covenant not to execute were improper and in violation of the following North Carolina Revised Rules of Professional Conduct: Rule 4.1 (a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 5.3(b) (a lawyer with supervisory authority over a nonlawyer shall make efforts to ensure the nonlawyer's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(c)(1) (a lawyer is responsible for the conduct of a nonlawyer who commits a violation of the Rules of Professional Conduct when the lawyer orders or ratifies such conduct); and Rule 8.4(d) (it is professional misconduct to engage in conduct that is prejudicial to the administration of justice).

Law

Respondent admits that by his conduct he has violated the above provisions of the North Carolina Revised Rules of Professional Conduct. He also admits the violations constitute grounds for discipline under Rule 7(a)(2) of the South Carolina Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. In addition, as set forth in the Agreement, respondent shall (1) complete the Legal Ethics and Practice Program Ethics School and a notary public class within one year of being disciplined; (2) require all notary publics in his office to attend a notary public class within the same time period, to maintain records of attendance, and to sign a statement that they have read and will abide by the South Carolina Notary Public Reference Manual; and (3) pay the costs incurred in the

investigation of this matter by ODC and the Commission on Lawyer Conduct within thirty days of the date of this opinion.

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

Re: Suspension of Electronic Filing in Richland County

Appellate Case No. 2015-002439

ORDER

By Order dated October 30, 2017, the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas was expanded to include Richland County effective November 14, 2017.

Unforeseen technical issues have made E-Filing in Richland County problematic for a number of court personnel, and issues with system response times have resulted in long delays for attorneys attempting to E-File documents. Based on these issues, the October 30, 2017 Order expanding E-Filing to Richland County is rescinded. Upon entry of this Order, E-Filing is suspended in Richland County, and documents shall be filed in the Traditional manner in Richland County until further notice.

The Richland County Clerk of Court shall promptly process all E-Filings that remain pending. Any E-Filings that cannot be processed through the E-Filing System shall be printed and entered manually by the Clerk of Court.

This Order shall not affect the validity of any E-Filed document processed before or after the entry of this Order. Furthermore, in the event a document that was served via a Notice of Electronic Filing cannot be accessed in the E-Filing System, that document should be viewed by accessing the Public Index online at http://www.sccourts.org/caseSearch/.

Finally, the declaration of a Limited Technical Failure of the E-Filing System in Richland County on November 15, 2017, may have adversely affected the ability of lawyers to comply with deadlines in court proceedings. Accordingly, I find it appropriate to declare the day of Wednesday, November 15, 2017, a "holiday" in

Richland County for the purpose of Rule 6 of the South Carolina Rules of Civil Procedure. This holiday declaration shall only apply to documents and cases that are within the scope of those required to be E-Filed under the South Carolina Electronic Policies and Guidelines.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
November 16, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edwin M. Smith, Jr., Appellant,

v.

David Fedor, Respondent.

Appellate Case No. 2014-001826

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

Opinion No. 5523
Heard February 7, 2017 – Filed November 22, 2017

AFFIRMED

James R. Gilreath and William Mitchell Hogan, both of The Gilreath Law Firm, PA, of Greenville for Appellant.

Katherine Carruth Goode, of Winnsboro, for Respondent.

LOCKEMY, C.J.: Edwin Smith, Jr. appeals the trial court's order granting David Fedor's motion for relief from judgment, arguing (1) the trial court erred in refusing to consider the confidential settlement agreement in determining whether Fedor satisfied the confession of judgment, (2) the trial court should have considered the merits of Smith's motion for reconsideration even though it was not provided to the court within ten days of filing, and (3) this court should remand the matter to the trial court for denial of the motion for relief from judgment because

the confidential settlement agreement is sufficiently clear, explicit, and unambiguous. We affirm.

FACTS

In 1998, Smith filed a lawsuit against Fedor, which resulted in a "mediated settlement" in 2002. As part of the settlement, Fedor executed a confession of judgment for $350,000 plus post-judgment interest to serve as security against the debt owed to Smith; in return, Smith released all claims and dismissed his lawsuit with prejudice. The confession of judgment provided,

> 5. The indebtedness owed by [Fedor] to [Smith] arose pursuant to a Confidential Settlement Agreement between [Fedor] and [Smith] dated September 17, 2002, in which the lawsuit . . . was settled. . . .
>
> 7. [Fedor] hereby authorizes the entry of an Order and judgment against [him,] and in favor of [Smith,] in the principal amount of $350,000, less any payments received by [Smith] from [Fedor] through the date of filing hereof. . . .

The confession of judgment also stated it "may not be filed" until Fedor defaulted on his obligations "as set forth in the Confidential Settlement Agreement."

On February 27, 2013, Smith filed the confession of judgment and a partial satisfaction of judgment with the trial court. The partial satisfaction of judgment claimed Fedor paid $335,000 but still owed $15,000 pursuant to the confession of judgment. Fedor moved for relief from judgment pursuant to Rule 60(b)(5), SCRCP, asserting he had paid Smith more than $350,000, satisfying the debt. Smith filed a response to Fedor's motion for relief, stating the confidential settlement agreement required Fedor to pay a total sum of $400,000—$50,000 up front, followed by annual installment payments of $35,000 secured by the confession of judgment. Smith contended the $50,000 initial payment was not included in the $350,000 debt secured by the confession of judgment, and neither the agreement nor the judgment indicated the initial payment of $50,000 would be credited toward the $350,000.

On August 26, 2013, the trial court held a hearing on Fedor's motion for relief from judgment. At the hearing, both parties agreed Fedor had paid $385,000 to Smith;

the dispute concerned whether Fedor owed Smith an additional $15,000. Fedor argued the confession of judgment stated only the amount of $350,000, he had satisfied the judgment, and was not obligated to pay any additional amount. Fedor entered an affidavit into evidence stating he "paid to [Smith] … the sum of $385,000[,] that sum being in excess of the sum recited in [Fedor]'s Confession of Judgment and that the Confession of Judgment should be deemed satisfied." Fedor asserted the confession of judgment is final and the parties cannot "inquire behind the confession and seek to now reargue the merits." Smith countered that the parties settled for $400,000, as provided for by the confidential agreement, and Fedor still owed $15,000. Smith mentioned an affidavit from James Gilreath that stated the total amount due was $400,000 including $50,000 to be paid prior to the signing of the confession of judgment, but the Gilreath Affidavit was never offered or entered into evidence. Smith conceded Fedor had paid $385,000, but that included the initial $50,000 payment; thus, Smith maintained Fedor had paid only $335,000 of the amount secured by the confession of judgment.

Fedor objected to any introduction or discussion of the confidential settlement agreement, which he said was not in evidence, "full of scratch-overs and strike-throughs," and "not clear upon its face." Fedor contended "the confession of judgment ended the case" and was "clear and concise on its face" that the amount owed was $350,000. Smith countered that "the confession of judgment . . . ha[d] to be read in the context of the [four]-page confidential settlement agreement." The trial court requested the parties submit memoranda regarding when a confession of judgment is satisfied and whether the confidential settlement agreement was admissible.

Fedor submitted a memorandum, in which he argued the confession of judgment was satisfied because the parties did not dispute that Fedor had paid over $350,000 and the confession of judgment receives the same finality as an order of judgment. Additionally, Fedor contended the court should not consider the confidential settlement agreement because the confession of judgment contained the "final word/judgment." Smith filed a memorandum, arguing the trial court should admit and consider the confidential settlement agreement because it met the exception to the parol evidence rule stated in *Smith v. McCann*.[1]

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[1] 289 S.C. 452, 457, 346 S.E.2d 720, 724 (1986) (noting "parol evidence may be admitted to show a separate and independent agreement, which is not inconsistent with the terms of a contemporaneous or subsequent written agreement, if it can be

In the order granting Fedor's motion for relief from judgment, the trial court concluded (1) the version of Rule 43(k), SCRCP[2] applicable at the time of the execution of the agreement rendered the confidential settlement agreement not binding on the court, (2) the 2009 amendment to Rule 43(k) was only prospective, and (3) the confession of judgment was satisfied based on the parties' agreement at the hearing that Fedor had paid more than $350,000.

On November 8, 2013, Smith filed a motion for reconsideration, arguing (1) Rule 43(k) is retrospective and the confidential settlement agreement is therefore enforceable, (2) the agreement is admissible pursuant to several exceptions to the parol evidence rule, (3) the agreement lacked any specific provisions requiring confidentiality and Fedor's default on the obligations contained in the agreement rendered any non-disclosure requirement no longer applicable, and (4) the confession of judgment prohibited set-off of payments.

On July 22, 2014, the trial court issued a Form 4 order denying the motion for reconsideration "because the [c]ourt did not receive a copy of the motion within ten days of the motion being filed." Smith filed a subsequent motion for reconsideration, arguing the original motion was timely because it was properly mailed to Fedor and the clerk of court and Fedor suffered no prejudice from the failure to provide the court with the motion within ten days of filing. Smith re-submitted his original motion and requested the trial court consider the merits.[3] The trial court ultimately denied the motion in a Form 4 order on September 5, 2014. This appeal followed.

STANDARD OF REVIEW

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inferred that the parties did not intend the written paper to be a complete integration of the agreement").

[2] In 2002, when the agreement was executed, Rule 43(k) provided, "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record." In 2009, the rule was amended to provide a third method—if the agreement is "reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRCP.

[3] Smith filed and served his notice of appeal on August 21, 2014, before the trial court ruled on his second motion for reconsideration.

"The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.*

LAW/ANALYSIS

I. Confidential Settlement Agreement

In 2002, Rule 43(k), SCRCP, provided, "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record." *See Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct. App. 2000) (quoting the version of Rule 43(k) that remained in effect in 2002). In 2009, the rule was amended to provide a third method for making such an agreement enforceable—if the agreement is "reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRCP. "In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." *Farnsworth v. Davis Heating & Air Conditioning, Inc*., 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). "Rule 43(k) applies to settlement agreements." *Id*. at 637, 627 S.E.2d at 726. The rule "is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995).

In *Farnsworth*, our supreme court reversed the trial court's granting of the respondent's motion to compel the appellant to comply with a settlement agreement because Rule 43(k) had not been satisfied. 367 S.C. at 636, 627 S.E.2d at 725. The respondent's attorney had signed a letter received from the appellant that offered a settlement, but the parties never entered the written document on the record. *Id*. The appellant rescinded the agreement and the court concluded, "As soon as [the respondent] received notice of rescission, the letter signed by counsel ceased representing an agreement. The [trial] court, therefore, ordered [the appellant] to comply with an agreement that did not exist." *Id*. at 637, 627 S.E.2d at 725; *see also* Rule 43(k), SCRCP (stating a written agreement between counsel is not binding unless "signed by counsel and entered in the record").

We find the trial court was correct in deciding the former version of Rule 43(k) applies to the confidential settlement agreement because the settlement agreement was signed in September 2002, before the rule was amended. Because the settlement agreement does not comply with the prior version of Rule 43(k), the agreement is not binding on the court. *See Hercules Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (stating the general rule is that statutes are to be construed prospectively rather than retroactively, absent an express provision or a clear legislative intent to the contrary). Additionally, this matter was not pending when the rule was amended in 2009, and thus, the exception providing for civil procedure rule changes applying to pending matters is inapplicable. *See Graham v. Dorchester Cty. Sch. Dist.*, 339 S.C. 121, 124, 528 S.E.2d 80, 82 (Ct. App. 2000) (providing new rules of civil procedure apply to proceedings in actions pending at the time the rule is amended). The underlying lawsuit was dismissed with prejudice in 2002, and Smith did not file the confession of judgment until 2013. Therefore the trial court correctly found Rule 43(k) applied only prospectively.

II. Motion to Alter or Amend Judgment

The trial court properly denied Smith's motion for reconsideration because he failed to provide the motion to the trial judge within ten days of filing. Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule. Further, our language in *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002) implies a trial court may deny the motion solely on the basis of the rule. *See* 353 S.C. at 63, 577 S.E.2d at 219 ("Because the [trial] court found it appropriate to hear the matter, we find no error in the [trial] court's decision to decide the motion *despite* [the appellant's] failure to comply with Rule 59(g), SCRCP." (emphasis added)). Accordingly, the trial court properly denied Smith's motion for reconsideration because he did not timely provide a copy of the motion to the judge.

Because the trial court did not err in denying Smith's motion for reconsideration, the arguments presented in that motion are unpreserved. The trial court never ruled on Smith's arguments that the agreement was admissible pursuant to exceptions to the parol evidence rule. Moreover, Smith raised several exceptions to the parol evidence rule in his motion for reconsideration that had not been raised before the trial court issued its order. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e)[, SCRCP] to present to the court an issue the party could have raised prior to judgment but did

not."). Consequently, none of Smith's arguments concerning exceptions to the parol evidence rule are preserved for review.

III. Confession of Judgment

According to Rule 60(b)(5) of the South Carolina Rules of Civil Procedure, "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . [if] the judgment has been satisfied . . . ." In order to correctly find the Confession of Judgment satisfied, the trial court must have found Fedor paid $350,000 to Smith after the execution of the Confession of Judgment. *See* S.C. Code Ann. § 15-35-360(2) (2005) (providing a judgment by confession "must show that the sum confessed therefor is justly due or to become due"). The evidence before the trial court included the Fedor affidavit, which stated Fedor "has paid to [Smith] … the sum of $385,000[,] that sum being in excess of the sum recited in [Fedor]'s Confession of Judgment and that the Confession of Judgment should be deemed satisfied;" the Confidential Settlement Agreement, which was not enforceable; and the affidavit from James Gilreath. While there was competing evidence, we cannot say the trial court abused its discretion in granting Fedor's motion for relief from judgment in this case. *Stearns*, 373 S.C. at 336, 644 S.E.2d at 795 ("An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support."). Accordingly, we affirm the trial court's granting of Fedor's motion to be relieved from judgment.

Conclusion

Based on the foregoing analysis, the circuit court's order is

AFFIRMED

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wadette Cothran and Chris Cothran, Respondents,

v.

State Farm Mutual Automobile Insurance Company and Robert Tucker, Defendants,

Of which State Farm Mutual Automobile Insurance Company is the Appellant.

Appellate Case No. 2016-000177

Appeal From Spartanburg County
L. Casey Manning, Circuit Court Judge

Opinion No. 5524
Heard September 8, 2017 – Filed November 22, 2017

REVERSED

Charles R. Norris and Robert W. Whelan, of Nelson Mullins Riley & Scarborough LLP, of Charleston, for Appellant.

Charles Logan Rollins, II, of The Hawkins Law Firm, of Spartanburg, for Respondents.

THOMAS, J.: Appellant State Farm Mutual Automobile Insurance Company (State Farm) appeals the circuit court's grant of summary judgment to Respondents Wadette and Chris Cothran. The Cothrans brought this action against State Farm alleging breach of an insurance contract and breach of the duty of good faith and fair dealing. State Farm argues the circuit court erred by granting summary judgment in the Cothrans' favor because our supreme court's precedent was controlling and by holding public policy prohibited insurers offering personal injury protection (PIP) benefits from reducing those benefits by the amount an insured receives from a workers' compensation policy. We reverse.

FACTS/PROCEDURAL HISTORY

The Cothrans filed this action in April 2015, alleging bad faith refusal to pay insurance benefits and breach of contract. In August 2015, the parties entered a stipulation of facts. Wadette Cothran was injured in a motor vehicle accident and incurred medical expenses in excess of $5,000. Wadette's employer's workers' compensation carrier paid her medical expenses in full. Wadette was also covered by her automobile policy issued by State Farm (the Policy), which provided PIP coverage with a limit of $5,000. State Farm paid $991 to the Cothrans for a portion of Wadette's lost wages but denied payment of the remaining PIP coverage because a provision (Excess Provision) in the Policy provided its PIP coverage was excess to any benefits the policyholder recovered under workers' compensation law. The Cothrans claimed the Excess Provision violated section 38-77-144 of the South Carolina Code (2015)[1] and they should recover the PIP benefits in addition to the workers' compensation benefits. Both parties moved for summary judgment and agreed there were no material facts in dispute. The sole matter before the circuit court was whether the Excess Provision violated section 38-77-144.

The Policy in its entirety is included in the record on appeal and was presented to the circuit court. The Excess Provision stated, "Any [PIP] Coverage provided by [the Policy] applies as excess over any benefits recovered under any workers' compensation law or any other similar law."

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[1] *See* § 38-77-144 ("There is no [PIP] coverage mandated under the automobile insurance laws of this State. . . . If an insurer sells no-fault insurance coverage which provides [PIP], medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff.").

State Farm argued our supreme court essentially decided this issue in *Richardson*[2] by finding section 38-77-144's prohibition against setoffs applied only to a possible setoff for a tortfeasor's liability. It claimed it was entitled to summary judgment because section 38-77-144 did not apply to the situation in this case. Alternatively, the Cothrans argued the plain meaning of section 38-77-144 did not allow a setoff of PIP benefits. They also argued *Richardson* did not address this situation and was only meant to prevent a liability carrier from receiving a windfall. Finally, the Cothrans asserted allowing a setoff of PIP benefits under these circumstances would violate public policy because a workers' compensation carrier would be prevented from claiming an equitable interest in the PIP benefits.

The circuit court granted summary judgment in favor of the Cothrans. The circuit court found the Excess Provision constituted a setoff under South Carolina law. The court then found the Excess Provision violated the plain meaning of section 38-77-144. With regard to *Richardson*, the circuit court determined it "addresse[d] only stacking of coverage," rather than a setoff provision. Further, the circuit court found if State Farm's argument was correct "there would be no bar to the PIP carrier alleging a setoff based on payments made by the health insurance carrier, the liability insurance carrier, or, for that matter, the injured party's Aunt Ethel and Uncle Fred who broke their piggy bank to pay for her hospital bill." The circuit court believed an interpretation permitting such a finding would lead to an "absurd result." Finally, the circuit court declared public policy would not allow a setoff under these circumstances because it would prevent the workers' compensation carrier from claiming an equitable interest in the PIP benefits. Subsequently, the circuit court denied State Farm's motion to reconsider. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by finding section 38-77-144 invalidates the Excess Provision?

2. Did the circuit court err by finding public policy prohibits a setoff of PIP benefits because it prevents workers' compensation carriers from asserting an equitable lien against PIP benefits?

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[2] *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993).

STANDARD OF REVIEW

The circuit court should grant a motion for summary judgment when the evidence shows "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. An appellate court "reviews the grant of a summary judgment motion under the same standard as the [circuit] court." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). "When the purpose of the underlying dispute is to determine if coverage exists under an insurance policy, the action is one at law." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012). "[W]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the [circuit] court properly applied the law to those facts." *Id*. at 398, 728 S.E.2d at 480 (quoting *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003)).

SECTION 38-77-144

State Farm argues the circuit court erred by granting summary judgment in the Cothrans' favor because our supreme court's ruling on section 38-77-144 in *Richardson* was controlling. Specifically, State Farm argues *Richardson* held section 38-77-144's prohibition against a setoff applied only to prevent a tortfeasor from receiving a setoff against an insured's PIP benefits. State Farm claims the circuit court erred by substituting its interpretation of legislative intent for our supreme court's interpretation. Also, State Farm asserts it was entitled to limit its liability by including the Excess Provision in the Policy.

The Cothrans argue the circuit court properly granted summary judgment in their favor based on the plain meaning rule because the text of section 38-77-144 is clear. The Cothrans claim "any policy provision that constitutes a [setoff] [of PIP benefits] must be invalid." The Cothrans contend *Richardson* does not apply to this case and addressed only whether an insurance policy may prohibit stacking of coverages.

We find the circuit court erred by finding section 38-77-144 invalidated the Excess Provision because the setoff prohibition in section 38-77-144 applies only to prevent tortfeasors from reducing their liability by the amount of PIP benefits

recovered by a claimant. "An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). "As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." *Id*. at 598, 762 S.E.2d at 712. Although not absolute, parties to an insurance contract "are generally permitted to contract as they see fit." *Id*. However, "[s]tatutes governing an insurance contract are part of the contract as a matter of law, and to the extent a policy provision conflicts with an applicable statute, the provision is invalid." *Id*.

"There is no [PIP] coverage mandated under the automobile insurance laws of this State. . . . If an insurer sells no-fault insurance coverage which provides [PIP], medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff." S.C. Code Ann. § 38-77-144 (2015).

> The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.

Anderson v. S.C. Election Comm'n, 397 S.C. 551, 556–57, 725 S.E.2d 704, 706–07 (2012) (citations omitted).

In *Richardson*, our supreme court considered the meaning of a "setoff" as used in section 38-77-144.[3] 313 S.C. at 60–61, 437 S.E.2d at 45. The insureds incurred

[3] At the time our supreme court decided *Richardson*, section 38-77-144 was numbered section 38-77-145. However, the wording of the current section

medical expenses following a motor vehicle accident, and they filed a claim for PIP benefits under two policies with the same insurer. *Id*. at 59, 437 S.E.2d at 44. The insurer paid the PIP benefits for one policy but denied payment on the other policy based on a policy provision that prevented the insureds from stacking their policies' PIP benefits. *Id*. The insureds brought a declaratory judgment action claiming the insurer's refusal to pay both policies' PIP benefits amounted to a setoff in violation of section 38-77-144. *Id*. The insurer argued the disputed provision was an "anti-stacking" provision, rather than a setoff as that term is used in section 38-77-144. *Id*. at 60, 437 S.E.2d at 44. Our supreme court analyzed the legislative history of section 38-77-144 and agreed with the insurer. *Id*. at 60, 437 S.E.2d at 45. The court noted the statute, prior to 1989, "allowed a tortfeasor to reduce his liability to a claimant by the amount of PIP benefits received by the claimant." *Id*. (citing S.C. Code Ann. § 38-77-290(f) (1989)). The court explained the legislature changed automobile insurance law in 1989, repealed the tortfeasor's statutory setoff, and "expressly provided that PIP coverage was not subject to a [setoff]." *Id*.

Considering this legislative history, the *Richardson* court found the legislature "intended for the [setoff] prohibition in [section 38-77-144] to refer to the statute allowing reduction of a tortfeasor's liability[,] which was repealed" in 1989. *Id*. Thus, our supreme court found the setoff in section 38-77-144 "is the tortfeasor's reduction in liability formerly allowed" by statute. *Id*. The court concluded the legislature "intended the [setoff] prohibition of section 38-77-14[4] to apply *only* to the tortfeasor." *Id*. at 61, 437 S.E.2d at 45 (emphasis added). Thus, although *Richardson* involved an anti-stacking provision, its holding was not limited or restricted only to stacking related provisions.

Additionally, this court has relied on *Richardson* to find section 38-77-144 "prevented [a] tortfeasor from profiting in the case where the injured party received PIP benefits." *Mount v. Sea Pines Co.*, 337 S.C. 355, 358, 523 S.E.2d 464, 465 (Ct. App. 1999) (per curiam). "By enacting section 38-77-14[4], the legislature attempted to insure that the tortfeasor paid the full amount of damages suffered by the injured party." *Id*. Based on these findings, the *Mount* court determined the

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38-77-144 is identical to the statute at the time of *Richardson* except for changing "must" to "shall" in one instance. *Compare* § 38-77-144 (noting PIP coverage "shall" not be assigned), *with* S.C. Code Ann. § 38-77-145 (Supp. 1992) (noting PIP coverage "must" not be assigned).

setoff prohibition in section 38-77-144 did not apply to prevent a tortfeasor from reducing a jury award in the plaintiff's favor by the amount the tortfeasor paid prior to trial toward the plaintiff's medical expenses. *Id*. Although the setoff at issue in *Mount* did not involve PIP benefits, the *Mount* court's interpretation and application of *Richardson* in a situation other than one involving an anti-stacking provision is instructive.

Further, the Fourth Circuit has considered whether the setoff prohibition in section 38-77-144 prohibits an insurer from reducing the amount of underinsured motorist (UIM) benefits by the amount of PIP benefits. *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 166 (4th Cir. 2009). In *Rowzie*, the plaintiff was involved in a motor vehicle accident with an underinsured motorist, and she received PIP benefits from her insurer. *Id*. The plaintiff also sought to recover UIM benefits from her insurer, but the insurer, based on express language in the policy, reduced the UIM award by the amount of PIP benefits it paid the plaintiff. *Id*. The plaintiff claimed the setoff prohibition in section 38-77-144 prohibited the insurer from reducing UIM benefits based on the amount it paid in PIP benefits. *Id*. The *Rowzie* court relied on *Richardson* to determine the setoff prohibition in section 38-77-144 applied "'only to the tortfeasor,' and not to serve as a general prohibition against all reductions of automotive insurance based on upon PIP/MedPay coverage." *Id*. at 168. The court emphasized "the specific finding in *Richardson* that the [setoff] prohibition applies 'only to the tortfeasor.'" *Id*. at 169. Subsequently, the court declared, "As the court in *Richardson* made clear, the South Carolina legislature drafted [section] 38-77-144 with the intention that the setoff prohibition would 'apply only to the tortfeasor.'" *Id*.

Thus, despite the language of section 38-77-144 appearing to prohibit any setoff of PIP benefits, our supreme court declared the legislative intent of that section was to prohibit tortfeasors from reducing their liability by the amount of PIP benefits. *See Richardson*, 313 S.C. at 61, 437 S.E.2d at 45 (finding the legislature "intended the [setoff] prohibition of section 38-77-14[4] to apply *only* to the tortfeasor" (emphasis added)). As discussed above, this court and the Fourth Circuit have followed *Richardson*'s holding.

In this case, the circuit court erred by finding section 38-77-144 prohibited the parties from contracting to setoff PIP benefits by the amount the Cothrans received under workers' compensation law. As discussed above, the setoff prohibition in

section 38-77-144 applies only to prevent tortfeasors from reducing their liability by the amount a claimant receives in PIP benefits. Section 38-77-144 does not prohibit an insured and insurer from contracting to reduce PIP benefits by the amount the insured receives under workers' compensation law. Because the Excess Provision allows a setoff only for what the insured receives under workers' compensation law and does not involve any setoff for tortfeasor liability, section 38-77-144 does not prohibit or invalidate the Excess Provision. Therefore, the parties were entitled to include the Excess Provision in the Policy. *See Williams*, 409 S.C. at 598, 762 S.E.2d at 712 (noting parties to an insurance contract "are generally permitted to contract as they see fit").

With regard to the Cothrans' argument that State Farm's interpretation of section 38-77-144 would lead to an absurd result because it would allow an insurer to essentially reduce PIP benefits by any payment an insured received, we believe the concern is overstated. South Carolina courts refuse to enforce insurance policy exclusions that render the coverage "virtually meaningless." *See Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994) (refusing to interpret an exclusion in a way that "would render the policy virtually meaningless, because it would exclude coverage for . . . the very risk contemplated by the parties"); *see also Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 580, 757 S.E.2d 399, 407 (2014) (explaining courts may use the doctrine of reasonable expectations to interpret a policy if the terms "are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print"); *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) (noting "the literal interpretation of policy language will be rejected whe[n] its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely 'illusory'"); *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 537 n.5, 514 S.E.2d 327, 537 n.5 (1999) (recognizing an "illusory" exclusion is unenforceable). Thus, if a policy contained a PIP exclusion so broad as to render PIP benefits unobtainable, virtually meaningless, or illusory, an insured would be able to dispute the exclusion without having to rely on section 38-77-144.

Accordingly, we find the circuit court erred by invalidating the Excess Provision based on section 38-77-144 because the setoff prohibition in that section only prohibits tortfeasors from reducing their liability to a claimant by the amount of

PIP benefits the claimant receives. Because section 38-77-144 does not prohibit the type of exclusion contained in the Excess Provision, the parties were free to contract as they wished. We reverse the circuit court's holding on this issue.

PUBLIC POLICY

State Farm argues the circuit court erred by invalidating the Excess Provision based on public policy. First, State Farm claims the issue of public policy was not before the circuit court and it erred by considering the issue. Second, State Farm contends PIP coverage is not required and our case law expressly disclaims any public policy regarding such coverage.

The Cothrans argue the circuit court correctly found public policy prohibits a setoff of PIP benefits by the amount of workers' compensation benefits received. The Cothrans claim the "public policy at issue . . . is the right of the employer's workers' compensation insurance carrier to reimbursement for the expenses it accrues as a result of a work-related injury." Specifically, the Cothrans argue public policy prohibits a setoff of PIP benefits because a workers' compensation carrier may have an equitable interest in the PIP benefits.

Here, the circuit court erred by finding public policy prohibits a policy exclusion that reduces the amount of PIP benefits by the amount the insured receives under workers' compensation law. "Whether a particular provision in an insurance policy violates the public policy of the state is a question of law that is reviewed [de novo] by an appellate court." *Williams*, 409 S.C. at 599, 762 S.E.2d at 712. "It is axiomatic that freedom of contract is subordinate to public policy, and agreements that are contrary to public policy are void." *Rhoden*, 398 S.C. at 398, 728 S.E.2d at 480 (internal quotation marks omitted) (brackets removed). However, "[w]e cannot read into an insurance contract, under the guise of public policy, provisions which are not required by law and which the parties thereto clearly and plainly have failed to include." *Smith v. Liberty Mut. Ins. Co.*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) (per curiam) (quoting *Barkley v. Int'l Mut. Ins. Co.*, 227 S.C. 38, 45, 86 S.E.2d 602, 605 (1955)).

> Public policy considerations include not only what is expressed in state law, such as the constitution and statutes, and decisions of the courts, but also a

> determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare.

Williams, 409 S.C. at 599, 762 S.E.2d at 712. "South Carolina does not require any PIP coverage under its automobile insurance laws and has no public policy regarding such coverage." *Smith*, 313 S.C. at 239, 437 S.E.2d at 144.

Public policy in this state does not prohibit a reduction of PIP benefits by the amount an insured receives in workers' compensation benefits. Our legislature has determined PIP coverage in this state is voluntary. *See* § 38-77-144 (stating "[t]here is no [PIP] coverage mandated under the automobile insurance laws of this State"). Because the legislature has deemed PIP coverage voluntary and not required for the public good, there is no prohibition on the parties' ability to limit the recovery of PIP benefits to certain situations. Thus, there is no public policy prohibition on the parties' ability to contract for a reduction in PIP benefits when the insured receives benefits from another source, e.g., under workers' compensation law. Furthermore, this type of exclusion, which reduces PIP benefits in only a very limited circumstance, does not produce harm "such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." *See Williams*, 409 S.C. at 599, 762 S.E.2d at 712 ("Public policy considerations include . . . a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare.").

With regard to the circuit court's specific finding that public policy prohibits the type of policy exclusion at issue in this case because it prevents the workers' compensation carrier from obtaining a lien on the PIP benefits, we disagree. As noted above, our legislature declared PIP coverage is not required. *See* § 38-77-144 ("There is no [PIP] coverage mandated under the automobile insurance laws of this [s]tate."). Because PIP coverage is voluntary, public policy does not require payment of PIP benefits so that a workers' compensation carrier may obtain a lien against those benefits. If our public policy was such that payment of PIP benefits was needed or desired for the benefit of workers' compensation carriers, the legislature could have mandated that PIP coverage be included with all automobile policies. Also, we find nothing in the relevant statutes to indicate the legislature

intended to favor workers' compensation carriers at the expense of automobile insurance carriers. Accordingly, we reverse the circuit court on this issue and find public policy does not prohibit a policy exclusion that reduces PIP benefits by the amount the insured recovers under workers' compensation law.

CONCLUSION

Based on the foregoing, we reverse the circuit court's grant of summary judgment in the Cothrans' favor because neither section 38-77-144 nor public policy prohibits the type of exclusion contained in the Excess Provision. Thus, the parties were free to include it in the Policy.

REVERSED.[4]

WILLIAMS and MCDONALD, JJ., concur.

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