The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus Emergency (As Amended March 4, 2021)[1]

Appellate Case No. 2020-000447

ORDER

(a) Purpose. The purpose of this order is to provide guidance on the continued operation of the trial courts during the current coronavirus (COVID-19) emergency. The measures contained in this order are intended to allow essential operations to continue while minimizing the risk to the public, litigants, lawyers and court employees.

In the past, the South Carolina Judicial Branch has shown great resilience in responding to hurricanes, floods, and other major disasters, and this Court is confident that the same will be true in this emergency. This emergency, however, differs from these prior emergencies in many aspects. The current emergency will significantly impact every community in South Carolina while the prior emergencies, although potentially horrific for the individuals and communities directly impacted, did not. The impact of the prior emergencies could be minimized or avoided by traveling away from the site of the disaster; this is not the case for the current emergency. Further, in the prior emergencies, the

[1] This order was initially filed on April 3, 2020, and has been amended three times. On April 14, 2020, changes were made to sections (c)(5) and (c)(8). On April 22, 2020, section (c)(17) was added. On December 16, 2020, the Court amended sections (c)(1), (c)(2) (c)(3), (c)(4), (c)(6), (c)(8), (c)(9), (d)(2), (d)(3), (f)(1)(C), (h)(1), (h)(2), (h)(3), and (i), and added new sections (c)(11)(D), (c)(18), (f)(4) and (i)(3). The latest amendment revises section (i) to extend the order for an additional 90 days.

circumstances giving rise to the emergency involved a single event with a beginning and a predictable end. This is not the case for the coronavirus, and even conservative estimates indicate the direct impacts of this pandemic will continue for many months.

In light of the extraordinary challenges presented by the current emergency, this Court finds it necessary to supplement and, in some situations, to alter significantly, the current practices regarding the operation of the trial courts. In the event of a conflict between this order and the South Carolina Rules of Civil Procedure (SCRCP), the South Carolina Rules of Criminal Procedure (SCRCrimP), the South Carolina Rules of Family Court (SCRFC), the South Carolina Rules of Probate Court (SCRPC), the South Carolina Rules of Magistrates Court (SCRMC), the South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR), South Carolina Rules of Evidence (SCRE) or any other rule or administrative order regarding the operation of a trial court, this order shall control.

(b) Terminology. The following terminology is used in this order.

(1) Judge: a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

(2) Remote Communication Technology: technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time.

(3) Summary Court: the magistrate and municipal courts.

(4) Trial Court: the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

(c) General Guidance. This section provides general guidance applicable to all trial courts or to several court types, and later sections will provide guidance that is limited to one court type. While this order remains in effect, the following general guidance shall apply:

(1) Jury Trials. If done in accordance with a plan approved by the Chief Justice,[2] jury selections and jury trials may be conducted. These plans should adhere to the guidance contained in section (c)(3) below.

(2) Non-Jury Trials and Hearings. Subject to the guidance provided in section (c)(3) below, non-jury trials and hearings may be conducted.

(3) General Guidance Regarding Trials and Hearings.

(A) Remote Non-Jury Trials and Hearings. Except as may be restricted by any constitutional provision, statutory provision or other provision of this order, a non-jury trial or a hearing on a motion or other matter, including a first appearance in a criminal case, may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel.

(B) In-Person Trials and Hearings.[3] An in-person trial or hearing may be conducted if a judge determines (1) it is appropriate to conduct an in-person trial or hearing and (2) the trial or hearing can

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[2] To obtain approval of a plan, the plan should be submitted to the Office of Court Administration. Since the plan will have to address courtroom and other facility specific information, a separate plan will need to be submitted for the circuit court in each county. Further, a separate plan will need to be submitted by each magistrate, municipal and probate court. Court Administration should be contacted to obtain additional advice and assistance regarding the content and requirements that should be addressed in any plan.

[3] The guidance in this order is, of course, subject to such additional orders and directions as the Chief Justice may prescribe as the administrative head of the unified judicial system under Article V, §4, of the South Carolina Constitution. As it relates to live hearings or trials, the ability to safely conduct live proceedings will undoubtedly vary significantly over time, and we are confident the Chief Justice will provide the trial courts with additional guidance and instructions as may be necessary to either expand or restrict live proceedings as this pandemic progresses.

be safely be conducted. If an in-person trial or hearing is held, the following will apply:

(i) Start and end times for trials and hearings must be staggered to minimize the number of persons who will be present at the same time in the courtroom or hearing room, and the waiting rooms, hallways or other common areas which support the courtroom or hearing room.

(ii) Unless the judge authorizes another person to attend, attendance at the trial or hearing shall be limited to the attorneys or parties in the matter, necessary witnesses and necessary court staff. In the event the matter has numerous counsel or parties, the judge may further limit attendance as may be necessary to safely conduct the hearing.

(iii) Except as restricted by constitutional or statutory provision, a judge may allow a party to appear or a witness to testify using remote communication technology. As an example, allowing a person who is at a heightened risk from COVID-19 due to age or serious underlying medical condition to appear or testify remotely might be an appropriate accommodation if requested by that person.

(iv) Except when necessary for the proceeding (such as handing an exhibit to the judge or opposing counsel, or counsel consulting with their client), all persons in the courtroom or hearing room must maintain at least six feet of distance from other persons in the room. Masks must be worn by all persons as specified by order of the Chief Justice dated July 30, 2020.[4] To ensure social distancing can be maintained, it is recommended the maximum number of persons not exceed one person per 113 square feet of space in the courtroom or hearing

[4] This order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2523.

room. This area may be reduced if plexiglass shields are being used, but the six foot distancing set forth above should be maintained.

(v) Efforts should be made to sanitize the witness stand and/or podium between witnesses and presentation by counsel. Further, before a subsequent trial or hearing is held, the courtroom or hearing room surfaces which may have been touched by participants in the prior matter, including door handles, should be sanitized.

(4) Minimizing Hearings on Motions. While the practice has been to conduct hearings on virtually all motions, this may not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above. Consent motions should be decided without a hearing; in the event a party believes that the order issued exceeds the scope of the consent, the party must serve and file a motion raising that issue within ten (10) days of receiving written notice of entry of the order.

(5) Determination of Probable Cause Following Warrantless Arrest. When a warrantless arrest has occurred, the arresting officer shall provide the appropriate judge with an affidavit or a written statement with the certification provided by section (c)(16) below setting forth the facts on which the warrantless arrest was made within eight (8) hours of the arrest. The judge shall consider this affidavit or written statement with the certification and, if appropriate, may have the officer or others supplement the affidavit or written statement with the certification with sworn testimony given over the telephone or other remote communication technology. The judge may administer any necessary oath using the telephone or other remote communication technology. If the judge finds a lack of probable

cause for the arrest, the defendant shall be released. The goal is to have this determination of probable cause be made within twenty-four (24) hours of the arrest. Only in the most extraordinary and exceptional circumstances should this determination not be made within forty-eight (48) hours of the arrest. If this determination is not made within forty-eight (48) hours after arrest, the judge making the determination shall explain in writing the facts and circumstances giving rise to this delay, and a copy of this explanation shall be provided to the Office of Court Administration.

(6) Preliminary Hearings in Criminal Cases. Preliminary hearings may be conducted in-person or by remote communication technology subject to the requirements specified by section (c)(3) above. However, a preliminary hearing conducted by remote communication technology will not be conducted over the objection of the defendant. In the event a defendant objects to a preliminary hearing being conducted using remote communication technology, and the judge determines that an in-person hearing cannot safely be conducted, the preliminary hearing may be continued until such time as the judge determines an in-person hearing can be safely conducted.[5]

(7) Remote Administration of Oaths. Where this order authorizes a hearing, trial or other matter to be conducted using remote communication technology, any oath necessary during that hearing, trial or other matter may be administered by the same remote communication technology. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing remote communication technology in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order.

[5] If a preliminary hearing is not held before the defendant is indicted by the grand jury, a preliminary hearing will not be held. Rule 2(b) of the South Carolina Rules of Criminal Procedure.

(8) Scheduling Orders.

(A) Scheduling Orders Issued Prior to April 3, 2020. Under a prior version of this order, all deadlines under scheduling orders issued prior to April 3, 2020, were stayed, retroactive to March 13, 2020. Forty-five (45) days following the date on which the Governor lifts or rescinds the emergency orders relating to the coronavirus emergency, this stay shall end.

(B) Scheduling Orders Issued On or After April 3, 2020. A new or amended scheduling order issued on or after April 3, 2020, will not be subject to any stay under this order. Both the decision to issue such an order and the terms of that order must consider the impact the emergency has on the ability of the parties and counsel to proceed. Judges are encouraged to seek input from the parties and counsel before issuing a new or amended scheduling order.

(9) Extensions of Time and Forgiveness of Procedural Defaults.

(A) Extensions of Time. Due to the increased need for extensions at the start of this emergency, the filing fees for a motion for an extension of time were waived, and the due dates for trial court filings due on or after April 3, 2020 were automatically extended for thirty (30) days. That need has now decreased.[6] Accordingly, the filing fee waiver shall not apply to any motions for extensions filed on or after January 16, 2021. Further, the automatic extension shall not apply to any action or event due on or after January 16, 2021.

(B) Forgiveness of Procedural Defaults Since March 13, 2020, to April 3, 2020. In the event a party to a case or other matter pending before a trial court was required to take certain action on or

[6] As explained by the order of April 3, 2020, the automatic extension was intended to give "lawyers and self-represented litigants appearing before the trial courts … time to take actions to protect themselves and their families." Since sufficient time has been provided for this to occur, and most lawyers and litigants have been able to adjust to working remotely, this automatic extension is no longer warranted.

after March 13, 2020, but failed to do so, that procedural default was forgiven, and the required action was required to be taken by May 4, 2020. If a dismissal or other adverse action has been taken, that adverse action was to be rescinded.

(C) Extensions by Consent. The provision in Rule 6(b), SCRCP, which permits the granting of only one extension of time by agreement of counsel, is suspended. Counsel may agree to further extensions of time without seeking permission from the court, and parties are strongly encouraged to do so upon request.

(D) Limitation. The provisions of (A) thru (C) above shall not extend or otherwise affect the time for taking action under Rules 50(b), 52(b), 59, and 60(b), SCRCP, or Rule 29, SCRCrimP. Further, these provisions do not extend or otherwise affect the time for the serving of a notice of appeal under the South Carolina Appellate Court Rules, or the time to appeal from a lower court to the circuit court.

(10) Alternatives to Court Reporters and Digital Courtrooms. A trial or hearing in the court of common pleas (including the master-in-equity court), the court of general sessions or the family court is usually attended by a court reporter (before the master-in-equity this is usually a private court reporter) or is scheduled in one of the digital courtrooms with a court reporter or court monitor. While every effort will be made to continue these practices, this may not be possible as this emergency progresses. In the event such resources are not reasonably available, a trial or hearing authorized under this order may proceed if a recording (preferably both audio and video) is made. The judge shall conduct the proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(11) Courthouses.

(A) Filings. To the extent possible, courthouses should remain open to accept filings and payments, and to report criminal information to the South Carolina Law Enforcement Division and the National Crime Information Center. For the acceptance of documents or payments submitted by delivery to the courthouse, this may be accomplished by providing access to a portion of the courthouse even if the rest of the courthouse is closed to the public; providing an alternate location where the documents or payments may be delivered; or by providing a drop box where filings may be deposited. Adequate signage should be provided at the courthouse to alert persons about how to make filings by delivery, and this information should also be posted to the court's website, if available.

(B) Closure. In the event of the closure of a courthouse, information about the closure shall be provided by signage at the courthouse, and on the court's website if available.

(C) Quarantine of Incoming Paper Documents. To protect the safety of the staff of the trial courts, incoming paper documents, whether delivered or mailed to the trial court, may be quarantined for a period of up to forty-eight (48) hours once the documents are physically received by the trial court.[7] Once the quarantine period has ended, these documents will be file stamped with the date on which they were received, and court staff will then process the documents.

(**D) Entrance Screening and Protective Masks.** All persons entering a courthouse shall be screened for fever and shall wear a

[7] One scientific study has reported that the coronavirus can live for up to 24 hours on cardboard. https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf.

protective mask while in the courthouse as required by the order of the Chief Justice dated July 30, 2020.[8]

(12) Statute of Limitations, Repose and Other Similar Statutes. This Court is aware this emergency has already affected the ability of litigants to commence legal actions and this adverse impact will most likely increase significantly as this pandemic progresses. The Judicial Branch has raised this concern to the leadership of the General Assembly as this issue relates to the statute of limitations, statutes of repose and similar statutes such as S.C. Code Ann. §15-36-100. While this Court has recognized the existence of judicial authority to toll a statute of limitations in other situations, it would be inappropriate for this Court to consider at this time what relief, if any, may be afforded to a litigant who is unable to file a civil action or take other actions under these statutory provisions due to this emergency.

(13) Service Using AIS Email Address. A lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS).[9] For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by email, a copy of the sent email shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. This method of service may not be used for the service of a summons and complaint, subpoena, or any other pleading or document required to be personally served under Rule 4 of the South Carolina Rules of Civil Procedure, or for any document subject to mandatory e-filing under Section 2 of the South Carolina Electronic Filing Policies and Guidelines. In addition, the following shall apply:

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[8] This order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2523.

[9] The email addresses for lawyers admitted in South Carolina can be accessed utilizing the Attorney Information Search at: https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm.

(A) Documents served by email must be sent as an attachment in PDF or a similar format unless otherwise agreed by the parties.

(B) Service by email is complete upon transmission of the email. If the serving party learns the email did not reach the person to be served, the party shall immediately serve the pleading or paper by another form of service in Rule 5(b)(1), SCRCP, or other similar rule, together with evidence of the prior attempt at service by email.

(C) In those actions governed by the South Carolina Rules of Civil Procedure, Rule 6(e), SCRCP, which adds five days to the time a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, shall also apply when service is made by email under this provision.

(D) Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.

(14) Signatures of Lawyers on Documents. A lawyer may sign documents using "s/[typed name of lawyer]," a signature stamp, or a scanned or other electronic version of the lawyer's signature. Regardless of form, the signature shall still act as a certificate under Rule 11, SCRCP, that the lawyer has read the document; that to the best of the lawyer's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

(15) Optional Filing Methods. During this emergency, clerks of the trial courts may, at their option, permit documents to be filed by electronic methods such as fax and email. If the clerk elects to do so, the clerk will post detailed information on the court's website regarding the procedure to be followed, including any appropriate restrictions, such as size limitations, which may apply. Documents filed by one of these optional filing methods shall be treated as being filed when received by the clerk of court and a document received on or before 11:59:59 p.m., Eastern Standard Time, shall

be considered filed on that day. These optional filing methods shall not be used for any document that can be e-filed under the South Carolina Electronic Filing Policies and Guidelines. If a trial court does not have a clerk of court, the court shall determine whether to allow the optional filing methods provided by this provision.

(16) Certification in Lieu of Affidavit. If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker stating, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt."

(17) Arrest and Search Warrants. Due to this emergency, it may not be possible for an officer seeking an arrest warrant or a search warrant to appear before the judge to be sworn and sign the warrant. Therefore, a judge may use the procedures provided in section (c)(7) above to remotely administer the oath to the officer and, if appropriate, the judge may take sworn testimony using remote communication technology to supplement the allegations in the warrant. The judge shall make a notation on the warrant indicating the oath was administered remotely and the officer was not available to sign the warrant in the presence of the judge. If probable cause is found, the judge shall sign the warrant and return the warrant to the officer for execution. While the officer may sign the warrant when it is returned, the failure to do so shall not affect the validity of the warrant. The warrant may be transmitted to the judge and returned to the officer by e-mail, fax or other electronic means. For the purpose of this section, the term "search warrant" shall also include applications under South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145.

(18) Discovery. Depositions and other discovery matters may be conducted using remote communication technology.

(d) Court of General Sessions. The following additional guidance is provided regarding the Court of General Sessions:

(1) Rule 3(c), SCRCrimP. Based on this emergency, the ninety (90) day period provided by Rule 3(c), SCRCrimP, is hereby increased to one-hundred and twenty (120) days.

(2) County Grand Juries. The Solicitor or the Attorney General is hereby authorized to present an indictment to the grand jury using remote communication technology such as video conferencing and teleconferencing, and any necessary oath may be administered using this same remote communication technology pursuant to (c)(7) above. County grand juries may convene in-person so long as the Chief Judge for Administrative Purposes determines grand jurors can be safely distanced and equipped with protective gear, and meeting rooms and courtrooms sanitized. To help ensure appropriate social distancing can be maintained, a minimum of 113 square feet of space per person should be available during any grand jury proceedings, including deliberations.

(3) Guilty Pleas. Guilty pleas may be conducted as specified by section (c)(3) above. However, a guilty plea by remote communication technology will not be conducted unless both the defendant and prosecutor consent. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary.

(e) Court of Commons Pleas. The following additional guidance is provided regarding the Court of Common Pleas, including the Master-in-Equity Courts:

(1) Isolation and Quarantine Orders. As this pandemic continues, it is possible the provisions of the South Carolina Emergency Health Powers Act, S.C. Code Ann. §§ 44-4-100 to 44-4-570, may be triggered as it relates to isolation and quarantine orders. Therefore, the Chief Judges for Administrative Purposes for Common Pleas should familiarize themselves with the procedures for judicial review and petitions under that Act, most

notably section 44-5-540, and begin to formulate a strategy to meet the timelines specified in that statute for judicial action.

(2) Procedural Guidance Regarding Filing. While the trial court case management system does not have a case type and subtype for these matters, the clerks of court should use "Nature of Action Code 699 (Special/Complex Other)" for these matters, and these matters will be exempt from any ADR requirement. Detailed instructions for attorneys to Electronically File in these cases are available at https://www.sccourts.org/efiling/ARGs/ARG-26%20Quarantine%20Petitions.pdf. It is also anticipated that all of these hearings will be conducted using remote communication technology. In coordination with the Pro Bono Program of the South Carolina Bar, a list of lawyers willing to serve as counsel for individuals or groups of individuals who are or are about to be isolated and quarantined under section 44-5-540(F), has been compiled.

(f) Family Court. The following additional guidance is provided regarding the Family Court:

(1) Granting of Uncontested Divorces. The Family Court may grant an uncontested divorce without holding a hearing where:

(A) The parties submit written testimony in the form of affidavits or certifications of the parties and corroborating witnesses that address jurisdiction and venue questions, date of marriage, date of separation, the impossibility of reconciliation and the alleged divorce grounds.

(B) The written testimony must include copies of the parties' and witnesses' state-issued photo identifications.

(C) Any decree submitted by any attorney shall be accompanied by a statement, as an officer of the court, that all counsel approve the decree and that all waiting periods have been satisfied or waived by the parties.

(D) Should either party request a name change in connection with a request for divorce agreement approval, that party shall submit written testimony to the Family Court in the form of an affidavit or

certification addressing the appropriate questions for name change and the name which he or she wishes to resume. This relief shall be included in any proposed Order submitted to the Court for approval at the time of the submission of the documents related to the relief requested.

(2) Approval of Settlement Agreements and Consent Orders without a Hearing.

(A) General Orders. Consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without the necessity of holding a hearing. Examples include consent orders resolving motions to compel, discovery disputes, motions to be relieved as counsel, or consent Orders appointing a Guardian ad Litem or addressing Guardian ad Litem fee caps. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

(B) Temporary Orders. Temporary consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed, and may be submitted and issued without the necessity of filing supporting affidavits, financial declarations or written testimony.

(C) Final Orders. Final consent orders approving final agreements in all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. These final consent orders include marital settlement agreements, custody and visitation settlement agreements and enforcement agreements. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

These Consent Orders shall be submitted together with all of the following:

(i) The final agreement, such as a marital settlement agreement, signed by the attorneys and the parties.

(ii) Updated signed Financial Declarations for each party.

(iii) An affidavit or certification from the Guardian ad Litem, if one has been appointed, addressing the best interests of the children.

(iv) Written testimony of all parties in the form of affidavit or certification addressing and answering all questions the Family Court would normally ask the parties on the record, including but not limited to affirmations from the parties that:

a. The party has entered into the Agreement freely and voluntarily, understands the Agreement, and desires for the Agreement to be approved by the Court, without the necessity of a hearing.

b. Setting forth the education level obtained by the party, the employment status of the party and the health of the party.

c. There are no additional agreements, and neither party has been promised anything further than that set out in the Agreement.

d. The party fully understands the financial situation of each of the parties, the underlying facts, terms and effect of the Agreement.

e. The party has given and received full financial disclosure.

f. The party has had the benefit of an experienced family law attorney.

g. The party has had the opportunity to ask any questions relating to procedures and the effect of the Agreement.

h. The party is not acting under coercion or duress, and the party is not under the influence of any alcohol or drug.

i. That the Agreement is fair and equitable, it was reached by the parties through arms-length negotiations by competent attorneys and the agreement represents some sacrifices and compromises by each party.

j. The Agreement is in the best interests of the children, if there are any.

k. That the parties have entered into a marital settlement agreement in full and final settlement of all issues arising from the marriage which have been raised or which could have been raised in the proceeding, other than issues relating to grounds for divorce.

l. The party is aware of the applicable contempt sanctions associated with non-compliance.

(D) Consent Orders under S.C. Code Ann. § 63-7-1700(D). Where all the parties consent and the Family Court determines a child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal, and the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the Family Court may order the child returned to the child's parent without holding a hearing.

(3) Hearings Generally. With respect to all contested hearings in family court, including agency matters and private actions, both temporary and permanent, all hearings should be conducted in accordance with section (c)(3) of this order.

(4) Execution of Bench Warrants. While the Chief Justice temporarily suspended the execution of bench warrants for non-payment of child support and alimony,[10] that suspension has expired. Therefore, bench warrants issued by the family court shall be promptly executed by appropriate law enforcement personnel.

(g) Probate Court. The following additional guidance is provided:

Certification in Lieu of Affidavit. In the probate court, the certificate in section (c)(16) may also be used for a marriage license application under S.C. Code Ann.§ 20-1-230, including any application which may be submitted electronically, or for any of the probate court forms available at www.sccourts.org/forms which are either an affidavit or require an oath or affirmation to be administered.

(h) Summary Court. The following additional guidance is provided regarding the Summary Courts:

(1) Bond Hearings in Criminal Cases. Bond hearings shall be conducted in the manner specified by section (c)(3) above. The frequency of these bond hearings shall be specified by the Chief Justice.[11] In addition to the normal factors for determining whether the defendant will be required to post a bond or will be released on a personal recognizance, the judge should consider the need to minimize the detention center population during this

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[10] See Orders of the Chief Justice dated May 7, 2020 and June 5, 2020 (available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2510 and https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2497).

[11] Currently, the Chief Justice has directed bond hearings be held twice a day. See Memorandum of the Chief Justice dated September 25, 2020 (available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2530).

emergency. Further, judges should consider home detention or other options to help reduce detention center population. The summary court shall uphold victims' rights in accordance with the South Carolina Constitution, including seeking to ensure that a victim advocate/notifier is available for all bond hearings, subject to the rights of the defendant under the United States Constitution and the South Carolina Constitution.

(2) Transmission of Warrants for General Sessions Offenses. Warrants for general sessions offenses shall continue to be forwarded to the clerk of the court of general sessions as provided for Rule 3, SCRCrimP. As to an arrest warrant for a defendant who is already in the custody of the South Carolina Department of Corrections, or a detention center or jail in South Carolina, this Court hereby authorizes these defendants to be served with the warrant by mail. Therefore, if it is determined that the defendant is already in custody, the judge shall annotate the warrant to reflect that a copy has been mailed to the defendant, mail a copy of the annotated warrant to the defendant, and immediately forward the annotated warrant and any allied documents to the clerk of the court of general sessions for processing under Rule 3, SCRCrimP. If the defendant is incarcerated at the South Carolina Department of Corrections, the judge shall also transmit a copy of the annotated warrant to the Office of General Counsel at the South Carolina Department of Corrections.

(3) Guilty Pleas. For offenses within the jurisdiction of the summary court (including those cases transferred to the summary court pursuant to S.C. Code Ann. § 22-3-545), guilty pleas may be conducted as specified by section (c)(3) above. However, a guilty plea by remote communication technology will not be conducted unless both the defendant and prosecutor consent. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. A defendant charged with criminal offenses, traffic violations, ordinance violations, and administrative violations within the jurisdiction of the summary courts may

plead guilty by affidavit or certification. This procedure may only be utilized by persons represented by an attorney and desiring to plead guilty where the charge does not carry imprisonment as a possible punishment or where the prosecutor or prosecuting law enforcement officer and defense attorney have agreed that the recommended sentence will not result in jail time. If applicable, the prosecutor or prosecuting law enforcement officer must comply with the Victims' Bill of Rights under Article I, Section 24 of the South Carolina Constitution.[12]

(i) Effective Date and Revocation of Prior Orders and Memoranda. This order is effective immediately. Unless extended, this order shall be rescinded on June 16, 2021. This order replaces the following orders and memoranda previously issued.

(1) Memoranda of the Chief Justice dated March 16, 2020, which are labeled as "Trial Courts Coronavirus Memo," and "Summary Courts Coronavirus Memo."

(2) Order dated March 18, 2020, and labeled "Statewide Family Court Order."

(3) Order dated May 29, 2020, entitled "County Grand Juries."

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

[12] This language regarding pleas by affidavit or certification incorporates language from a May 7, 2020, order of the Chief Justice (available at https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2020-05-07-01).

Columbia, South Carolina
April 3, 2020
As Amended March 4, 2021

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

In the Matter of Gregory Payne Sloan

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

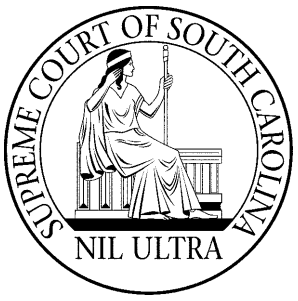
The Committee on Character and Fitness has now scheduled a hearing via video conference in this regard on April 8, 2021, beginning at 4:00 p.m..

Any individual may appear before the Committee in support of, or in opposition to, the petition. If you wish to appear, you must submit your contact information (name, phone number and email address) to the address below in order to be included in the video conference.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

March 8, 2021



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
March 10, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Win Myat, Petitioner,

v.

Tuomey Regional Medical Center, Respondent.

Appellate Case No. 2019-001757

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Sumter County
R. Ferrell Cothran Jr., Circuit Court Judge

Opinion No. 28009
Heard February 3, 2021 – Filed March 10, 2021

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

William R. Padget and Francis M. Hinson IV, both of HHP Law Group, LLC of Columbia, for Petitioner Win Myat.

G. Murrell Smith Jr. and David C. Holler, both of Smith Robinson Holler DuBose Morgan, LLC, of Sumter; and Shanon N. Peake, of Smith Robinson Holler DuBose Morgan, LLC, of Columbia, all for Respondent Tuomey Regional Medical Center.

Wm. Grayson Lambert and M. Craig Garner Jr., both of Burr & Forman LLP, of Columbia; and Edward H. Bender, of Columbia, all for Amicus Curiae South Carolina Hospital Association.

Frank L. Eppes, of Eppes & Plumblee, P.A.; and Daniel W. Luginbill and Julia M. Flumian, both of McGowan, Hood, & Felder, LLC, of Mt. Pleasant, all for Amicus Curiae South Carolina Association for Justice.

PER CURIAM: We issued a writ of certiorari to review the court of appeals' decision in *Myat v. Tuomey Regional Medical Center*, 427 S.C. 601, 832 S.E.2d 306 (Ct. App. 2019). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, C.J., KITTREDGE, HEARN, FEW, JJ., and Acting Justice Paula H. Thomas, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Palmetto Construction Group, LLC, Respondent,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Petitioners.

Appellate Case No. 2019-002052

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 28010
Heard January 12, 2021 – Filed March 10, 2021

AFFIRMED AS MODIFIED

A. Bright Ariail, Law Office of A. Bright Ariail, LLC, of Charleston for Petitioners.

Jaan Gunnar Rannik and Andrew K. Epting Jr., Epting & Rannik, LLC, both of Charleston for Respondent.

JUSTICE FEW: This is a civil action to collect a debt under a contract that contains an arbitration provision. The defendants appealed the master in equity's

order refusing to set aside the entry of their default. The court of appeals dismissed the appeal on the basis that an order refusing to set aside an entry of default is not immediately appealable. *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 428 S.C. 261, 266, 834 S.E.2d 204, 206 (Ct. App. 2019). The defendants filed a petition for a writ of certiorari claiming the order is immediately appealable because it had the effect of precluding their motion to compel arbitration, and in fact, the order states, "Defendants' motion to stay and compel arbitration is denied as [the defendants are] in default." *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) ("An order denying arbitration is immediately appealable." (citing *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34-35, 524 S.E.2d 839, 842-43 (Ct. App. 1999))); *see also* S.C. Code Ann. § 15-48-200(a)(1) (2005). We affirm the court of appeals.

Palmetto Construction Group brought this action against Restoration Specialists, its managing member Mark Ward, and his wife Lynnette Ward for payment under a construction contract with an arbitration provision. The defendants did not answer the complaint. The circuit court found all three defendants were in default under Rule 55(a), SCRCP, and referred the case to the master in equity pursuant to Rule 53(b), SCRCP. The defendants filed a motion to set aside the entry of default. The master denied the motion, and the defendants appealed. The court of appeals held the master's order was not immediately appealable and dismissed the appeal. *Palmetto Constr. Grp.*, 428 S.C. at 266, 834 S.E.2d at 206. The court of appeals found the fact the order refusing to set aside the entry of default effectively precluded the defendants' effort to compel arbitration did not affect the immediate appealability of the order. 428 S.C. at 266-67, 834 S.E.2d at 207.

A party in default has three primary options: (1) do nothing pending the entry of judgment by default under Rule 55(b), SCRCP; (2) file an appearance under Rule 55(b)(2), SCRCP, in an attempt to protect its interests before the entry of judgment by default; or (3) request the entry of default be set aside pursuant to Rule 55(c), SCRCP. Under either option, the party has no right of appeal until after final judgment. *See Thynes v. Lloyd*, 294 S.C. 152, 153, 363 S.E.2d 122, 122 (Ct. App. 1987) (stating an "order refusing to grant relief from the entry of default is not appealable until after final judgment"); *but see Johnson ex rel. Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 317, 368 S.E.2d 456, 456 (1988) (stating "while the Court of Appeals reached the correct result in [*Thynes*], it improperly relied on Rule 72, SCRCP, and federal cases interpreting the appealability of orders made pursuant

to Rule 55(c) . . . . We agree that the . . . denial of a Rule 55(c) motion is not directly appealable under S.C. Code Ann. § 14-3-330 (1976).").

The defendants contend the law of arbitration changes the immediate appealability of the master's order. To support their contention, they rely on language from the Supreme Court and this Court stating the law "favors" arbitration. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983) ("Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The policy of the United States and South Carolina is to favor arbitration of disputes."). However, there is nothing in the law of arbitration that affects the immediate appealability of an order refusing to set aside an entry of default. Specifically, the fact the order effectively precludes the defaulting party's effort to arbitrate the claim does not change whether the order may be immediately appealed.

Our courts' statements that the law "favors" arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions. *See* Richard Frankel, *The Arbitration Clause As Super Contract*, 91 Wash. U. L. Rev. 531, 533 (2014) ("Much of this arbitration favoritism is attributable to lower-court misinterpretation of thirty-year-old dicta . . . ."). Congress passed the Federal Arbitration Act in 1924 to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158, 164 (1985). "[The Act's] purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." 470 U.S. at 219-20, 105 S. Ct. at 1242, 84 L. Ed. 2d at 164 (quoting H.R. Rep. No. 96, at 1 (1924)). Quoting the House Report on the Act, the Supreme Court explained,

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the

> American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. *This bill declares simply that such agreements for arbitration shall be enforced*, and provides a procedure in the Federal courts for their enforcement.

470 U.S. at 219-20 n.6, 105 S. Ct. at 1242 n.6, 84 L. Ed. 2d at 164-65 n.6 (quoting H.R. Rep. No. 96 at 1-2) (emphasis added).

The Supreme Court of South Carolina first discussed a "federal policy favoring the arbitration of disputes" in *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 103, 333 S.E.2d 781, 784-85 (1985), relying on cases interpreting the Federal Arbitration Act. Referring to a similar "policy" in South Carolina, we cited cases that simply recognized the right to contract for limited arbitration. 286 S.C. at 103-04, 333 S.E.2d at 785 (citing *Harwell v. Home Mut. Fire Ins. Co.*, 228 S.C. 594, 599, 91 S.E.2d 273, 275 (1956) (stating as to a limited arbitration agreement, "where the policy expressly or by necessary implication forbids the insured from bringing suit until after the amount of the loss has been submitted to arbitration or appraisal, compliance with such provision . . . is a condition precedent to the right of insured to maintain an action on the policy"); *Bollmann v. Bollmann*, 6 S.C. 29, 42-43 (1875) ("An arbitration proceeds from the consent of the parties. The Court is but the instrument through which . . . effect can be given to their will. It contemplates an adjustment of their controversy by a forum not bound by the strict rules of law, but permitted within certain limits to substitute their own mode of investigation in the place of that through which alone Courts of justice are allowed to exercise their functions.")).

Before *Trident Technical College*, South Carolina practiced a reluctance similar to that of the federal courts to enforce arbitration agreements because they deprived the courts of jurisdiction. In *Episcopal Housing Corp. v. Federal Insurance Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977), for example, we stated, "It is well established in South Carolina that general arbitration agreements which oust the South Carolina circuit court from jurisdiction are unenforceable as against public policy." 269 S.C. at 636, 239 S.E.2d at 649; *see also Childs v. Allstate Ins. Co.*, 237 S.C. 455, 460, 117 S.E.2d 867, 869-70 (1961) (stating "an [arbitration] agreement is upheld when it provides for arbitration of the amount of the loss" (a limited arbitration agreement)

but is "not binding upon the parties" if it "undertakes to require arbitration of the question of liability"); *Jones v. Enoree Power Co.*, 92 S.C. 263, 267, 75 S.E. 452, 454 (1912) ("An agreement to submit to arbitration all questions of law and fact that may arise under a contract is contrary to the public policy and void, as an attempt to oust the courts of their jurisdiction and establish in their place a contract tribunal.").

In *Episcopal Housing Corp.*, however, we finally accepted the supremacy of federal law permitting general arbitration agreements. "It is equally true," we stated, referring to the previously quoted statement that general arbitration agreements were unenforceable, "that under the supremacy clause of the United States Constitution . . . , this Court must recognize that federal statutes enacted pursuant to the United States Constitution are the supreme law of the land." 269 S.C. at 636, 239 S.E.2d at 649. In *Trident Technical College*, only eight years after *Episcopal Housing Corp.* and two years after the Supreme Court made its first "policy" statement in *Moses H. Cone*, we followed the federal courts by stating "this policy favoring the arbitration of disputes is also well established in South Carolina." 286 S.C. at 103, 333 S.E.2d at 785.

Neither the Supreme Court nor this Court, however, meant to give the law of arbitration such a special status that it would supplant state procedural law. Rather, these statements must be read in the context in which the Courts made them: overruling a longstanding, policy-based rule that arbitration agreements are unenforceable. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), the Supreme Court explained, "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." 489 U.S. at 476, 109 S. Ct. at 1254, 103 L. Ed. 2d at 498; *see also Dean Witter Reynolds*, 470 U.S. at 219-20, 105 S. Ct. at 1242, 84 L. Ed. 2d at 164 ("The [Federal Arbitration] Act, after all, does not mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements."). Therefore, when considered in the proper context, our statements that the law "favors" arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—"favoring" arbitration. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584 (2003) ("There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private

agreements to arbitrate." (citing *Volt Info. Scis.*, 489 U.S. at 476, 109 S. Ct. at 1254, 103 L. Ed. 2d. at 498)).

In this case, the simple fact the master refused to set aside the entry of default, thereby preventing the defendants from requesting the court to compel arbitration, does not mean the order was immediately appealable. In a case like this, the circuit court should proceed to a determination of damages and the entry of judgment under Rule 55(b). From the final order of judgment, the aggrieved party may file an appeal challenging the circuit court's finding there was not good cause to set aside the entry of default, and may address any Rule 60, SCRCP, issue such as whether the aggrieved party demonstrated excusable neglect. *See ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 494-95, 713 S.E.2d 335, 338-39 (Ct. App. 2011) (considering—after default judgment—whether the defaulting party's neglect was excusable pursuant to Rule 60, SCRCP); *Thynes*, 294 S.C. at 154, 363 S.E.2d at 123 (stating "the denial of a motion" to set aside an entry of default for good cause "is not appealable until after final judgment" (citation omitted)).

Therefore, the court of appeals correctly determined the order refusing to set aside the entry of default was not immediately appealable. The court of appeals erred, however, in addressing the defendants' argument they did not waive their right to arbitration. *See Palmetto Constr. Grp.*, 428 S.C. at 267-70, 834 S.E.2d at 207-08. In the context of default, the concept of waiver is bound up in the Rule 55(c) determination of good cause and Rule 60(b) determinations such as excusable neglect. On appeal from a final judgment, the defendants may challenge any such determinations, and if that challenge is successful, may claim they did not in fact waive their contractual right to arbitration.

The decision of the court of appeals to dismiss the appeal is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley, deceased, Petitioner,

v.

SNH SE Ashley River Tenant, LLC; FVE Managers, Inc.; Five Star Quality Care, Inc.; SNH SE Tenant TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; Candy D. Cure; John Doe; Jane Doe; Richard Roe Corporation; and Mary Doe Corporation, Defendants,

Of which SNE SE Ashley River Tenant, LLC; FVE Managers, Inc.; Five Star Quality Care, Inc.; SNH SE Tenant TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; and Candy D. Cure are the Respondents.

Appellate Case No. 2019-001767

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 28011
Heard November 19, 2020 – Filed March 10, 2021

REVERSED

Kenneth Luke Connor, Christopher Caleb Connor and Laura S. Jordan, all of Connor & Connor, LLC, of Aiken, for Petitioner.

G. Mark Phillips and Robert William Whelan, of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Respondents.

JUSTICE JAMES: This appeal concerns the enforceability of an arbitration agreement executed between Ashley River Plantation, an assisted-living facility (the facility), and Thayer Arredondo, the attorney-in-fact under two powers of attorney executed by Hubert Whaley, a facility resident. In an unpublished opinion, the court of appeals held the arbitration agreement was enforceable. *Arredondo v. SNH SE Ashley River Tenant, LLC*, Op. No. 2019-UP-293 (S.C. Ct. App. filed Aug. 14, 2019). We hold neither power of attorney gave Arredondo the authority to sign the arbitration agreement. Therefore, we reverse the court of appeals.

I. Background

On October 12, 2012, Arredondo decided to place Mr. Whaley, her father, in Respondents' Ashley River Plantation assisted-living facility in Charleston. Whaley was eighty-four years old, was diagnosed with dementia, and required assistance with daily functions such as bathing, dressing, toileting, and taking medications. When Whaley was admitted into the facility, Arredondo held two valid powers of attorney, a General Durable Power of Attorney (GDPOA) and a Health Care Power of Attorney (HCPOA).

When Arredondo and Whaley arrived at the facility, Arredondo met with a facility representative and signed various documents in connection with Whaley's admission. During that meeting, the facility representative did not mention or present an arbitration agreement to Arredondo. Later that day, after Whaley was admitted, Arredondo met with a different facility representative who, according to Arredondo, told her she "needed to sign additional documents related to [her] father's admission to the facility." Included among those documents was the arbitration agreement, which Arredondo signed.

The arbitration agreement, which Arredondo obviously executed before any dispute arose between the parties, contains a mutual waiver of the right to a trial by

judge or jury and requires arbitration of all claims involving potential damages exceeding $25,000. The agreement bars either party from appealing the arbitrators' decision, prohibits an award of punitive damages, limits discovery, and provides Respondents the unilateral right to amend the agreement.

On February 21, 2014, while he was still a resident at the facility, Whaley was admitted to Bon Secours St. Francis Hospital, where he died six days later. Arredondo, as Personal Representative of Whaley's estate, brought this action alleging claims for wrongful death and survival against Respondents. The complaint alleges that during his residency at the facility, Whaley suffered serious physical injuries and died as a result of Respondents' negligence and recklessness.

Respondents moved to compel arbitration. In opposition to the motion, Arredondo argued (1) the two powers of attorney did not give her the authority to sign the arbitration agreement, and (2) even if she had authority to sign it, the agreement is unconscionable and therefore unenforceable. To buttress her unconscionability argument, Arredondo submitted an affidavit in which she described the events surrounding her execution of the arbitration agreement. Arredondo stated that when she had questions about the arbitration agreement and told the facility representative she was not comfortable signing it, the facility representative responded, "this [is] a document that everyone sign[s] when admitting their loved ones to the facility and that [Arredondo] needed to sign the 'Arbitration Agreement' in order to ensure [Whaley's] admission to the facility." Respondents insist the evidence supports only the conclusion that Arredondo's execution of the arbitration agreement was not a prerequisite for Whaley's admission into the facility. As we will discuss, our determination of whether Arredondo was required to sign the agreement in order for Whaley to be admitted is dispositive of the threshold issue of whether Arredondo had authority under the HCPOA to sign the arbitration agreement.

In denying Respondents' motion to compel arbitration, the circuit court ruled neither power of attorney gave Arredondo the authority to sign the arbitration agreement and also ruled that even if Arredondo had authority to sign it, the agreement is unconscionable. The court of appeals reversed, holding Arredondo had actual authority to execute the arbitration agreement and holding the agreement is not unconscionable. This Court granted Arredondo's petition for a writ of certiorari to review the court of appeals' decision.

II. Discussion

"Arbitrability determinations are subject to de novo review." *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016) (quoting *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration." *Id.*

Arredondo argues the court of appeals erred in holding the two powers of attorney granted her authority to sign the arbitration agreement. She also contends the court of appeals erred in holding the arbitration agreement is not unconscionable. We hold neither power of attorney gave Arredondo the authority to execute the arbitration agreement. In light of our holding on that point, we need not address the issue of unconscionability.

A. Arredondo's Authority to Execute the Arbitration Agreement

"Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney." *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Id.* (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting *Watson*, 407 S.C. at 455, 756 S.E.2d at 161). Accordingly, we look to the specific language of the GDPOA and HCPOA to determine whether either document authorized Arredondo to execute a pre-dispute arbitration agreement.

Before we begin our review of the authority granted to Arredondo by the powers of attorney, we emphasize our analysis does not turn upon the presence or absence of an explicit reference to arbitration or arbitration agreements in the powers of attorney. The decision of the United States Supreme Court (USSC) in *Kindred*

Nursing Centers Ltd. Partnership v. Clark[1] forecloses such an approach. In *Kindred*, the USSC reviewed two of three consolidated cases from the Supreme Court of Kentucky, one dealing with a power of attorney signed by Wellner and another signed by Clark.[2] In both cases, the agents holding the powers of attorney signed arbitration agreements when their principals were admitted into a nursing facility. The Supreme Court of Kentucky held an agent was authorized to sign an arbitration agreement depriving her principal of "an 'adjudication by judge or jury' only if the power attorney 'expressly so provide[d].'" 137 S. Ct. at 1426 (quoting *Whisman*, 478 S.W.3d at 329). The USSC dubbed this approach the "clear-statement rule" and held it violated the Federal Arbitration Act (FAA) by "fail[ing] to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426-27. The USSC then held the Clark power of attorney undoubtedly authorized the agent to sign an arbitration agreement because it granted the agent the all-encompassing authority "to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way" and "[g]enerally to do and perform for me and in my name all that I might do if present." *Id.* at 1425; *see Whisman*, 478 S.W.3d at 317-18. As such, no remand for further proceedings related to the Clark power of attorney was necessary. However, the USSC noted the Supreme Court of Kentucky had invalidated the Wellner arbitration agreement on two alternative grounds, one based upon the prohibited clear-statement rule and the other based upon the Kentucky Court's finding that the Wellner power of attorney was not otherwise broad enough to allow Wellner's agent to sign a pre-dispute arbitration agreement. Noting these alternative holdings, the USSC remanded the Wellner case to the Supreme Court of Kentucky for an analysis of whether the alternative holding was tainted by or not wholly independent of the clear-statement rule. We discuss below the Supreme Court of Kentucky's decision on remand.

1. The General Durable Power of Attorney

Paragraph one of the General Durable Power of Attorney (GDPOA) authorized Arredondo:

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[1] 137 S. Ct. 1421 (2017).

[2] *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015). Belinda Whisman, the agent under a power of attorney executed by her father, was the lead respondent in the three cases before the Supreme Court of Kentucky. However, only the Wellner and Clark powers of attorney were before the USSC in *Kindred*.

> To make, sign, execute, issue, assign, transfer, endorse, release, satisfy and deliver any and all instruments or writing of every kind and description whatsoever, whether sealed or unsealed, of, in or concerning any or all of my business affairs, property or other assets whatsoever, including all property, real, personal or mixed, stocks, securities and choses in action, and wheresoever situated, including, without limiting the generality hereof thereto, notes, bonds, mortgages, leases, deeds, conveyances, bills of sale, and assignments, endorsements, releases, satisfactions, pledges or any agreements concerning any transfers of the above or of any other property, right or thing.

(a) Chose in action

The court of appeals held the GDPOA granted Arredondo authority to execute the arbitration agreement because it "granted Arredondo authority to execute all instruments concerning all types of property, including 'choses in action.'" Further, the court of appeals held Arredondo's authority under the GDPOA "extended to 'any other property, right or thing.'" Arredondo first takes issue with what she claims was the court of appeals' overly broad interpretation of the term "choses in action." She contends the court of appeals erroneously elevated a chose in action to include a cause of action that did not exist at the time Arredondo signed the arbitration agreement. In light of the language used in the GDPOA, we agree with Arredondo.

A "chose in action" is a type of property interest or a proprietary right to a claim or debt. *See Ball v. Ball*, 312 S.C. 31, 33-34, 430 S.E.2d 533, 534-35 (Ct. App. 1993) (holding a vested military pension was a "chose in action," or form of property, because the recipient "could maintain an action at law to enforce this right should the military ever wrongfully attempt to deny it to him"), *aff'd*, 314 S.C. 445, 445 S.E.2d 449 (1994); *see also Chose in Action*, *Black's Law Dictionary* (11th ed. 2019) (defining "chose in action" as "a proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or *a claim for damages in tort*" (emphasis added)). Arredondo and Respondents agree "chose in action" generally means "cause of action."

Respondents contend the court of appeals correctly held the GDPOA authorized Arredondo to sign the arbitration agreement because the agreement concerned a cause of action against the facility. Again, Arredondo argues this interpretation fails because Whaley did not possess a cause of action against

Respondents at the time the arbitration agreement was signed. Respondents cite *Ball* for the proposition that "South Carolina courts construe the term 'property' very broadly." 312 S.C. at 33, 430 S.E.2d at 534. We agree with that basic proposition, but it does not necessarily mean the GDPOA applied to a property right that did not exist at the time Arredondo signed the arbitration agreement. We return to *Kindred* and the Supreme Court of Kentucky's decision on remand to explain.

As noted above, in *Kindred*, the USSC remanded the case of the Wellner power of attorney with instructions to the Supreme Court of Kentucky to determine whether its application of the prohibited "clear-statement rule" impermissibly tainted its alternative holding that the Wellner power of attorney otherwise did not authorize Wellner's agent to sign a pre-dispute arbitration agreement. 137 S. Ct. at 1429. The Supreme Court of Kentucky considered the remanded issue in *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017). One provision of the Wellner power of attorney authorized Wellner's agent "to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance." *Wellner*, 533 S.W.3d at 193 (quoting *Whisman*, 478 S.W.3d at 325). Similar to Respondents' position in the instant case, the nursing facility seeking to enforce the arbitration agreement in *Wellner* claimed the term "personal property" included choses in action such as personal injury claims. *Id.* at 192-93. While the Supreme Court of Kentucky recognized "a personal injury claim is a chose-in-action, and therefore constitutes personal property," it nevertheless held—independently of the clear-statement rule—the "pre-dispute arbitration contract did not relate to any property rights of . . . Wellner." *Id.* at 194 ("By executing [the nursing home's] pre-dispute arbitration agreement, [Wellner's agent] did not 'make, execute and deliver deeds, releases, conveyances and contracts of [any] nature in relation to [Wellner's] property.' The only 'thing' of . . . Wellner's affected by the pre-dispute arbitration agreement was his constitutional rights, which no one contends to be his real or personal property." (quoting *Whisman*, 478 S.W.3d at 325-26)).

We agree with the rationale of the Supreme Court of Kentucky.[3] We hold this particular GDPOA did not authorize Arredondo to sign the arbitration agreement because the arbitration agreement did not concern a chose in action or any other property right Whaley possessed at the time Arredondo signed it.

[3] The USSC denied the nursing facility's subsequent petition for a writ of certiorari. *Kindred Nursing Ctrs. Ltd. P'ship v. Wellner*, 139 S. Ct. 319 (2018).

(b) "Transfer" of property, right, or thing

We also hold the court of appeals erred in concluding Arredondo's authority under the GDPOA "extended to 'any other property, right or thing.'" The court of appeals took this phrase out of context, as the complete provision including this phrase authorized Arredondo to execute "any agreements concerning any transfers of the above or of any other property, right or thing." (emphases added). The GDPOA does not define "transfers." "Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). The plain, ordinary, and popular meaning of the noun "transfer" is a "conveyance of right, title, or interest in real or personal property from one person to another." *Transfer*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/transfer (last visited Mar. 4, 2021). By signing the arbitration agreement, Arredondo (for herself, for Whaley, and for his heirs and executors) waived the right to a jury trial, waived any claim to punitive damages, agreed to limited discovery, and waived the right to appeal the arbitration decision. These acts were not "transfers" of anything to anyone. Thus, the provision of the GDPOA authorizing Arredondo to enter into any agreements concerning transfers of any property, right, or thing did not grant her the authority to sign the arbitration agreement.

(c) Title of GDPOA

Finally, Respondents argue the power of attorney's title—"General Durable Power of Attorney"—suggests Whaley intended for the instrument to grant Arredondo broad authority. Rather than relying on such a generalization, we look to the actual language of the GDPOA to determine what authority it granted Arredondo. While the GDPOA gave Arredondo significant authority to make business and property decisions for Whaley, the mere title of the document did not increase Arredondo's authority beyond the plain meaning of the provisions contained in the document. Certainly, the GDPOA could have been drafted to give Arredondo the broad power to sign all documents Whaley could sign himself or otherwise do anything Whaley could do himself, but it was not so drafted. *Cf. Kindred*, 137 S. Ct. at 1429 (explaining the Clark power of attorney, which provided the agent power "to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way," and "generally to do and perform for me and in my name all that I might do if present," was broad enough to authorize the execution of a pre-dispute arbitration agreement).

For the foregoing reasons, we hold the court of appeals erred in concluding the GDPOA granted Arredondo authority to execute the arbitration agreement.

2. The Health Care Power of Attorney

When Whaley was admitted to the facility, Arredondo also held a Health Care Power of Attorney (HCPOA) naming her as Whaley's attorney-in-fact. In their arguments regarding Arredondo's authority under this instrument, the parties focus solely upon the provisions of subparagraph 11(d) in the "Agent's Powers" section of the HCPOA. Subparagraph 11(d) authorized Arredondo:

> To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

(a) Action "necessary" to making, documenting, or implementing a health care decision

The court of appeals held the HCPOA granted Arredondo the authority to sign the arbitration agreement because it authorized her "to pursue legal action and to grant any waiver required by health care providers such as [Respondents]." We will discuss that holding in a moment, but we initially address the first clause of subparagraph 11(d). Arredondo clearly had no authority to take any action under the first clause of subparagraph 11(d) unless the action taken was "necessary to making, documenting, and assuring implementation" of a decision concerning Whaley's health care. (emphasis added). The only health care decision in play when Arredondo signed the arbitration agreement was Arredondo's decision to seek Whaley's admission into the facility. Consequently, we must determine whether signing the arbitration agreement was "necessary" to Arredondo making, documenting, and assuring implementation of that decision.

The plain, ordinary, and popular meaning of the word "necessary" is "absolutely needed" or "required." *Necessary*, Merriam-Webster Dictionary, https://

www.merriam-webster.com/dictionary/necessary (last visited Mar. 4, 2021). We hold Arredondo's signature on the arbitration agreement was not "absolutely needed" or "required" to ensure Whaley's admission into the facility. In support of her argument on the separate issue of whether the arbitration agreement is unconscionable, Arredondo submitted her affidavit in which she testified a facility representative told her she had to sign the agreement in order for Whaley to be admitted. On the issue of unconscionability, Respondents have consistently maintained Arredondo was not required to sign the arbitration agreement. During its discussion of the issue of unconscionability, the circuit court found, "[Arredondo] was only told [the arbitration agreement] must be signed to ensure [Whaley's] admission to the facility." (emphasis added by the circuit court). These arguments relative to unconscionability cut against the parties' respective interests on the threshold issue of Arredondo's authority under the HCPOA. Nevertheless, we must determine the propriety of this factual finding of the circuit court by examining the evidence in the record. *See Johnson*, 416 S.C. at 512, 788 S.E.2d at 218 ("[A] circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." (citation omitted)). We hold the evidence in the record reasonably supports only the finding urged by Respondents—the arbitration agreement was presented to Arredondo as a "voluntary standalone" agreement that was not a prerequisite for Whaley's admission into the facility. Arredondo plainly stated in her affidavit that Whaley had already been admitted into the facility and provided with a room before Arredondo was asked to sign the arbitration agreement. Similarly, in their brief to this Court, Respondents state: "[The facility] did not present the Agreement until after Arredondo received the services she requested." As Respondents stressed during oral argument before this Court, once Whaley was admitted to the facility, he was entitled to statutory protections, and the facility could not have discharged him had Arredondo refused to sign the arbitration agreement. *See* S.C. Code Ann. § 44-81-40(D) (2018) ("A resident may be transferred or discharged only for medical reasons, for the welfare of the resident or for the welfare of other residents of the facility, or for nonpayment and must be given written notice of not less than thirty days . . . .").

As courts in other jurisdictions have recognized, the characterization of an arbitration agreement as either a mandatory condition to admission or an optional, collateral agreement often determines the authority issue when the agent holds a power of attorney empowering her to make necessary health care decisions. *Compare LP Louisville E., LLC v. Patton*, 605 S.W.3d 300, 311 (Ky. 2020) ("[W]hen an agreement to arbitrate is presented as a condition of admission to a

nursing home, unless otherwise agreed, a power of attorney expressing general authority to make necessary health care decisions includes the incidental or reasonably necessary authority to enter that agreement."), *with Dickerson v. Longoria*, 995 A.2d 721, 739 (Md. 2010) (explaining an agent authorized to make health care decisions on his principal's behalf did not have authority to execute a voluntary arbitration agreement because "[t]he decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement"), *Life Care Ctrs. of Am. v. Smith*, 681 S.E.2d 182, 185-86 (Ga. Ct. App. 2009) (explaining health care power of attorney did not authorize daughter to execute "optional" arbitration agreement on mother's behalf when daughter was authorized "to make any decision [the mother] could make to obtain or terminate any type of health care"), *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008) (explaining health care surrogate did not have authority to execute arbitration agreement on her father's behalf because the execution of an arbitration agreement is not a health care decision when the arbitration agreement is not required for admission into the nursing home), *Coleman v. United Health Servs. of Ga., Inc.*, 812 S.E.2d 24, 26 (Ga. Ct. App. 2018) (explaining agent authorized to take action necessary to admit principal to health care facility did not have authority to execute "voluntary" arbitration agreement), *Wisler v. Manor Care of Lancaster PA, LLC*, 124 A.3d 317, 324 (Pa. Super. Ct. 2015) (stating an agent's authority to consent to medical treatment on behalf of a principal "does not necessarily entail the authority to consent to arbitration, agreement to which was not a precondition to be admitted to [the facility]"), *and Miller v. Life Care Ctrs. of Am., Inc.*, 478 P.3d 164, 172-74 (Wyo. 2020) (explaining durable health care power of attorney did not give agent authority to execute arbitration agreement because arbitration agreement was not required for admission to health care facility and, therefore, was unrelated to principal's health care).

(b) Authority to grant any waiver <u>required</u> by a health care provider

We now return to the court of appeals' holding that subparagraph 11(d) of the HCPOA granted Arredondo the authority to sign the arbitration agreement because the HCPOA authorized her "to pursue legal action and to grant any waiver required by health care providers such as [Respondents]." Addressing the second part of this holding first, we note subparagraph 11(d) gave Arredondo the authority to sign only those waivers "<u>required</u> by [a] . . . health care provider." (emphasis added). As Respondents contend, the arbitration agreement includes a series of waivers (of the right to adjudication by a judge or jury, of the right to an award of punitive damages,

and of the right to an appeal). As we have already discussed, Arredondo was not required to sign the arbitration agreement for Whaley to be admitted. Since Arredondo was not required to sign the arbitration agreement, it logically follows that any waivers contained in the agreement were not required by the facility. For the reasons set forth above in our discussion of the term "necessary," we conclude the HCPOA did not give Arredondo the authority to grant the waivers recited in the arbitration agreement.

(c) Authority to pursue legal action

The court of appeals also held the provision in subparagraph 11(d) of the HCPOA authorizing Arredondo to "pursu[e] any legal action in [Whaley's] name" granted her the authority to sign the arbitration agreement. Arredondo claims that because she signed the arbitration agreement before any potential legal claim accrued, this provision did not grant her authority to sign the agreement. Respondents argue this language of the HCPOA did not limit Arredondo's authority to taking action only after a cause of action accrues. Respondents contend Arredondo's authority to pursue legal action included selecting arbitration as a preferred forum for dispute resolution.

We first note the parties overlook the context in which this provision appears in subparagraph 11(d) of the HCPOA. This provision authorized Arredondo to pursue legal action only to "force compliance with [Whaley's] wishes as determined by [Whaley's] agent, or to seek actual or punitive damages for the failure to comply." For that reason alone, we hold this provision of the HCPOA is of no significance in this case. However, even if this provision authorized Arredondo to pursue legal action unrelated to forcing compliance with Whaley's health care wishes, this provision still did not authorize Arredondo to sign a pre-dispute arbitration agreement. In *Wellner*, the Supreme Court of Kentucky analyzed a provision of the Wellner power of attorney authorizing the agent to "demand, sue for, collect, recover and receive all . . . demands whatsoever," and to "institute legal proceedings." 533 S.W.3d at 193-94. The Court recognized "the power to institute or defend suits concerning [Wellner's] property rights would necessarily encompass the power to make litigation-related decisions within the context of a suit so instituted, *including the decision to submit the pending dispute to mediation or arbitration*." *Id.* at 193 (quoting *Whisman*, 478 S.W.3d at 323) (internal quotation marks omitted). Yet, the Court held the provision did not grant the agent authority to execute a pre-dispute arbitration agreement: "the act of executing a pre-dispute arbitration agreement upon admission to a nursing home ha[s] nothing at all to do with . . . institut[ing] legal

proceedings." *Id.* at 193-94 (quoting *Whisman*, 478 S.W.3d at 325) (internal quotation marks omitted) (second alteration in original). Here, Arredondo did not execute the arbitration agreement in connection with an existing claim Whaley had against the facility. We again agree with the Supreme Court of Kentucky's reasoning and conclude Arredondo's execution of the pre-dispute arbitration agreement did not constitute the pursuit of legal action.

We hold the court of appeals erred in holding the HCPOA granted Arredondo authority to execute the arbitration agreement.

III. Conclusion

Under the facts of this case, neither the GDPOA nor the HCPOA granted Arredondo authority to execute the arbitration agreement. Therefore, we reverse the court of appeals and hold the arbitration agreement is unenforceable. We need not address Arredondo's argument that the arbitration agreement is unconscionable. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

REVERSED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I concur in the majority opinion. I write only to address Respondents' and the court of appeals' reliance on the obsolete phrase "chose in action." The majority takes two steps regarding Respondents' argument as to the meaning of the phrase "chose in action." The majority's first step is to hold that the phrase does not mean what Respondents claim it means. I completely agree with the majority. The second step is unnecessarily to define the phrase. In doing so, the majority brings a new and undeserved life to a phrase that—in my opinion—has no precise meaning in modern law. It is time for attorneys and courts to stop using such antiquated phrases, not to resuscitate them.

Historically, a "chose" was a "thing," as in a physical thing. *See* William C. Anderson, A DICTIONARY OF LAW 179 (1891) (defining "CHOSE" as "A thing recoverable by an action at law: a thing, personalty"); 1 Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY 288 (1869) (defining "CHOSE" as "A thing"). A "chose in action" was the legal right to bring an action in court to recover the thing, "A thing of which one has not the possession or actual enjoyment, but only a right to it, or a right to demand it by action at law." Burrill, *supra*, at 288. Even in the nineteenth century, however, the phrase had no precise definition, and the general definition changed over time according to usage. *See, e.g.*, William R. Anson, PRINCIPLES OF THE LAW OF CONTRACT 362 n.(b) (1919) ("The term *chose in action* has been in common use for a long time, but some doubts have been recently raised as to its precise meaning." (citing *Law Quarterly Review for 1983, 1894, 1895*)). In one lengthy attempt at explaining the meaning of the phrase, two authors wrote, "Originally the term was only applied to a right of action in the strict sense, that is, the right to bring an action at law, but subsequently it was extended to the right of taking proceedings in equity." 1 Stewart Rapalje and Robert L. Lawrence, A DICTIONARY OF AMERICAN AND ENGLISH LAW 207 (1883); *see also id.* ("A right of presentation to a benefice when the church is vacant is called in the old books a chose in action; but this use of the word is obsolete.") (citation omitted). Other early commentators described varying limits for the use of the phrase. *See, e.g.*, Percy Bordwell, *Seisin and Disseisin (Concluded) v. Chattels*, 34 Harv. L. Rev. 717, 722-23 (1921) (stating "it is hard to include a right to a chattel in the adverse possession of another as a chose in possession, just as it is hard to include under choses in action such incorporeal rights as patents, copyrights, and trade names which have none of the ephemeral characteristics of rights of action"); Thaddeus D. Kenneson, *Purchase for Value Without Notice*, 23 Yale L.J. 193, 194 (1914) (stating "a chose in action always presupposes a personal relation between two individuals").

In South Carolina, a "chose in action" included a right to property in the form of "notes or bonds," such as those "taken by an administrator at a sale of his intestate's estate." *Rhame v. Lewis*, 34 S.C. Eq. 269, 303 (13 Rich Eq. 93, 105) (Ct. App. 1867) (citing *Thackum v. Longworth*, 11 S.C. Eq. 267, 274 (2 Hill Eq. 132, 134) (Ct. App. L. & Eq. 1835)). Still, the phrase was used to describe "a thing" in the sense of an existing right in property that is not in the owner's current possession. The phrase is used in one subsection of our Rules of Civil Procedure, Rule 17(e), and in several current sections of the South Carolina Code, each retaining the link between the phrase and "property." *See, e.g.*, S.C. Code Ann. § 12-6-30(11) (2014) (defining "Tangible property" in the Income Tax Act to exclude "choses in action"); S.C. Code Ann. § 12-16-20(4) (2014) (defining "Intangible personal property" in the Estate Tax Act to include "choses in action"); S.C. Code Ann. § 16-23-710(17) (2015) ("'Property' . . . includ[es] . . . choses in action, and other similar interest in property."); S.C. Code Ann. § 33-36-840(2) (2006) (providing after merger of not-for-profit corporations, "The new or surviving corporation . . . possesses . . . all property, real and personal, applications for membership, all debts due on whatever account, and all other choses in action of each of the consolidating or merging corporations."); S.C. Code Ann. § 40-39-10(3) (Supp. 2020) (defining "Pledged goods" as to "Pawnbrokers" as "tangible personal property . . . , choses in action, . . . , which property is deposited with or otherwise actually delivered into the possession of a pawnbroker in the course of his business").

In the 1979 edition of BLACK'S LAW DICTIONARY, "Chose" still meant, "A thing; an article of personal property," *Chose*, BLACK'S LAW DICTIONARY (5th ed. 1979), and "Chose in action" still meant, "Right of proceeding in a court of law to procure payment of sum of money, or right to recover a personal chattel or a sum of money by action," *Chose in action*, BLACK'S LAW DICTIONARY (5th ed. 1979). Eventually, as usage changed, courts and commentators have expanded the definition. *See, e.g.*, *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344 n.3, 745 S.E.2d 90, 93 n.3 (2013) ("A 'chose in action' has been variously defined . . . ."); Anson, *supra*, at 362 n.1 ("The term '*chose* in action' may have once meant the physical *thing* to be recovered; but it now means an aggregate of legal relations that include one or more rights *in personam*. It does not include patents or copyrights, for in these rights are *in rem*."); *chose in action*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating the phrase includes "A proprietary right in personam, such as . . . a claim for damages in tort").

If there was a time in our history when the phrase conveyed a precise meaning, the phrase has lost that meaning as the passage of time brought new usages. What is left of "chose in action" is a descriptive phrase with no precise meaning, a phrase we should stop using because it is not only vague and meaningless but also obsolete. Today, if lawyers wish to write legal instruments such as powers of attorney with precise meaning, they should use phrases that in current usage are defined precisely, and they should avoid phrases like "chose in action" that mean nothing.

As the majority explains, the Supreme Court of the United States reversed the Kentucky Supreme Court's interpretation of a power of attorney regarding arbitration because the "clear statement rule" the Kentucky court's interpretation created "fails to put arbitration agreements on an equal plane with other contracts." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806, 812 (2017). Our Court, therefore, may not find a power of attorney inadequate to grant the authority to agree to arbitration based on what the document *does not say* about arbitration. In this case, our Court must examine what the General Durable Power of Attorney *does say* about Ms. Arredondo's authority to bind her father. Respondents rely on what they claim is clarity in the phrase "choses in action." In using the phrase "chose in action," however, the General Durable Power of Attorney does not grant any authority because the phrase does not mean anything. The majority's first step ends the analysis because the phrase "choses in action" does not say a thing about Ms. Arredondo's authority to bind her father to an arbitration provision.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nationwide Mutual Fire Insurance Company,
Respondent,

v.

Sharmin Christine Walls, Randi Harper, Wendy Timms in her capacity as Personal Representative of The Estate of Christopher Adam Timms, Deborah Timms,
Defendants,

Of whom Sharmin Christine Walls and Randi Harper are the Petitioners.

Appellate Case No. 2019-001596

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 28012
Heard November 19, 2020 – Filed March 10, 2021

REVERSED

Michael F. Mullinax, of Mullinax Law Firm, P.A., of Anderson, for Petitioner Sharmin Christine Walls; John

Kirkman Moorhead, of Moorhead LeFevre, P.A., of Anderson, for Petitioner Randi Harper.

John Robert Murphy and Wesley Brian Sawyer, of Murphy & Grantland, P.A., of Columbia, for Respondent Nationwide Mutual Fire Insurance Company.

Roy T. Willey, IV, and Eric M. Poulin, both of Anastopoulo Law Firm LLC, of Charleston, for Amicus Curiae United Policyholders. Frank L. Eppes, of Eppes & Plumblee, PA, of Greenville, Bert G. Utsey, III, of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Charleston and Joe Brewer, of the Law Office of D. Josey Brewer, of Greenville, for Amicus Curiae The South Carolina Association for Justice.

JUSTICE HEARN: In this declaratory judgment action, Nationwide relies on flight-from-law enforcement and felony step-down provisions[1] in an automobile liability insurance policy to limit its coverage to the statutory mandatory minimum. Following a bench trial and after issuance of this Court's opinion in *Williams v. Government Employees Insurance Co. (GEICO)*, 409 S.C. 586, 762 S.E.2d 705 (2014), the circuit court held the step-down provisions were void pursuant to Section 38-77-142(C) of the South Carolina Code (2015). The court of appeals reversed. We now reverse the court of appeals and hold that section 38-77-142(C) renders Nationwide's attempt to limit the contracted-for liability insurance to the mandatory minimum void.

FACTS

Three individuals—Sharmin Walls, Randi Harper, and Christopher Timms—were passengers in a vehicle driven by Korey Mayfield that crashed in Anderson County on July 11, 2008 following a high-speed chase by law enforcement. On the

[1] While Nationwide characterized the provisions as exclusions, they are more appropriately denominated as step-downs since, in the event the provisions are triggered, Nationwide is obligated to pay the mandatory minimum limits rather than the liability limit for which the parties contracted.

day of the accident, the group left from Walls' home in Walls' vehicle, a Chevrolet Lumina, driven by Mayfield. A trooper with the South Carolina Highway Patrol activated his blue lights after observing the Lumina traveling approximately twelve miles over the speed limit and swerving over the center line. Mayfield refused to pull over, and during the chase, the trooper's vehicle reached speeds of 109 miles per hour. All the passengers begged Mayfield to stop the car, but Mayfield refused. Eventually, the trooper received instructions to terminate the pursuit, which he did. Nevertheless, Mayfield continued speeding and lost control of the vehicle. Timms died in the single-car accident, and Walls, Harper, and Mayfield sustained serious injuries. After being charged with reckless homicide, Mayfield entered an *Alford* plea. *North Carolina v. Alford*, 400 U.S. 25 (1970).

At the time of the accident, Walls' automobile was insured through her Nationwide policy, which included bodily injury and property damage liability coverage with limits of $100,000 per person and $300,000 per occurrence. Walls also maintained uninsured motorist (UM) coverage for the same limits, but she did not have underinsured motorist (UIM) coverage. Walls' liability policy contained the following provisions:

> B. This coverage does not apply, with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law as of the date of the loss, to:
> …
> 6. Bodily injury or property damage caused by:
>
> a) you;
> b) a relative; or
> c) anyone else while operating your auto;
>
> (1) while committing a felony; or
> (2) while fleeing a law enforcement officer.

In reliance on those provisions, Nationwide paid only $50,000 in total to the injured passengers—the statutory minimum as provided by section 38-77-140—rather than the liability limits stated in the policy. S.C. Code Ann. § 38-77-140(A)(2) (2015). Safe Auto, Mayfield's insurance company, also paid a total of $50,000 to the passengers.

Nationwide brought this declaratory judgment action requesting the court declare that the passengers were not entitled to combined coverage of more than $50,000 for any claims arising from the accident. Walls answered, denying there was any evidence that the flight-from-law enforcement and felony provisions applied.[2]

Following a bench trial, the circuit court held in part that Mayfield was a non-permissive user and that the provisions at issue were unconscionable and void as against public policy. Thus, the circuit court held that Walls, Harper, and Timms' estate were entitled to recover $100,000 per person pursuant to the liability limits in Walls' policy. In the alternative, the court found that due to Mayfield's conduct in attempting to elude the police, the vehicle would be deemed uninsured as to the innocent passengers, and they should be entitled to recover pursuant to the UM provisions of the policy.

Two days after the issuance of the circuit court's order, *Williams v. GEICO*, 409 S.C. 586, 762 S.E.2d 705 (2014) was decided. Nationwide filed a Rule 59(e), SCRCP, motion. At the hearing on that motion, the passengers abandoned their argument with respect to UM coverage. In its post-trial order, the circuit court found that Mayfield was committing a felony and fleeing from the police at the time of the accident. Nevertheless, the circuit court held that the *Williams* decision prohibited step-down provisions pursuant to section 38-77-142(C).

Nationwide appealed, and the court of appeals reversed, holding the provisions did not violate our state's public policy or the statutory schemes of Titles 38 and 56. *Nationwide Mut. Fire Ins. Co. v. Walls*, 427 S.C. 348, 360, 831 S.E.2d 131, 138 (Ct. App. 2019). More specifically, the court of appeals noted that the *Williams* decision interpreted section 38-77-142(C) to prohibit provisions that reduced the contracted-for coverage to the mandatory minimum limit when "the policy's declaration page purport[ed] to provide a higher amount of coverage to a certain class of insureds." *Id.* at 358, 831 S.E.2d at 136-37 (citing *Williams*, 409

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[2] In her answer, Walls also asserted counterclaims and defenses, including: breach of contract regarding the liability, UM, and UIM coverage; bad faith refusal by Nationwide to honor the claims; and unconscionability, asserting that Nationwide's use of the provisions were void as against public policy. Mayfield and the passengers eventually entered into a stipulation of dismissal of the bad faith counterclaim; therefore, that issue is not before this Court.

S.C. at 603, 762 S.E.2d at 714). The court of appeals distinguished the family step-down provision at issue in *Williams* from the provisions in this case because Nationwide's provisions were not triggered by a party's relationship to the insured, but rather, by the conduct of the driver. *Walls*, 427 S.C. at 358, 831 S.E.2d at 137. Furthermore, the court of appeals noted that full coverage remained when injury was not the result of "foreseeably dangerous conduct that the insured [could] reasonably avoid." *Id.* at 358-59, 831 S.E.2d at 137. The court of appeals also held that pursuant to section 56-9-20 of the South Carolina Code (2018), insurers were permitted to place reasonable restrictions on coverage above the minimum limits. *Id.* at 359, 831 S.E.2d at 137 (quoting S.C. Code Ann. § 56-9-20(5)(d) (2018)). Therefore, the court of appeals held the provisions were not arbitrary or capricious, and further, the statutory mandatory minimum coverage provided protection to innocent passengers of a vehicle evading law enforcement. *Walls*, 427 S.C. at 359-60, 831 S.E.2d at 137. This appeal—in which only Walls and Harper are involved as petitioners—followed.

ISSUE PRESENTED

Do Nationwide's felony and flight-from-law enforcement step-down provisions violate section 38-77-142(C)?[3]

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The determination of whether coverage exists under an insurance policy is an action at law. *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 610, 730 S.E.2d 862, 864 (2012) (quoting *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011)). "'In an action at law tried without a jury, the appellate court will not

[3] At oral argument, counsel for Harper and Walls stated he was not pursuing a public policy argument. While we fully recognize the dissent is correct that courts across the country have upheld similar policy exclusions as not being contrary to public policy, we do not consider that issue because it was abandoned by Petitioners. Accordingly, we view the dissent's discussion of public policy as unnecessary since it is neither an issue before us nor a basis for our decision. We reiterate that our decision today is grounded only on the language of the statute and our decision in *Williams*.

disturb the trial court's findings of fact unless there is no evidence to reasonably support them.'" *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (quoting *Crossmann*, 395 S.C. at 46-47, 717 S.E.2d at 592). "However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard." *Kennedy*, 398 S.C. at 610, 730 S.E.2d at 864 (citing *Crossmann*, 395 S.C. at 47, 717 S.E.2d at 592).

DISCUSSION

Harper and Walls argue that section 38-77-142(C), as interpreted by this Court in *Williams*, prohibits any step-down provisions in a liability policy's coverage. Nationwide contends that section 38-77-142 operates as a mere omnibus provision, defining who must be covered in a liability policy, and that subsection (C) requires that policies not treat covered parties differently from one another. We agree with Harper and Walls.

Section 38-77-142(C) states, "Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void." S.C. Code Ann. § 38-77-142(C) (2015). Subsections (A) and (B) specify who must be covered in liability insurance policies, including named insureds and permissive users, as well as what injuries must be covered. S.C. Code Ann. § 38-77-142(A)-(B) (2015). More specifically, subsection (A) states in part:

> No policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of the vehicle or may be issued or delivered by an insurer…unless the policy contains a provision insuring the named insured and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured against liability for death or injury sustained or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of the vehicle by the named insured or by any such person.

S.C. Code Ann. § 38-77-142(A) (2015). Subsection (B) similarly provides who and what injuries must be insured and additionally contains a clause regarding notice that

states "mere failure of the insured to turn the motion or complaint over to the insurer" would not void coverage if the insured "otherwise cooperate[d] and in no way prejudice[d] the insurer." S.C. Code Ann. § 38-77-142(B) (2015). *See Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 272-73, 831 S.E.2d 406, 412 (2019) (In upholding notice clauses within insurance policies, we discussed the import of section 38-77-142(B) as demonstrating "the legislature's recognition of the role notice provisions play in insurance contracts."). Therefore, subsections (A) and (B) provide required provisions for liability insurance policies, and once the insurer places the required provisions in the policy with the agreed-upon limits of coverage, any attempt by the insurer to reduce the coverage afforded by the provisions is void pursuant to subsection (C).

In interpreting the same statutory provision, the *Williams* Court found it significant that section 38-77-142 required insurers to provide liability coverage to insureds "'within the coverage of the policy.'" *Williams*, 409 S.C. at 603, 762 S.E.2d at 714 (quoting S.C. Code Ann. § 38-77-142(A)-(B) (2015)). In that case, a husband and wife—both named insureds—were killed in a car accident when a train struck their vehicle. *Williams*, 409 S.C. at 591, 762 S.E.2d at 708. The couple had a motor vehicle insurance policy with GEICO that included liability limits of $100,000 per person and $300,000 per accident for bodily injury, and $50,000 per accident for property damage. *Id*. Within its policy, GEICO included a step-down provision that reduced coverage to the statutory minimum limits when an insured's relative sustained bodily injury. *Id*. at 592, 762 S.E.2d at 708. Rather than paying the full $100,000 as provided by the couple's policy, GEICO sought to pay the then-statutory minimum of $15,000 pursuant to the family step-down clause. *Id.* The personal representatives of the couple's estates filed a declaratory judgment action to determine the amount of liability proceeds GEICO was required to pay. *Id.* at 592, 762 S.E.2d at 709. The circuit court found in relevant part that the step-down provision was valid and did not violate public policy or section 38-77-142. *Id.* at 593, 762 S.E.2d at 709.

On appeal, this Court held that 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 (citing *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989); *Cobb v. Benjamin*, 325 S.C. 573, 580-81, 482 S.E.2d 589, 593 (Ct. App. 1997)). In examining section 38-77-142, the Court stated that the plain language of

subsections of (A) and (B) required a policy to provide coverage for the named insureds and permissive users "against liability for damage incurred 'within the coverage of the policy.'" *Williams*, 409 S.C. at 603, 762 S.E.2d at 714 (citing S.C. Code Ann. § 38-77-142 (A)-(B) (2015)). Further, the Court held that the face amount of coverage was relevant pursuant to section 38-77-142—not the statutory minimum limits of liability. *Williams*, 409 S.C. at 603, 762 S.E.2d at 714 (citing S.C. Code Ann. § 38-77-140 (2015)). In conclusion, the Court stated the family step-down provision violated section 38-77-142's prohibition and public policy. *Id.* at 607, 762 S.E.2d at 717.

Here, like GEICO's family step-down provision in *Williams*, Nationwide's provisions reduce coverage from the contracted-for policy limit of $300,000 per occurrence to the statutory minimum of $50,000 per occurrence for insureds when they are injured while either fleeing from law enforcement or engaging in a felony. In light of our interpretation of section 38-77-142(C) in our *Williams* decision, Nationwide's step-down provisions are void. Further, we have previously rejected the argument that section 56-9-20(5)(d) of the South Carolina Code (2018) allows limitations on excess coverage so as to render section 38-77-142(C) inapplicable. *Williams*, 409 S.C. at 607 n.8, 762 S.E.2d at 716 n.8 ("We disagree…that section 56-9-20(d) [sic]…somehow serves to thwart the application of section 38-77-142(C) because the [insureds] purchased coverage over the statutory minimum limits…. [S]ection 56-9-20(d) [sic] has no bearing on the application of *other* motor vehicle laws, such as section 38-77-142…."). Rather, we have held and affirm today that section 38-77-142(C) makes no distinction between mandatory minimum limits and excess coverage. *Id.* at 603, 762 S.E.2d at 714 ("Thus, it is the face amount of the coverage that is relevant under section 38-77-142, not the statutory minimum limits of liability coverage set forth in section 38-77-140…."). Moreover, in reaching this decision, we find it significant that the General Assembly has not amended section 38-77-142 since this Court decided *Williams* in 2014. *See York v. Longlands Plantation*, 429 S.C. 570, 576, 840 S.E.2d 544, 547 (2020) (finding the General Assembly's "silence over the past seven decades" important); *Wigfall v. Tideland Utils, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation.").[4]

[4] We reject the dissent's suggestion that our statutory interpretation is a thinly-disguised attempt to legislate from the bench. Our "judicial sleight of hand" is merely an effort to remain faithful to the language of the statute, as interpreted

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

REVERSED.

BEATTY, C.J. and FEW, J., concur. KITTREDGE, J., dissenting in a separate opinion in which JAMES, J., concurs.

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in *Williams*, which the General Assembly has seen fit not to alter in the nearly seven years since the opinion's issuance. Simply put, our decision is controlled by section 38-77-142, and should the General Assembly disagree with our interpretation, it may, of course, correct our construction by codifying certain exclusions or otherwise altering the statute. *See, e.g.*, Ark. Code Ann. § 23-89-205(1)-(2) (West 2020) (providing that an insurer may include an intentional act exclusion, a felony exclusion, and an evasion-from-law-enforcement exclusion); *see also* Ark. Code Ann. § 23-89-214 (West 2020) (expressly prohibiting step-down provisions that reduce coverage when the insured vehicle is involved in an accident and the driver is someone other than the insured).

JUSTICE KITTREDGE: Today, counter to every other jurisdiction in the country, a majority of this Court holds that a clear provision in an insurance policy—one which reduces coverage to the statutory minimum where an insured causes damage while fleeing a law enforcement officer—is unenforceable. We are told this decision reflects the intent and policy of the South Carolina General Assembly as set forth in section 38-77-142 of the South Carolina Code (2015). Specifically, the majority "hold[s] that section 38-77-142(C) renders Nationwide's attempt to limit the contracted-for liability insurance to the mandatory minimum void." I dissent. I would affirm the court of appeals, which I believe correctly held that the provisions reducing liability coverage to the mandatory minimum limit for "committing a felony" or "while fleeing a law enforcement officer" violate neither the statutory laws of South Carolina nor our state's public policy. *Nationwide Mut. Fire Ins. Co. v. Walls*, 427 S.C. 348, 831 S.E.2d 131 (Ct. App. 2019). I would adopt the excellent opinion of the court of appeals in every respect.

I.

Nationwide Mutual Fire Insurance Company issued a standard automobile liability policy to Sharmin Christine Walls. Subsequently, Walls and several friends decided to drive around Anderson in her Chevrolet Lumina, which was insured by the Nationwide policy. Because Walls had consumed a significant amount of alcohol that day, she allowed one of her friends, Korey Mayfield, to drive her car. The parties agree that Mayfield was a permissive user and, thus, an insured under the policy.[5]

A South Carolina state trooper spotted the Lumina speeding and crossing the yellow center line. The trooper activated his emergency lights and siren and attempted a traffic stop. Mayfield refused to pull over, and a chase ensued, reaching speeds in excess of 100 miles per hour. The trooper eventually abandoned the pursuit for public safety reasons, but his decision made no difference, for despite the lack of pursuit, Mayfield continued to drive dangerously in an effort to evade law enforcement. Shortly thereafter, the Lumina crashed on Leatherdale Road in Anderson County. The Lumina was traveling in excess of

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[5] I accept this stipulation notwithstanding the finding of the circuit judge that Mayfield was an unauthorized, non-permissive user. Perhaps this finding by the circuit court is a scrivener's error. The majority takes no issue with the circuit court's finding in this regard, and neither will I.

twice the posted speed limit at the time of the crash. As a result of the crash, one passenger died, and the other three passengers (including Mayfield and Walls) were seriously injured. Mayfield pled guilty to reckless homicide.

Walls's liability policy with Nationwide contained the following:

> B. This coverage does not apply, with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law as of the date of the loss, to:
>
> . . . .
>
> 6. Bodily injury or property damage caused by:
>
> a) you;
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> b) a relative; or
>
> c) anyone else while operating your auto;
>
> (1) while committing a felony; or
>
> (2) while fleeing a law enforcement officer.

Relying on the validity of this provision, Nationwide tendered $50,000, the statutory minimum required by section 38-77-140 of the South Carolina Code (2015). Walls, however, demanded the policy limits. In an effort to resolve the coverage dispute, Nationwide filed the underlying declaratory judgment action. There is no dispute as to the material facts. This case does not concern a motor vehicle accident involving general negligence or gross negligence principles. Mayfield intentionally fled from law enforcement. As the majority notes, "the circuit court found that Mayfield was committing a felony and fleeing from the police at the time of the accident."[6]

[6] Failure to stop for blue light—fleeing a law enforcement officer— is a felony in South Carolina when it results in great bodily injury or death. *See* S.C. Code Ann. § 56-5-750(C) (2018).

II.

I begin with the unassailable premise that South Carolina has long recognized that "[r]easonable exclusionary clauses which do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes are permitted." *Pa. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984). In this case, the court of appeals correctly followed the policy decision of our legislature in allowing contracted-for exclusions to reduce coverage for "fleeing a law enforcement officer"—conduct our legislature has deemed a crime. *See* S.C. Code Ann. § 56-5-750. Even our decision in *Williams v. GEICO*, which the majority claims compels the result today, acknowledged the "general rule [that] 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." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014).

An exclusion for criminal conduct does not preclude a claim in its entirety. The public policy, as determined by our legislature, seeks to provide a measure of protection to injured parties. More precisely, section 38-77-140(A) mandates that an automobile insurance policy issued in South Carolina must "contain[] a provision insuring the persons defined as insured against loss from [] liability" in specified minimum amounts. The reduction from excess coverage to a compulsory minimum is often referred to as a step-down. Here, the relevant subsection is section 38-77-140(A)(2) that provides for "[$50,000 in the event] of bodily injury to two or more persons in any one accident." Section 38-77-140 concludes with the following: "Nothing in this article prevents an insurer from issuing, selling, or delivering a policy providing liability coverage in excess of these requirements." S.C. Code Ann. § 38-77-140(B). In addition, "[w]ith respect to a policy which grants [] excess or additional coverage, the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is *required* by this article." S.C. Code Ann. § 56-9-20(5)(d) (2018) (emphasis added). Walls and Nationwide contracted for liability coverage in excess of the compulsory minimum, and the policy included the "committing a felony" and "fleeing a law enforcement officer" provisions.

Did the South Carolina Legislature intend to render the "committing a felony" and "fleeing a law enforcement officer" provisions void pursuant to section 38-77-142?

I am convinced our legislature intended no such thing.

In relevant part, section 38-77-142 provides:

> (A) No policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of the vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle that is principally garaged, *docked*, or used in this State unless the policy contains a provision insuring the named insured and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured against liability for death or injury sustained or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of the vehicle by the named insured or by any such person. Each policy or contract of liability insurance, or endorsement to the policy or contract, insuring private passenger automobiles principally garaged, *docked*, or used in this State, that has as the named insured an individual or husband and wife who are residents of the same household and that includes, with respect to any liability insurance provided by the policy, contract, or endorsement for use of a nonowner automobile a provision requiring permission or consent of the owner of the automobile for the insurance to apply.
>
> (B) No policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of a vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle principally garaged or used in this State without an endorsement or provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the

> policy or contract as a result of negligence in the operation or use of the motor vehicle by the named insured or by any other person. . . .
>
> (C) Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void.

(Emphasis added).

Notice the two references in subsection 38-77-142(A) to vehicles that are "docked" in South Carolina. The South Carolina General Assembly patterned this omnibus statute after a corresponding Virginia statute. *See* Va. Code Ann. § 38.2-2204(A) (2020). While South Carolina's statute applies to motor vehicles only, the Virginia statute applies to vehicles *and* watercraft "garaged, docked, or used in" Virginia. The inadvertent inclusion of the word "docked" in the South Carolina omnibus statute makes it abundantly clear that our legislature adopted the Virginia statute.

No decision examining the Virginia law has interpreted the statute so as to prohibit an illegal acts exclusion, as the majority here does today. In fact, I cannot find a single case in any jurisdiction that supports today's decision. Neither the majority nor Petitioner Walls has cited a single reported decision that purports to buttress today's result—that is, except for *Williams v. GEICO*, this Court's most recent foray into judicially legislating public policy as it relates to insurance law in South Carolina.

And so we come to this Court's 2014 decision in *Williams v. GEICO*. Petitioner Walls and the majority rely exclusively on *Williams* to strike down not only the "committing a felony" and "fleeing a law enforcement officer" exclusions in this policy, but *all* so-called step-downs that reduce liability coverage to the statutory minimum when an insured engages in criminal conduct that is clearly addressed in the policy. I dissented in *Williams*. I did not, however, disagree with the Court's policy-making rationale. I dissented because I believed the legislature, not this Court, establishes policy. I did not believe section 38-77-142 mandated the Court's policy decision. I believed (and still believe) the key language in section 38-77-142(C)—any provision that purports "to limit or reduce the coverage afforded by the provisions *required* by this section is void"—addresses the mandatory requirement of minimum coverage. (Emphasis added.) I note the title to section

38-77-142 includes the phrase "required provisions." Beyond the required mandatory coverage, when addressing voluntary coverages and policy provisions, I would not void policy provisions based on a misguided and myopic view of section 38-77-142.

Yet, if a *Williams* situation were presented to this Court again, I would be inclined to follow the *Williams* decision because, despite being given the chance to do so, the legislature has not overruled that decision. However, the issue before us today does not remotely resemble the issue in *Williams*. In *Williams*, husband and wife insureds were killed in an accident when their vehicle was struck by a train. The GEICO policy provided an exclusion (beyond the statutory minimum) for liability coverage when there is "bodily injury to any insured or any relative of an insured residing in his household." Thus, the Court was presented with a family step-down provision that reduced liability coverage when a family member of the at-fault insured was the claimant.

The *Williams* Court reviewed the Motor Vehicle Financial Responsibility Act and noted that the purpose of the Act "is to give greater protection to those injured through the *negligent* operation of automobiles." *Williams*, 409 S.C. at 599, 762 S.E.2d at 712 (emphasis added). While the majority in *Williams* acknowledged "a wide divergence of authority in this area," it gave controlling weight to cases from jurisdictions that disfavored family step-down provisions, most notably the Commonwealth of Kentucky. *Id.* at 604–07, 762 S.E.2d at 715–16 (discussing in detail *Lewis ex rel. Lewis v. West American Insurance Co.*, 927 S.W.2d 829, 833 (Ky. 1996), in which the Supreme Court of Kentucky found, "To uphold the family exclusion would result in perpetuating socially destructive inequities.").

It appears family step-down provisions were designed to address the possibility of collusion among family members. It further appears that the concern with family collusion was often more theoretical than real, and some courts, as in *Lewis*, struck down the perceived anachronistic family step-down provision on policy grounds. The husband and wife insureds in *Williams* were both killed in the accident—to be sure, no collusion existed and thus the purported rationale for the family step-down did not exist. The *Williams* majority agreed with the public policy reasoning of *Lewis* and observed that "it would indeed be an unusual public policy that would condone denying coverage to a child where he or she is catastrophically injured while being driven by a parent to school, but would allow recovery where the parent injures a stranger while on the way to work." *Id.* at 607, 762 S.E.2d at 716.

However, the Court in *Williams* did not stop with merely declaring its preferred policy. That policy preference had to be tied to the South Carolina Legislature. The answer, of course, was found in a forced construction of section 38-77-142. *Williams* concluded that the family step-down provision was in contravention of section 38-77-142 and "to allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary, capricious and injurious to the public good." *Id.* at 607, 762 S.E.2d at 717.

From either a public policy or statutory construction perspective, the policy exclusions here for "committing a felony" and "fleeing a law enforcement officer" bear not the slightest resemblance to the family step-down provision in *Williams*. The suggestion that *Williams* controls the decision here is specious. The focus in *Williams* was on the purpose of the law—to protect those injured by the *negligent* operation of automobiles. In this regard, section 38-77-142 tracks the stated purpose of the Motor Vehicle Financial Responsibility Act by providing in subsection (A) that mandatory coverage is to provide coverage for "liability for death or injury sustained or loss or damage incurred within the coverage of the policy or contract *as a result of negligence in the operation or use of the vehicle by the named insured or by any such person*." (Emphasis added). Subsection (B) of section 38-77-142 contains a similar reference to "negligence in the operation" of the vehicle. Here, we are confronted not with negligence but the intentional criminal act of an insured fleeing from law enforcement. Next, *Williams* dealt with *who* was covered. The point in *Williams* was that one insured could not be singled out for disfavored treatment as compared to another insured. Here, the focus is instead on the conduct of the insured in causing the injury; there are not different levels of coverage for injured parties—all are treated the same.

I am confident Nationwide's specific criminal conduct policy exclusions are completely consistent with section 38-77-142, but the majority rules otherwise. In so ruling, the Court is legislating. Make no mistake about it. The Court not only interprets section 38-77-142 to its own liking, the Court majority nullifies the many statutory provisions that allow parties freedom to contract for additional coverage and additional provisions, including section 38-77-140(B) and section 56-9-20(5)(d). Attributing the result today to the South Carolina General Assembly under the guise of statutory interpretation is judicial sleight of hand.

Finally, I address the suggestion that the decision today is in line with the public policy of South Carolina. I reiterate that where the legislature has spoken, the

legislature establishes public policy. This Court may intervene and overrule a public policy determination of the legislature only when that policy contravenes the South Carolina Constitution or United States Constitution. As noted, with respect to automobile insurance policies, every other jurisdiction in the United States that follows a similar statutory scheme permits criminal conduct exclusions that reduce liability coverage to the statutory minimum where the injury is caused by an insured. I believe the universal acceptance of the validity of such exclusions (or step-down provisions) reflects the public policy. *See* 8A *Couch on Insurance* § 121:94 & n.3 (3d ed. Dec. 2020 Update) (collecting cases standing for the proposition that "[a]n exclusion in an automobile policy as to loss while the automobile used is engaged in unlawful flight from the police is not against public policy"). Justifications for such exclusions are obvious and common sense. The "committing a felony" and "fleeing a law enforcement officer" exclusions address conduct that significantly increases the insured risk, and an insured can easily avoid the application of the exclusions by obeying the law. *See, e.g.*, David J. Marchitelli, Annotation, *Automobile Liability Insurance Policy Exclusion as Applied to Loss or Injury Resulting from Insured's Flight from Police*, 41 A.L.R.6th § 527 (2009) ("Efforts to exclude coverage for such behavior are often bolstered by judicial and legislative policies against allowing individuals to insure themselves against the consequences of their own intentional misconduct.").[7] The "committing a felony" and "fleeing a law enforcement officer" exclusions manifestly support public policy. To borrow from *Williams*, the "committing a felony" and "fleeing a law enforcement officer" exclusions in the Nationwide and Walls policy are in no manner "arbitrary, capricious [or] injurious to the public good." *See Williams*, 409 S.C. at 607, 762 S.E.2d at 717.

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[7] I fully understand that most every motor vehicle accident is the result of a criminal violation, such as speeding, running a red light, and the list could go on. In the insurance context, those claims are treated as negligence, and properly so. It would be wholly improper for a sneaky insurance company to exclude criminal acts generally, thereby reducing coverage to the mandatory minimum in virtually every case. The policy exclusion for criminal conduct must be precise and transcend the realm of negligence, as the Nationwide and Walls policy here does. Nationwide and Walls excluded liability coverage for "committing a felony" (an understood term of art) and "fleeing a law enforcement officer" (intentional criminal conduct proscribed by a specific statute).

I dissent.

JAMES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mohsen A. Baddourah, as a member of the City Council of the City of Columbia, Appellant,

v.

Henry McMaster, in his capacity as Governor for the State of South Carolina, Respondent.

Appellate Case No. 2017-002576

Appeal from Richland County
G. Thomas Cooper Jr., Circuit Court Judge

Opinion No. 28013
Heard October 14, 2020 – Filed March 10, 2021

AFFIRMED AS MODIFIED

Tobias G. Ward Jr. and J. Derrick Jackson, of Tobias G. Ward, Jr., PA, Joseph M. McCulloch Jr., and Kathy R. Schillaci, all of Columbia, for Appellant.

Thomas A. Limehouse Jr., of Office of the Governor, of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: Governor Henry McMaster issued an order suspending Mohsen Baddourah from his position as a member of the Columbia City Council after Baddourah was indicted for second-degree domestic violence.

Baddourah initiated this declaratory judgment action in the circuit court, seeking a determination that (1) he is a member of the Legislative Branch and is, therefore, excepted from the Governor's suspension power under the South Carolina Constitution; and (2) second-degree domestic violence is not a crime involving moral turpitude, so it is not an act that is within the scope of the Governor's suspension power. The circuit court dismissed Baddourah's complaint on the ground the court lacked subject matter jurisdiction and, alternatively, for failure to state a cause of action. We affirm as modified.

I. FACTS

Baddourah was elected to his second term representing District 3 on the Columbia City Council, for the period of January 1, 2016 to December 31, 2019. On July 2, 2016, Baddourah was in the midst of a divorce and custody battle when he was arrested for an alleged altercation involving his estranged wife. He was subsequently indicted on a charge of second-degree domestic violence.

On March 13, 2017, the Governor issued Executive Order 2017-05, finding second-degree domestic violence is a crime of moral turpitude[1] and suspending Baddourah from his position as a member of the Columbia City Council pursuant to article VI, section 8 of the South Carolina Constitution "until . . . the above-referenced charge is resolved, at which time further appropriate action will be taken by the undersigned."

After this Court declined to hear Baddourah's challenge to the Executive Order in our original jurisdiction, Baddourah filed a declaratory judgment action in the circuit court in July 2017. Baddourah asserted that, while the Governor may suspend any officer of the state or its political subdivisions who has been indicted for a crime involving moral turpitude, South Carolina's Constitution includes an exception for "members and officers of the Legislative and Judicial Branches," citing S.C. Const. art. VI, § 8. Baddourah sought a determination that (1) he is excepted from the Governor's suspension power under article VI, section 8 because he is a

[1] Prior to the suspension, the Governor sought an opinion from the South Carolina Attorney General's Office as to whether second-degree domestic violence is a crime involving moral turpitude for purposes of the Governor's suspension power under article VI, section 8. The opinion of the Attorney General was "that a court would most likely conclude that domestic violence 2nd degree is a crime of moral turpitude" for this purpose. *See* S.C. Att'y Gen. Op. (Mar. 9, 2017), 2017 WL 1095385, at *1.

member of the Legislative Branch in his position on the Columbia City Council, and (2) the Executive Order is not enforceable because second-degree domestic violence is not a crime involving moral turpitude. In addition, Baddourah sought a mandatory injunction staying enforcement of the Executive Order and an award of attorney's fees.

By order filed November 9, 2017, the circuit court granted the Governor's motion to dismiss Baddourah's complaint. The court first ruled dismissal was proper under Rule 12(b)(1), SCRCP, based on a lack of subject matter jurisdiction. The circuit court found the Governor's suspension power is discretionary and under the separation of powers doctrine of the South Carolina Constitution, courts may not review discretionary acts by the Executive Branch, so the Executive Order was not subject to court review.

The circuit court alternatively found that, even accepting Baddourah's factual allegations as true, his complaint failed to state sufficient facts to constitute a cause of action or claim for relief and should, therefore, be dismissed under Rule 12(b)(6), SCRCP. The circuit court found Baddourah's argument that he is a member of the Legislative Branch by virtue of his position on the Columbia City Council was without merit, as the text of the state constitution indicated that "Legislative Branch" was meant to refer to members of the South Carolina General Assembly. The circuit court further found that it "need not reach or decide the question of whether Domestic Violence, Second Degree, constitutes a 'crime involving moral turpitude' for purposes of article VI, section 8," as this phrase is not defined in the text of the state constitution and, therefore, its meaning must be determined by the Governor in his sole discretion.

Baddourah appealed to the court of appeals, and this Court certified the appeal for review pursuant to Rule 204(b), SCACR. *See Baddourah v. McMaster*, Appellate Case No. 2017-002576, S.C. Sup. Ct. Order dated June 16, 2020.

II. DISCUSSION

On appeal, Baddourah argues the circuit court erred in (1) dismissing his complaint based on a lack of subject matter jurisdiction; (2) alternatively, dismissing the action for failing to state a cause of action, after finding he was not a member of the Legislative Branch; and (3) failing to address whether second-degree domestic violence is a crime of moral turpitude. Baddourah asserts this appeal concerns novel issues that should not have been decided on a motion to dismiss.

As an initial matter, we note that, a few days before oral argument, the Governor submitted supplemental filings indicating both Baddourah's suspension and term of office have ended and suggesting the appeal should be dismissed for mootness.[2] We decline to dismiss the appeal under the circumstances present here. Baddourah promptly challenged the Executive Order when he was first suspended in 2017, but the litigation continued over an extended period, before this Court's certification of the appeal. Moreover, the appeal concerns issues that are capable of repetition, yet evading review, so they are appropriate for our consideration. The suspension of Baddourah, even if appropriate, resulted in a period of approximately 1.5 years where the residents of District 3 had no representation on the Columbia City Council, so bringing clarity to the questions before the Court is highly desirable for all concerned. *Cf., e.g.*, *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431–32, 468 S.E.2d 861, 864 (1996) (recognizing that a court may take appellate jurisdiction, despite the mootness of a specific case, if the issue raised is a matter that is capable of repetition yet evades review); *id.* at 432, 468 S.E.2d at 864 (observing "[s]hort-term student suspensions, by their very nature, are completed long before an appellate court can review the issues they implicate" and concluding such cases "clearly fit[] into the evading review exception of the mootness doctrine").

A. Subject Matter Jurisdiction

Baddourah contends the circuit court erred in dismissing his complaint under Rule 12(b)(1), SCRCP after finding it lacked subject matter jurisdiction to review discretionary acts by the Governor. We agree.

"A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). A judgment is void and without legal effect if a court does not have jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "The question of subject

[2] In his supplemental filings, the Governor stated Baddourah's indictment was nolle prossed in 2018, after Baddourah completed a pretrial intervention program, and by Executive Order 2018-51, the Governor ended Baddourah's suspension from the Columbia City Council on October 17, 2018. Baddourah served on the Columbia City Council until his term ended on December 31, 2019. This Court certified the appeal in June 2020, but the issue of mootness was not raised until just prior to oral argument in October 2020.

matter jurisdiction is a question of law for the court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citation omitted).

The subject matter of this declaratory judgment action concerns the Governor's suspension power under the South Carolina Constitution. In particular, article VI, section 8 states the Governor has the power to suspend officers of the state and its political subdivisions under the following specified conditions:

> Any officer of the State or its political subdivisions, ***except members and officers of the Legislative and Judicial Branches***, who has been indicted by a grand jury for a ***crime involving moral turpitude*** or who has waived such indictment if permitted by law ***may be suspended*** by the Governor until he shall have been acquitted. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law.

S.C. Const. art. VI, § 8 (emphasis added).

The circuit court found that, "[b]y using the word 'may,' this provision represents a textual commitment of the question to the Governor, in the exercise of his discretion, and makes clear that the Governor's suspension authority is neither automatic nor ministerial." The circuit court noted courts have jurisdiction to review ministerial acts of the Governor; however, where the Governor's authority is discretionary in nature, courts may not substitute their judicial discretion for that of the executive without violating the separation of powers provision of the South Carolina Constitution. Accordingly, the circuit court found dismissal was proper because it lacked subject matter jurisdiction to consider Baddourah's complaint. *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.").

We hold the circuit court erred in finding it lacked subject matter jurisdiction in this case. Baddourah alleged the Governor did not have the power to suspend him under article VI, section 8 of the South Carolina Constitution because (1) this provision expressly excepts members of the Legislative Branch, and (2) it only authorizes suspension for a crime of moral turpitude. The circuit court was asked to make legal determinations—whether Baddourah qualifies as a member of the

Legislative Branch and whether the offense qualifies as a crime involving moral turpitude. These legal questions involve interpretation of the constitution to determine the extent of the Governor's suspension power, a subject that is appropriate for judicial determination. *See Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 123, 691 S.E.2d 453, 461 (2010) ("It is the duty of this Court to interpret and declare the meaning of the constitution."); *Rose v. Beasley*, 327 S.C. 197, 206, 489 S.E.2d 625, 629 (1997) ("Under South Carolina law, the Governor can neither appoint to office nor suspend or remove from office unless the power to do so is conferred upon him by the Constitution or statute.").

The determination of these legal questions does not implicate the separation of powers clause. Consequently, we hold the circuit court erred in dismissing Baddourah's complaint based on its finding that it lacked subject matter jurisdiction.

B. Failure to State a Cause of Action

Baddourah further argues the circuit court erred in alternatively dismissing his action under Rule 12(b)(6), SCRCP, for failing to state a cause of action. The circuit court based this conclusion on two subsidiary findings: (1) Baddourah was not a member of the Legislative Branch and, thus, was not excepted from the Governor's suspension power, and (2) whether second-degree domestic violence qualifies as a crime of moral turpitude was solely within the Governor's discretion and need not be addressed by the courts. We shall address each point in turn.

1. Legislative Branch Exception

Baddourah first asserts the circuit court erred in finding he was not excepted from the Governor's suspension power as a member of the "Legislative Branch." We disagree.

The circuit court found "[t]he exclusion of 'members and officers of the Legislative and Judicial Branches' from section 8 of article VI is derived from the separation of powers prescribed in the Constitution of 1895." The court stated, "This separate, tripartite structure is expressly memorialized in article I, section 8, which mandates that . . . the legislative, executive, and judicial powers" of state government "shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." *See* S.C. Const. art. I, § 8.

The circuit court explained that, by referring to "the legislative, executive, and judicial powers" as the functions "of one of said departments," the constitution's framers were directly referring to the three distinct "Departments" of state government addressed in three separate articles of the constitution. *See* S.C. Const. art. III (entitled, "Legislative Department"); S.C. Const. art. IV (entitled, "Executive Department"); S.C. Const. art. V (entitled, "Judicial Department"). By capitalizing "Legislative and Judicial Branches" in article VI, section 8, the circuit court found, the framers essentially employed defined terms, craving reference to their use elsewhere in the constitution, namely, articles III and V, which address, respectively, the Legislative and Judicial Departments.

The circuit court highlighted the language employed in article III, governing the Legislative Department, which confirms South Carolina's legislative power is vested in "two distinct branches" of state government:

> The ***legislative power of this State*** shall be vested in ***two distinct branches***, the one to be styled the "Senate" and the other the "House of Representatives," and both together the "General Assembly of the State of South Carolina."

S.C. Const. art. III, § 1 (emphasis added). The circuit court stated: "[T]he relevant text is unambiguous and does not mention municipal officials or contemplate that they will be viewed as members of the Legislative Branch. Indeed, municipal government is separately addressed elsewhere in the constitution," citing S.C. Const. art. VIII (entitled, "Local Government").

The circuit court found further support for the conclusion that the term "Legislative Branch" does not include members of municipal councils because the text of other, unrelated constitutional provisions, such as a section addressing the adoption of the constitution and the terms of elected officials, shows the drafters were capable of distinguishing "legislative" officers from other types of officers. *See, e.g.*, S.C. Const. art. XVII, § 11 ("All officers, State, executive, legislative, judicial, circuit, district, County, township and municipal, who may be in office at the adoption of this Constitution . . . shall hold their respective offices until their terms have expired and until their successors are elected or appointed and qualified as provided in this Constitution . . . .").

We find Baddourah, as a member of the Columbia City Council, is a member of a local "legislative body," which has been delegated authority by the state's highest legislative body, the General Assembly. *See generally Noble v. Ternyik*, 539 P.2d 658, 660 (Or. 1975) (referencing the highest legislative body of a state and "lesser" or "subordinate" legislative bodies to which a state has delegated some legislative power); *Issa v. Benson*, 420 S.W.3d 23, 26–27 (Tenn. Ct. App. 2013) (discussing "subordinate legislative bodies like city councils" that perform some legislative functions).

Baddourah's membership in a local or subordinate "legislative body," however, does not make him a member of the "Legislative Branch" as that term is used in our constitution, nor confer on him all of its attendant functions. Rather, the meaning must be discerned from the context in which it is used and an examination of other constitutional provisions. *See generally Carroll v. Town of York*, 109 S.C. 1, 10, 95 S.E. 121, 124 (1918) (holding under the Constitution of 1895, "the legislative branch of the government has the exclusive power of taxation, but may delegate it to towns for municipal purposes, and may therefore restrict the towns in that respect").

The constitutional provisions cited by the circuit court, including the directive governing the separation of powers in article I, section 8 (providing a separation of the legislative, executive, and judicial "powers" in the respective "departments"), as well as our review of other portions of the constitution, leads to the conclusion that the framers' reference to the "Legislative Branch" was intended to refer to the Senate and the House of Representatives (which it denominated the two legislative branches). In other words, the General Assembly. *See* S.C. Const. art. III (governing the "Legislative Department"); art. III, § 1 (indicating the legislative power of the state is vested in two "branches" of state government, the Senate and the House of Representatives, which together comprise the General Assembly).

While Baddourah understandably takes issue with the fact that the constitution did not just simply refer to the "General Assembly" in the exception to the Governor's suspension power, we agree with the circuit court that the genesis for the distinction was respect for the separation of powers provision of article I, section 8. The purpose of the exception in the provision outlining the Governor's suspension power was to prevent the Governor, part of the Executive Branch, from intruding on or removing officers in the Legislative and Judicial

Branches,[3] and article VI, section 8 (concerning the Governor's suspension power) echoes the language used in article I.

Various terms have been used to describe the divisions of government. The most common descriptions, however, refer to the executive, legislative, and judicial "branches" of government. *See Sloan v. Sanford*, 357 S.C. 431, 436, 593 S.E.2d 470, 473 (2004) (discussing "the separation of powers of the three branches of government, that is, [the need] to keep the ***executive, judicial, and legislative branches*** of government separate" (emphasis added)). This Court, recognizing the importance of the separation of the three co-equal branches of government, recently changed its public denomination from the Judicial Department to the Judicial Branch to better conform with this prevailing terminology and to disabuse the public of the notion that the Judicial Department/Branch is a department within the Executive Department/Branch. For all the foregoing reasons, we hold the circuit court did not err in finding Baddourah was not a member of the Legislative Branch and, thus, was not excepted from the Governor's suspension power.

2. Crimes Involving Moral Turpitude

Baddourah next argues the circuit court erred in dismissing his complaint under Rule 12(b)(6), SCRCP for failing to state a cause of action, after finding the question of whether the offense charged was a crime involving moral turpitude need not be addressed by the courts. We agree.

In dismissing Baddourah's complaint for a declaratory judgment, the circuit court found that it "need not reach or decide the question of whether" second-degree domestic violence constitutes a crime involving moral turpitude for purposes of article VI, section 8. The court reasoned that, because this phrase is not defined in the text of the South Carolina Constitution, its application must be left solely to the determination of the Governor in the exercise of his discretion, citing *McConnell v. Haley*, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011) ("Because there is no indication in the Constitution as to what constitutes an 'extraordinary occasion' to justify an extra session of the General Assembly, this matter must be left to the

[3] For example, the General Assembly has its own procedures for the punishment and expulsion of officers. *See* S.C. Const. art. III, § 12 ("Each house shall . . . punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member . . . .").

discretion of the Governor and this Court may not review that decision."). The circuit court found this was particularly true where the Governor had requested and obtained an Attorney General opinion, which had confirmed the Governor's conclusion that second-degree domestic violence qualified as a crime of moral turpitude for purposes of article VI, section 8. *See supra* note 1. As a result, the circuit court stated, "it cannot be said that [the Governor's] exercise of his discretion to temporarily suspend [Baddourah] was arbitrary."

(a) Propriety of Court Ruling on Offense

Baddourah first asserts the circuit court erred in failing to address his contention that second-degree domestic violence is not a crime of moral turpitude. Baddourah states that, although the circuit court refused to address the question, the Governor argued in his motion to dismiss that the offense is a crime of moral turpitude, yet did "not cite a single case where a South Carolina court has determined this." Baddourah also asserts the circuit court erred in relying on *McConnell* to rule that a term addressing the Governor's authority is discretionary where it is not defined in the constitution, as the circumstances here are distinguishable. We agree.

Baddourah maintains that, while it is not defined in the constitution, the concept of "a crime of moral turpitude," in contrast to the situation in *McConnell*, is a recognized term of art that has been ruled on by numerous jurisdictions. He opines that "it would be an absurd result if the Governor and the [AG] can review and interpret the case law on what constitutes a crime of moral turpitude, but the court whose primary job it is to interpret the law cannot."

In response, the Governor contends "the circuit court properly rejected [Baddourah's] latest attempt to litigate the underlying criminal charge against him by declining to address specifically whether [Baddourah's] indictment for Domestic Violence, Second Degree charges a 'crime involving moral turpitude.'" The Governor maintains the circuit court correctly found the term was undefined in the constitution, so its definition must be left solely to his discretion. We disagree.

We find the circuit court erred in failing to address whether second-degree domestic violence is a crime involving moral turpitude. Baddourah is not attempting to litigate his criminal charge (which the Governor acknowledges has been dismissed, see *supra* note 2). We do agree that the Governor's exercise of his suspension power is a matter left to his sole discretion. However, defining terms used in the state's constitution is not. It is well settled that the interpretation of the

state's constitution is a matter for the courts. The interpretation of the constitution necessarily requires defining the meaning of its terms.

The Governor's exercise of his suspension power is predicated on the constitution, which provides the Governor can suspend any officer of the state or its political subdivisions who has been indicted for a crime of moral turpitude, unless the individual is a member or officer of the Legislative or Judicial Branches. Because we have concluded Baddourah is not a member of the Legislative Branch, the only question remaining is whether the offense is one involving moral turpitude. This point is dispositive because it determines if the Governor had the requisite authority to issue the suspension order.

A crime of moral turpitude is a term of art that has been defined by South Carolina law, and whether an offense qualifies as a crime of moral turpitude is a question that is appropriate for the courts, contrary to the ruling of the circuit court.[4] *See State v. Yates*, 280 S.C. 29, 37, 310 S.E.2d 805, 810 (1982) ("Whether a particular offense constitutes a crime of moral turpitude has been developed in South Carolina on a case by case basis as a matter of common law."), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also State v. Major*, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990) (stating "[i]n determining whether a crime is one involving moral turpitude, the Court focuses primarily on the duty to society and fellow men which is breached by the commission of the crime" (alteration in original) (citation omitted)).

Because the circuit court did not rule on this novel question, Baddourah asks the Court to address his argument that second-degree domestic violence is not a

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[4] To the extent the circuit court relied on *McConnell* in finding the issue was not appropriate for determination by the courts, we find *McConnell* involved a distinguishable situation that ultimately did not turn on the point for which it was cited by the circuit court. *McConnell* focused on a constitutional provision stating "[t]he Governor may ***on extraordinary occasions*** convene the General Assembly in ***extra*** session." *McConnell*, 393 S.C. at 138, 711 S.E.2d at 887 (emphasis added by the Court). While the Court held the term "extraordinary occasion" must, of necessity, be left to the Governor's discretion since it was undefined in the constitution, the Court's decision actually turned on the meaning of an "extra" session, which the Court recognized has a readily discernible meaning, i.e., the Governor cannot convene an "extra" session when the General Assembly is already in session and has not adjourned *sine die*. *Id.*

crime involving moral turpitude. Due to the lengthy period of time this action has been pending in the courts and the desirability of bringing closure to the parties, we do so in the interest of judicial economy. We begin by reviewing, as a logical starting point, the origins of the term "crimes involving moral turpitude."

(b) Development of "Crimes Involving Moral Turpitude"

"Moral turpitude" has been present in the law of the United States for well over two centuries. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1002 (2012). The beginning of its development can be traced to social and political discourse in the early nineteenth century, when recitations about the "honor"—or lack thereof—of public figures shaped the political landscape. *Id.* at 1010–11. Because the government had not yet developed institutional routines, reputation was a key factor used in the early Republic to judge individuals, and "moral turpitude" became a term for characterizing their conduct. *See id.* at 1011. The phrase "moral turpitude" appeared in the published letters, pamphlets, speeches, and private correspondence of many notable political figures of the time; it was a term denoting "honor's opposite" and was a concept taken from classical thinkers such as Cicero, a figure the nation's founders admired.[5] *Id.* at 1010–11.

This concept naturally extended to the law of defamation because printed statements of dishonor "could 'damn[] a man's reputation for all time.'" *Id.* at 1011 (alteration in original) (citation omitted). English law had already established "the rough principle" that spoken words implying a plaintiff was guilty of a crime punishable by imprisonment was actionable per se, i.e., without proof of damages. *Id.* at 1016. American courts struggled to define the boundaries of the English rule, such as whether the line should be drawn between felonies and misdemeanors, or by the term of punishment. *Id.* In these circumstances, the "nascent American legal system" attempted "to invent a new rule for an old tort." *Id.* The New York Supreme Court did so in 1809, in *Brooker v. Coffin*, 5 Johns. 188, 191–92 (N.Y. Sup. Ct. 1809), when it adopted the rule that a crime would be deemed actionable as slander

[5] In 45 B.C., the Roman philosopher Marcus Tullius Cicero, in his multi-volume work, *De Finibus Bonorum et Malorum* (i.e., On the Ends of Good and Evil), equated virtue with moral excellency and described moral turpitude as a most undesirable trait: "[A]s virtue or moral excellency is for itself to be valued and desired, so vice or moral turpitude is to be hated and avoided." Simon-Kerr, *supra*, at 1011 & n.75 (citing an 1812 translation, 3 Cicero, *De Finibus Bonorum et Malorum* 158 (Jeremy Collier, ed., Samuel Parker, trans., 1812)).

per se if the words, if true, would result in indictment for a crime involving moral turpitude or subject a person to an infamous punishment. *Id.* at 1016–17. The New York court noted a "contradiction of cases" then existed, and it believed its rule would provide a suitable criterion; however, the court did not actually define moral turpitude in its opinion. *Brooker*, 5 Johns. at 192.

Over forty-five years later, after numerous courts had failed to come to a consensus and there was still no treatise or legal dictionary that defined moral turpitude, the Supreme Court of Tennessee turned to the definition in Webster's Dictionary, which stated "[m]oral turpitude is said to imply 'inherent baseness or vileness of principle in the human heart; extreme depravity.'" *See* Simon-Kerr, *supra*, at 1022 & 1022 n.155 (alteration in original) (quoting *Smith v. Smith*, 34 Tenn. (2 Sneed) 473, 479 (1855)). The Tennessee court's definition from Webster's "provided a lasting definition that could be and often was quoted in cases necessitating a moral turpitude analysis," and "it was [eventually] incorporated almost verbatim into law treatises." *Id.* at 1022 n.155.

The application of moral turpitude was also extended to the law of evidence, where it was used to evaluate witness impeachment issues based on the reasoning that "evidence of a person's reputation was relevant to his or her credibility." *Id.* at 1025–26. By the late nineteenth century, many courts "had endorsed formal rules permitting evidence of crimes or acts involving moral turpitude for impeachment[.]" *Id.* at 1026. However, in contrast to its use for the law of defamation, "moral turpitude proved an uneasy fit as a standard for impeachment evidence." *Id.* Observers have noted that the difficulty lies in the fact that there is a difference between "character," which is what a person *really is*, and "reputation," which is what a person *seems to be*. *Id.* As evidentiary rules matured, courts criticized the moral turpitude standard as indeterminate, noting it "often did mire courts in a definitional morass." *Id.* at 1027, 1033. After Congress's adoption of the Federal Rules of Evidence in 1975, most, but not all, states abandoned moral turpitude as an evidence standard and turned to an analysis based on (1) the length of the sentence or (2) whether the offense involved dishonesty or a false statement, regardless of the punishment.[6] *See id.* at 1027, 1034.

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[6] South Carolina echoes the federal rule. *See* Rule 609(a), SCRE (allowing impeachment with evidence of (1) a conviction for a crime that is punishable by death or imprisonment in excess of one year, or (2) a crime involving dishonesty or false statement, regardless of the punishment).

Moral turpitude was also appropriated for use in other fields, such as voting rights,[7] juror disqualification, professional licensing, and immigration law. *Id.* at 1001; *see also* Note, *Crimes Involving Moral Turpitude*, 43 Harv. L. Rev. 117, 118 (1929) (stating that, in addition to defamation and the credibility of witnesses, the phrase "crimes involving moral turpitude" is one that "has been widely employed[] in legislation dealing with immigration, disbarment, [and the] revocation of physicians' licenses" (footnotes omitted)). In these contexts, its function changed to being a standard "to judge character instead of reputational harm." Simon-Kerr, *supra*, at 1002.

Despite this development across various fields, the term "moral turpitude" is not without its detractors. Judge Richard Posner, formerly one of the leading appellate judges in the nation and a legal professor, has observed that the words base, vile, depraved, and turpitude have virtually disappeared from the modern American vocabulary, leaving courts to grapple with antiquated "legalese." *Arias v. Lynch*, 834 F.3d 823, 831–32 (7th Cir. 2016) (Posner, J., concurring). While there are some guidelines for its application, the moral turpitude standard lacks absolute precision in American law.[8]

Ultimately, this lack of precision might be inherent in a concept based on contemporary standards of community morality. Commentator Simon-Kerr has compared the difficulty in applying the moral turpitude standard to the test for obscenity, which also focuses on community morality standards and has likewise eluded certainty. Simon-Kerr, *supra*, at 1003 n.15. "As framed in 1957, the

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[7] "In 1877, Georgia passed the first constitutional amendment to overtly use the moral turpitude standard as a disenfranchisement tool." Simon-Kerr, *supra*, at 1041–42. South Carolina and Alabama "also passed laws aimed at disenfranchising black men by discriminating against certain offenses." *Id.* at 1041. However, the United States Supreme Court held Alabama's constitutional provision violated the Equal Protection Clause of the Fourteenth Amendment, where the particular offenses selected for classification by state registrars as crimes of moral turpitude disenfranchised approximately ten times more black voters than white. *Id.* at 1043 (citing *Hunter v. Underwood*, 471 U.S. 222, 226–33 (1985)).

[8] Judge Posner remarked, "It is preposterous that that stale, antiquated, and, worse, meaningless phrase [moral turpitude] should continue to be a part of American law." *Arias*, 834 F.3d at 830 (Posner, J., concurring).

[obscenity] test asks 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.'" *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)). Simon-Kerr stated this test "provoked Justice [Potter] Stewart's famous comments about pornography":

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .

Id. (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)). We hasten to add, however, that while crimes involving moral turpitude have continued to evolve over the last two centuries (there was, for example, no such thing as trafficking in crack cocaine in the early days of the Republic), and there has been some disagreement in the conclusions as to specific crimes among jurisdictions, there is a recognized framework for its application.

(c) Crimes Involving Moral Turpitude in South Carolina

With this backdrop, it is evident that moral turpitude has long been used, in many contexts, as a legal term of art. South Carolina has applied a traditional framework, defining moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *See State v. Horton*, 271 S.C. 413, 414, 248 S.E.2d 263, 263 (1978) (citation omitted).

Although descriptions have varied among jurisdictions since the nineteenth century, this definition is currently the most common one appearing in court opinions and law journals. Lindsay M. Kornegay & Evan Tsen Lee, *Why Deporting Immigrants for "Crimes Involving Moral Turpitude" Is Now Unconstitutional*, 13 Duke J. Const. L. & Pub. Pol'y 47, 57 & n.56 (2017) (arguing moral turpitude is impermissibly vague and noting this definition, is the most prevalent, however, and appears in *Moral turpitude*, Black's Law Dictionary (9th ed. 2009)); *see also Arias*, 834 F.3d at 831 (Posner, J., concurring) (noting Congress had never defined "moral turpitude," but courts and immigration agencies have tended to cite a variation of the definition in *Black's Law Dictionary*).

South Carolina courts have not required that an offense be a felony to qualify as a crime involving moral turpitude. *See State v. Harris*, 293 S.C. 75, 76, 358 S.E.2d 713, 714 (1987) ("***While not determinative***, it is also significant that the legislature has categorized the crime as a felony." (emphasis added)). Further, we have pointed out that, "[w]hile all crimes involve some degree of social irresponsibility, all crimes do not involve moral turpitude." *State v. LaBarge*, 275 S.C. 168, 172, 268 S.E.2d 278, 280 (1980).

Making the issue somewhat more complex, South Carolina courts have held that whether some offenses are a crime involving moral turpitude can depend on the facts of the case. In those cases, determining whether an offense qualifies as a crime involving moral turpitude involves consideration of the nature of the crime as defined by law as well as the particularized facts contained in the indictment. *See, e.g.*, *State v. Bailey,* 275 S.C. 444, 446, 272 S.E.2d 439, 440 (1980) (observing whether assault and battery of a high and aggravated nature is a crime of moral turpitude depends upon the facts of the particular case as set forth in the indictment); *id.* ("Proof of the nature of a prior conviction must necessarily be confined to the inherent nature of the crime as defined by law and particularized by the indictment."); *see also In re Lee*, 313 S.C. 142, 143–44, 437 S.E.2d 85, 86 (1993) (stating "while the crimes of misconduct in office, assault of a high and aggravated nature, and assault and battery of a high and aggravated nature are not always crimes of moral turpitude, they may be depending on the facts as particularized in the indictment"); *State v. Hall*, 306 S.C. 293, 295, 411 S.E.2d 441, 442 (Ct. App. 1991) (holding whether resisting arrest "is a crime of moral turpitude depends upon the facts of the case"; specifically, whether the resistance was violent).

This Court has also stated that crimes involving primarily self-destructive behavior generally do not implicate moral turpitude; rather, "[i]n determining whether a crime is one involving moral turpitude, the Court focuses primarily on the duty to society and fellow man which is breached by the commission of the crime." *State v. Ball*, 292 S.C. 71, 73–74, 354 S.E.2d 906, 908 (1987), *overruled on other grounds by State v. Major*, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990) (retaining the test for moral turpitude stated in *Ball* but overruling *Ball* because of its holding regarding cocaine possession and stating that, because "any involvement with cocaine contributes to the destruction of ordered society," mere possession of cocaine is a crime of moral turpitude).

In *Ball*, the Court outlined some offenses that have been deemed crimes involving moral turpitude in South Carolina under the foregoing test: accessory to

bank robbery, arson, assault and battery with intent to kill, assault with intent to rape, assault with intent to ravish, auto theft, breaking into a motor vehicle with intent to steal, conspiracy to obtain property under false pretense, criminal sexual conduct with a minor (any degree), failure to yield right of way, hit and run, housebreaking and larceny, larceny, manufacture of marijuana, possession of marijuana with intent to distribute, receiving stolen goods, robbery, sale of controlled substances, sale of narcotics, and tax fraud. *Id.* In contrast, the Court noted the following had not been deemed crimes involving moral turpitude: bookmaking, disorderly conduct, illegal possession of prescription drugs, possession of an unlawful weapon, public drunkenness, and simple possession of marijuana. *Id.* at 74, 354 S.E.2d at 908.

(d) Second-Degree Domestic Violence

We turn now to the particular offense with which Baddourah was charged, second-degree domestic violence.

Domestic violence is generally defined in subsection 16-25-20(A) of the South Carolina Code as follows:

> (A) It is unlawful to:
>
> > (1) cause physical harm or injury to a person's own household member; or
> >
> > (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

S.C. Code Ann. § 16-25-20(A) (Supp. 2020). Subsection (C) provides a person commits the offense of domestic violence in the second degree if the person violates subsection (A) and any of several enumerated alternatives set forth in subsection (C). *Id.* § 16-25-20(C). Alternative (1) states, "[M]oderate bodily injury to the person's own household member results or the act is accomplished by means likely to result in moderate bodily injury to the person's own household member."[9] *Id.* § 16-25-20(C)(1).

[9] Section 16-25-10 defines the term "moderate bodily injury" as follows:

The indictment charging Baddourah with second-degree domestic violence alleged, in relevant part, that he "did . . . cause physical harm or injury to a household member, [his spouse], or did offer or attempt to cause physical harm or injury . . . , with apparent present ability under circumstances reasonably creating fear of imminent peril by ***striking [his spouse] with a car door***[,] an act likely to result in moderate bodily injury." (Emphasis added.)

Baddourah argues his offense, allegedly striking his spouse with a car door, did not involve "severe" injury,[10] and he urges this Court to require offenses involving moral turpitude to be limited to "extremely grave acts of violence and depravity" or offenses that are *malum in se*. For support, Baddourah cites *Tucker v. Oklahoma*, in which the Oklahoma court discussed various definitions of moral turpitude and noted that it had previously "applied an Eighth Circuit definition which restricted moral turpitude to 'the gravest offenses–felonies, infamous crimes, those that are *malum in se*.'" 395 P.3d 1, 5 (Okla. Crim. App. 2016) (citation omitted). The Oklahoma court reasoned, "It is difficult to characterize domestic violence as a *malum in se* crime, or one recognized as inherently evil and immoral, given that for centuries it was not recognized as a crime at all, and only recently has our Legislature granted it felony status." *Id.* The Oklahoma Court noted the State had not presented a compelling reason "to expand the definition of 'moral turpitude' and to separate

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> "Moderate bodily injury" means physical injury that involves prolonged loss of consciousness or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.

S.C. Code Ann. § 16-25-10(4) (Supp. 2020).

[10] Baddourah maintains his wife grabbed his iPhone and was attempting to shut and lock her car door and leave with his phone, so he grabbed the door to keep it from shutting. Baddourah's wife, in contrast, maintained Baddourah shut the door, causing her to sustain injuries.

domestic assault and battery from the well-settled law that assault and battery is not a crime of moral turpitude." *Id.*

We decline Baddourah's suggestion to require a threshold of "extremely grave acts of violence and depravity" or to restrict our analysis to *malum in se* offenses. As discussed above, the measure of moral turpitude in South Carolina is not based on the severity of physical injury, as even offenses that do not involve physical harm or felonies have been designated as crimes of moral turpitude. *See generally Ball*, 292 S.C. at 73–74, 354 S.E.2d at 908 (summarizing offenses). Moreover, we reject the Oklahoma court's reasoning that the past failure to recognize the significant danger of domestic violence to household members, as well as its impact on children and other societal harm, somehow justifies insulating it from classification under contemporary standards as a crime involving moral turpitude.

Under South Carolina's moral turpitude framework, we focus "primarily on the duty to society and fellow man [that] is breached by the commission of the crime." *Ball*, 292 S.C. at 74, 354 S.E.2d at 908. According to the Centers for Disease Control and Prevention ("CDC"), domestic violence affects millions of people in the United States each year, ranging from one episode to severe, chronic abuse over multiple years. CDC, *Preventing Intimate Partner Violence* (2020 Fact Sheet), https://www.cdc.gov/violenceprevention/pdf/ipv/IPV-factsheet_2020_508.pdf. About 1 in 4 women and nearly 1 in 10 men in the United States have experienced physical or sexual violence and/or stalking by an intimate partner during their lifetime, and over 43 million women and 38 million men have experienced psychological aggression by a partner. *Id.* (citing data from the CDC's National Intimate Partner and Sexual Violence Survey, 2015 Data Brief–Updated Release).

In South Carolina, domestic violence occurs at rates far exceeding the national average, as evidenced by annual statistics compiled by organizations such as the National Coalition Against Domestic Violence ("NCADV"). *See* NCADV, *State-by-State Statistics on Domestic Violence*, https://ncadv.org/state-by-state (last visited Jan. 5, 2021). A fact sheet published by the NCADV indicates 41.5% of South Carolina women and 17.4% of South Carolina men experience physical or sexual violence and/or stalking by an intimate partner in their lifetimes. NCADV, *Domestic Violence in South Carolina*, https://assets.speakcdn.com/assets/2497/south_carolina_2019.pdf (last visited Jan. 5, 2021). In 2011, South Carolina had the highest rate of women murdered by men in the United States, more than double the

national average. *Id.* In 2012, South Carolina had the second highest rate of women murdered by men. *Id.*

In its most recent annual report (its 23rd), the Violence Policy Center ("VPC") notes that, nationwide, 92% of women murdered by men are killed by someone they know, and it lists South Carolina as number 11 in a ranking of states for the killing of women by men, based on 2018 FBI data. *See* VPC, *When Men Murder Women, An Analysis of 2018 Homicide Data* (Sept. 2020), https://vpc.org/studies/wmmw2020.pdf. For over two decades, South Carolina had consistently ranked in the top 10 worst states in the United States in the VPC's annual reports, and it topped the list in four of those years. *See id.*; *see also* South Carolina Domestic Violence Advisory Committee, *S.C. Domestic Violence Advisory Committee 2018 Annual Report* 1 (Mar. 27, 2019), https://dc.statelibrary.sc.gov/handle/10827/29954.

In 2015, the South Carolina General Assembly passed the Domestic Violence Reform Act, which increased penalties for domestic violence, with the aim of curbing these alarming statistics. *See generally* Christina L. Myers, *South Carolina still near bottom in violence against women*, A.P. News (Feb. 11, 2019), https://apnews.com/article/af9c4ee9c722496398f20d6e234d172e.

In light of the prevalence of domestic violence nationally, and the overwhelming statistics for South Carolina in particular, there can be no doubt that domestic violence is an affront to the fundamental sanctity of the home and society. Accordingly, we find the more persuasive view is that domestic violence, with its inherent violation of a special relationship, can qualify as a crime of moral turpitude. *See California v. Burton*, 196 Cal. Rptr. 3d 392, 397 & n.8 (Ct. App. 2015) (stating where the assailant is in a special relationship with the victim, "for which society rationally demands, and the victim may reasonably expect, stability and safety," and then commits a willful act upon the victim in violation of that relationship, it "necessarily connotes the general readiness to do evil that has been held to define moral turpitude" (citation omitted)); *cf. Major*, 301 S.C. at 184, 391 S.E.2d at 237 (holding that, because "cocaine contributes to the destruction of ordered society," mere possession of cocaine is a crime of moral turpitude).

Turning to the specific offense for which Baddourah was indicted, second-degree domestic violence, we examine its statutory definition and consider the facts alleged in the indictment, in which Baddourah was charged with "striking [his spouse] with a car door[,] an act likely to result in moderate bodily injury."

Cf. Bailey, 275 S.C. at 446, 272 S.E.2d at 440 (observing some offenses are not invariably crimes of moral turpitude, so a court must look to not only the statutory definition of an offense, but also the particularized facts alleged in the indictment to determine whether an offense qualifies as an offense involving moral turpitude); *In re Lee*, 313 S.C. at 143–44, 437 S.E.2d at 86 (stating some crimes "may be [crimes involving moral turpitude] depending on the facts as particularized in the indictment"). Under the circumstances presented here, in which it is alleged that an individual engaged in conduct that was "likely to result in moderate bodily injury," we conclude the charge of second-degree domestic violence qualifies as a crime involving moral turpitude.[11]

Because we find Baddourah's indictment charged a crime involving moral turpitude, we hold the Governor had the constitutional authority to issue the Executive Order suspending Baddourah from his position as a member of the Columbia City Council. Although Baddourah disputes whether the suspension was warranted, where the Governor is constitutionally authorized to impose a suspension, the decision whether to do so is a matter committed to the Governor's discretion after considering all of the attendant circumstances. Consequently, the circuit court's order dismissing Baddourah's challenge to the suspension order is affirmed as modified.

III. CONCLUSION

We conclude the Governor acted within the scope of his authority in issuing the Executive Order suspending Baddourah from the Columbia City Council. As a result, the order of the circuit court is affirmed as modified.

AFFIRMED AS MODIFIED.

KITTREDGE, HEARN, FEW, and JAMES, JJ., concur.

[11] Our holding today is limited to the issue before the Court, a charge of second-degree domestic violence involving an allegation of physical violence "likely to result in moderate bodily injury."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Darell Oneil Boston, Appellant.

Appellate Case No. 2018-000504

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5808
Heard November 10, 2020 – Filed March 10, 2021

AFFIRMED

David Nelson Lyon, of Duff Freeman Lyon, LLC, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

KONDUROS, J.: Darell Oneil Boston was convicted of manufacturing crack cocaine and sentenced to seventeen years' imprisonment. He appeals the circuit court's denial of his motion to suppress evidence found during a "knock and talk." We affirm.

FACTS/PROCEDURAL HISTORY

On March 6, 2015, Sergeant Joseph Sherwood of the North Charleston Police Department, after responding to a dispatch call, proceeded to patrol a nearby apartment community.[1] The police department had directed Sergeant Sherwood to increase patrols of the apartment community as it had been the site of narcotics activity and because vulnerable adults resided in the apartment community. A week earlier, the landlord contacted the department to report a nonresident had threatened him.

At approximately 5:30 p.m. on that evening, Sergeant Sherwood, along with two other officers—Sergeant Hoose and Officer Etninan—observed two men, later identified as Boston and William Holmes, get out of a taxi and enter the apartment of a resident, Denise Holman. Sergeant Sherwood knew Holman had some undetermined mental challenges and used narcotics. Sergeant Sherwood stated the area had "always been a hot spot for narcotics activity" and "single occupants that live in there . . . [are] not mentally handicapped . . . but they need to be assisted and [can be] easily taken advantage of." Sergeant Sherwood also had some knowledge of Boston and Holmes, recognizing them from another residence where drug activity took place. Sergeant Sherwood had previously had "several run-ins with them."

The entry of the two men into Holman's apartment raised concerns for Sergeant Sherwood about her safety and the nature of the activity that might be going on inside the apartment. Sergeant Sherwood and the other officers "decided we were going to go knock on the door to check on [Holman] and see if everything is okay." He elaborated:

> When [w]e have the complaints that we were having and the elements that we had at this residence[,] we will knock on the door to make sure that one, she is okay[,] and two, see if there is any possib[ilit]y [of] any crime or

[1] Sergeant Sherwood was a patrol officer at the time of the incident in 2015 but a sergeant at the time of the pretrial hearing in 2017.

> if she had any information for us. And maybe they were just friends and I would have been fine with that and said[,] okay Ms. Denise[,] see you later[,] and just been on my way[,] but there was a little more to [it] than that.

After Boston and Holmes had been inside Holman's apartment for approximately fifteen minutes, Sergeant Sherwood knocked on Holman's door. Holman responded to the knock by answering the door and fully opening the door. Holman allowed him to enter and she stepped aside. When Sergeant Sherwood entered the small apartment, he saw two men in the kitchen area of the apartment "huddled around" a running microwave oven and saw two plastic bags that had a white residue on them. When the men noticed him, the men opened the microwave, hid their hands, and ran into the bathroom. Sergeant Sherwood also saw a scale on the kitchen counter.

Concerned the men may have been armed, Sergeant Sherwood performed a protective sweep and ordered Boston and Holmes out of the bathroom. Holmes agreed to Sergeant Hoose's request to conduct a search of his person, which revealed a scale and a baggie of white powder. Sergeant Sherwood found a Pyrex brand measuring cup in the bathroom, with a steaming substance in the cup that appeared to be crack cocaine. Sergeant Sherwood then left the scene to obtain a search warrant, returned and searched the residence, taking multiple items into evidence, and arrested Boston and Holmes.

Sergeant Sherwood did not arrest Holman because she was not a participant to the manufacturing he observed. It was his understanding that often those who manufacture narcotics pay another person for the use of his or her home to manufacture crack in exchange for money or crack. Holman allowed the men to use her apartment because she hoped they would give her some of the manufactured crack.

At the pretrial hearing on November 30, 2017, Boston moved to suppress the evidence the officers seized, including baggies containing white powder, scales, and Pyrex measuring cups, on the grounds that the search violated his right to be free from an unreasonable search and seizure under both the United States and the South Carolina Constitutions and was an unreasonable invasion of his privacy under the South Carolina Constitution. The circuit court denied Boston's motion to

suppress the evidence, finding Sergeant Sherwood had reasonable suspicion to engage in the knock and talk.

The matter proceeded to trial,[2] and on February 7, 2018, a jury found Boston guilty of manufacturing crack cocaine. The circuit court sentenced him to seventeen years of imprisonment. Boston moved for a new trial, which the court denied. This appeal follows.

STANDARD OF REVIEW

> "On appeal from a motion to suppress on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse only if there is clear error." *Robinson v. State,* 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014), *cert. denied,* —— U.S. ——, 134 S. Ct. 2888, 189 L.Ed.2d 845 (2014); *see State v. Tindall,* 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010) (recognizing that in criminal cases an appellate court sits to review errors of law only and [is], therefore, bound by the trial court's findings unless clearly erroneous).

State v. Counts, 413 S.C. 153, 160, 776 S.E.2d 59, 63 (2015).

LAW/ANALYSIS

Boston contends the circuit court erred by denying his motion to suppress the evidence in violation of his right to privacy under Article 1, section 10, of the South Carolina Constitution and *State v. Counts*, 413 S.C. 153, 776 S.E.2d 59 (2015), because law enforcement did not have reasonable suspicion to engage in the knock and talk.[3] We disagree.

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[2] Boston objected to the introduction of the evidence obtained by officers pursuant to the knock and talk at trial.

[3] The State argues even if this court holds the knock and talk was unreasonable under *Counts*, the circuit court did not err because the officers acted consistently with the law in effect at the time of the incident. We recognize the incident that is the subject of this appeal occurred in 2015, four months prior to the supreme court's decision in *Counts*. However, *Counts* was the prevailing precedent at the

Article 1, section 10, of the South Carolina Constitution establishes:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

Our supreme court has also established that South Carolina may provide more protection than that afforded by the United States Constitution: "[S]tate courts can develop state law to provide their citizens with a second layer of constitutional rights," and "this [c]ourt can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution." *State v. Forrester*, 343 S.C. 637, 643-44, 541 S.E.2d 837, 840 (2001).

In 2015, our supreme court extended constitutional protection in *State v. Counts*: law enforcement must have reasonable suspicion of illegal activity to perform a knock and talk. 413 S.C. at 174, 776 S.E.2d at 71. Without such a requirement, the supreme court found a knock and talk would violate a person's right to privacy set forth in the South Carolina Constitution. *Id.* at 174, 776 S.E.2d at 70-71. In establishing this threshold requirement, our supreme court reaffirmed that the

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time of Boston's pretrial suppression hearing in 2017. At the pretrial hearing, the State did not raise the argument to the circuit court that the officers were acting in accordance with the law prior to the *Counts* decision. Rather, at the pretrial hearing, the State asserted the applicability of the *Counts* decision to the circuit court. While we may rely on additional grounds a respondent raises on appeal, we decline to do so here. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("[T]he respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it").

South Carolina Constitution's privacy protection against unreasonable searches and seizures "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." *Id.* at 168, 776 S.E.2d at 68 (quoting *Forrester*, 343 S.C. at 645, 541 S.E.2d at 841).

In *Counts*, law enforcement officers responded to two anonymous tips that Counts was selling narcotics and using fake identification cards. *Id*. at 173, 776 S.E.2d at 70. The officers independently confirmed Counts had a criminal record and had used more than one identity. *Id.* Based upon the anonymous tips and the information confirmed by the officers, our supreme court found the officers had reasonable suspicion of illegal activity to engage in a knock and talk. *Id.*

> Notably, law enforcement received two separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities. Through their investigation, the officers confirmed that Counts had two false identification cards on record and had prior drug convictions. In light of this evidence, the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the "knock and talk."

Id.

This court recently addressed the legality of a knock and talk in *State v. Kotowski*, 427 S.C. 119, 828 S.E.2d 605 (Ct. App. 2019), *aff'd in part, vacated in part on other grounds*, 430 S.C. 318, 844 S.E.2d 650 (2020) (per curiam). In *Kotowski*, the sheriff's office of Dorchester County received an anonymous tip alerting the department to drug use at a particular residence. *Id.* at 125, 828 S.E.2d at 608. An officer drove by the residence a number of times, noting a vehicle parked at the residence was owned by the son of a person previously convicted for crimes involving methamphetamine. *Id.* Officers went to the home to engage in a "knock and talk." *Id.* at 125-26, 828 S.E.2d at 628. Kotowski responded to the knock and stepped outside to speak to the officer, closing the door behind him. *Id.* at 126, 828 S.E.2d at 628. The officer testified Kotowski smelled strongly of ammonia.

Id. Kotowski indicated his girlfriend was also in the home. *Id.* Kotowski went inside to get her and attempted to close the door, but the officer placed his foot in the way. *Id.* When the girlfriend appeared, the officer asked if she would consent to a search of her home, but she declined. *Id.* "Believing something to be amiss," the officer ordered his fellow officers to perform a protective sweep of the house, which revealed evidence of drugs and resulted in the issuance of a warrant and Kotowski's arrest. *Id*. at 126-27, 828 S.E.2d at 609.

This court found the officers did have reasonable suspicion to utilize the knock and talk investigative technique:

> The trial court did not err in denying Kotowski's motion to suppress the evidence seized by law enforcement officers after conducting the knock and talk. Law enforcement relied on three pieces of information in arguing they had reasonable suspicion: (1) the anonymous tip Sergeant Thompson received on June 13, 2014; (2) the spotty surveillance Sergeant Thompson conducted of the house, which is where he recognized the vehicle belonging to the son of a convicted methamphetamine cook; and (3) the [National Precursor Log Exchange] records, showing what Sergeant Thompson referred to as "a substantial amount of purchases."

Id. at 129, 828 S.E.2d at 610.

Furthermore, *Kotowski* lays out the basis for what constitutes reasonable suspicion:

> Reasonable suspicion consists of "'a particularized and objective basis' that would lead one to suspect another of criminal activity." *State v. Lesley*, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *State v. Willard*, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). "An additional factor

> to consider when determining whether reasonable suspicion exists is the officer's experience and intuition." *State v. Taylor*, 388 S.C. 101, 116, 694 S.E.2d 60, 68 (Ct. App. 2010), *rev'd on other grounds*, 401 S.C. 104, 736 S.E.2d 663 (2013). "Nevertheless, 'a wealth of experience will [not] overcome a complete absence of articulable facts.'" *Id.* (quoting *United States v. McCoy*, 513 F.3d 405, 415 (4th Cir. 2008)). "Furthermore, an officer's impression that an individual is engaged in criminal activity, without confirmation, does not amount to reasonable suspicion."

Id. at 128-29, 828 S.E.2d at 610.

In the present case, the circuit court did not err in denying Boston's motion to suppress. Sergeant Sherwood testified to objective knowledge of the apartment community and the three people inside the apartment. Sergeant Sherwood had years of experience investigating criminal drug activity, with extensive training and certification, including eleven years with the department, and was very familiar with the apartment community he surveilled. He knew Boston and Holmes did not live there and recognized them from a previous incident at another location. Sergeant Sherwood's department had specifically directed him to patrol the area of the apartments based upon information the area had been "a hot spot of narcotics activity." He also testified he had knowledge of the practice of those engaged in illegal activity using the apartments of others to manufacture drugs. During his patrol, he observed Boston and Holmes enter the home of a person he knew lived alone, had some undefined limitations, and had used narcotics in the past.

The circuit court relied on specific evidence to find the knock and talk was based on reasonable suspicion of illegal activity. Nothing in the Record indicates law enforcement engaged in the knock and talk "randomly." *See Counts*, 413 S.C. at 173, 776 S.E.2d at 70 ("T]he officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'"). *Id*. at 173, 776 S.E.2d at 70. Likewise, Sergeant Sherwood and his fellow officers did not randomly knock on Holman's door. While patrolling an area known as an area of criminal drug activity, Sergeant Sherwood observed the specific occurrence of Boston and

Holmes going into the home of Holman, forming a basis for reasonable suspicion.[4] Therefore, the circuit court did not err in denying Boston's motion to suppress the evidence.

CONCLUSION

The circuit court did not err in denying Boston's motion to suppress because law enforcement had reasonable suspicion of illegal activity to approach Holman's door and conduct the "knock and talk." Accordingly, the decision of the circuit court is

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

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[4] While neither the circuit court nor the parties asserted Sergeant Sherwood knocked on Holman's door to perform a "welfare check" expressly, Sergeant Sherwood testified he was concerned about Holman. While Sergeant Sherwood testified the impetus for the knock and talk was investigative, we are also aware Sergeant Sherwood had concern for Holman as a person who may have been vulnerable to being taken advantage of by others. *See Counts*, 413 S.C. at 176 n.7, 776 S.E.2d at 72 n. 7 ("A 'welfare check' is not a criminal investigative technique. As its name implies, a 'welfare check' is conducted by law enforcement based upon concern for a person's welfare not to inquire about illegal activity at the residence"). *Id.* at 176 n.7, 776 S.E.2d at 72 n.7.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lamar Clark, Appellant,

v.

Philips Electronics/Shakespeare, Employer, and Gallagher Bassett Services, Carrier, Respondents.

Appellate Case No. 2018-001197

Appeal From The Worker's Compensation Commission

Opinion No. 5809
Submitted February 1, 2021 – Filed March 10, 2021

REVERSED AND REMANDED

William B. Salley, Jr., of Salley Law Firm, P.A., of Lexington, for Appellant.

Brooke Ann Payne, of Payne Law Group, LLC, of Mt. Pleasant, for Respondents.

HILL, J.: Lamar Clark was hurt in July 2011 while working for Philips Electronics (Philips). Philips admitted the injury, and Clark continued working for them another six months. An October 2011 MRI of Clark's back revealed a herniated disc at L5-S1. He began having "new onset radicular pain down to the buttocks." Dr. Daniel Sheehan diagnosed Clark with lumbar radiculopathy, also called sciatica, a condition often caused when a herniated disc pinches a lumbar spinal nerve and radiates pain to the legs and other lower extremities. A conservative course of

treatment, including pain medication and physical therapy, was prescribed. Dr. Thomas Holbrook began treating Clark in February 2012 and confirmed Clark "has lumbar radiculopathy on the left, secondary to a herniated disc on the left at L5-S1." Dr. Holbrook performed a microdiscectomy (a general anesthesia surgery to remove parts of a herniated disc to relieve pressure on the affected nerve). This relieved Clark's pain but only temporarily. Dr. Holbrook referred Clark to Dr. Steven Storick for pain management. Dr. Holbrook ordered another MRI, which showed a herniated disc at the left L4-5 with nerve root compression. Clark underwent a second miscrodiscectomy in September 2013. Again, the surgery appeared to help with Clark's pain but did not stop it. Clark continued with physical therapy and pain medications. In July 2015, at Dr. Storick's urging, Clark underwent a radiofrequency rhizotomy (a procedure designed to relieve chronic pain by destroying affected nerves). This procedure, along with prescribed painkillers, provided Clark some relief.

Over the years since his injury, Clark's medical providers have also addressed his mental health, attempting to combat the depression and anxiety caused by his persistent pain. Dr. Storick contemplates Clark may benefit from a spinal cord stimulator but does not recommend the treatment until Clark's depression and other aspects of his mental health have improved.

Dr. Robert Brabham, a psychologist and vocational rehabilitation expert with over fifty years' experience, concluded Clark was totally and permanently disabled. Jan Westmoreland, M.Ed., whom Philips engaged to evaluate Clark's ability to work, found Clark's medical records disclosed he could work at sedentary or light duty jobs. She listed several suitable positions available in the market, including cashier, attendance monitor, and movie ticket taker. When Westmoreland later learned Clark had completed a second year of college, she amended her report to state Clark could find work in IT support, computer programming, or as a security guard.

At the hearing before the Single Commissioner, Clark sought an award of permanent and total disability, alleging injuries to his back, left leg, left hip, and left foot, as well as psychological overlay. *See* S.C. Code Ann. § 42-9-10 (2015). He alternatively claimed he was totally and permanently disabled because he had lost more than fifty percent of the use of his back. *See* S.C. Code Ann. § 42-9-30(21) (2015).

A month before the hearing, it became known that Clark had claimed a back injury in 2006 while working for Tile Depot in Florida, and he had filed for worker's

compensation and unsuccessfully sought social security disability income (SSDI) in 2008 and 2009 related to this injury. Clark had not disclosed this to Philips, who highlighted at the hearing that Clark claimed extensive physical limitations and pain symptoms in his SSDI paperwork and that he had sought mental health treatment. It was also discovered Clark had presented to a local hospital several months before the 2011 injury complaining of back pain.

The Single Commissioner ruled Clark was permanently and totally disabled pursuant to § 42-9-10, having proven injury to more than one body part (his back and legs) that destroyed his earning capacity. The Single Commissioner alternatively found Clark totally and permanently disabled due to loss of use of fifty percent of his back pursuant to § 42-9-30(21). The Single Commissioner ruled Clark reached maximum medical improvement (MMI) on May 25, 2016, and Philips would be responsible for Clark's future medical and psychological care related to the injuries from the 2011 accident. *See* S.C. Code Ann. § 42-15-60 (2015).

Philips appealed to the Appellate Panel. It reversed, finding Clark was not permanently and totally disabled, suffered no psychological injury, had reached MMI on July 23, 2014, and sustained a twenty percent permanent partial disability to his back, entitling him to benefits of $14,477.40. The Panel, however, ordered Clark to reimburse Philips $33,539.31, the net credit owed to Philips for the temporary total benefits it had paid Clark after the July 23, 2014 MMI date.

Clark now appeals. He claims the Panel's order is not supported by substantial evidence, and several of its factual findings are clearly erroneous. For the reasons that follow, we agree with Clark and reverse and remand.

I. STANDARD OF REVIEW

A. The Substantial Evidence Standard

We must affirm the factual findings of the Panel if they are supported by substantial evidence. S.C. Code Ann. § 1-23-380(5) (2005 & Supp. 2020); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132–33, 276 S.E.2d 304, 305 (1981). Like any other finder of fact, the Panel may not rest its findings on speculation or guesswork. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) ("Workers' compensation awards must not be based on surmise, conjecture or speculation."). We may reverse the Panel's decision if its findings are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," resulting in

prejudice to Clark's substantial rights. § 1-23-380(5)(e). The Panel must anchor its ruling on evidence substantial enough to provide a reasonable basis for its findings. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012).

B. Credibility Determination

The Panel concluded Clark's lack of credibility "undermined the medical opinions and treatment received . . . as the opinion and conclusions of [Clark's] providers were based upon self-serving assertions of the claimant." The order noted Clark's "lack of truthfulness" was "an impediment to supporting the Single Commissioner's decision."

The Panel was entitled to conclude Clark's credibility crumbled when it was learned he had not disclosed his 2006 back injury. We are also mindful that factual findings based on credibility calls can, and often do, amount to substantial evidence that requires us to affirm. But a credibility finding has no force independent of context—deciding a party is not credible does not make all of the party's other evidence incredible. Instead, the trier of fact must weigh and measure each piece of evidence. The Panel, bound as it is to make findings based on substantial evidence, "must explain how the credibility determination is important to making the particular factual finding." *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 647, 842 S.E.2d 349, 354 (2020). The lesson of *Crane* is that the Panel may not base a factual finding on a credibility determination without explaining both the basis of the credibility determination and how the determination rationally affects the disputed fact. An unexplained credibility determination or an unexplained use of a credibility finding means the factfinder's approach was arbitrary rather than rational.

II. ANALYSIS

A. Section 42-9-10 Disability

Clark seeks permanent and total disability under § 42-9-10 on the theory that he had injured a body part scheduled by § 42-9-30 as well as another body part and experienced a loss of earning capacity. *See Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 105–06, 580 S.E.2d 100, 102–03 (2003).

1. Injury to More Than One Body Part

The Panel found Clark had a twenty percent "impairment to his back, taking into account any affects to his legs." Despite acknowledging Clark had injured his back and legs, the Panel proceeded to deny Clark permanent and total disability under section 42-9-10, reasoning he only injured one body part (his back) and had no lost earning capacity. This was clear error. There is no substantial basis in the record permitting the Panel to find Clark only injured one body part. The Panel gave the opinions of Clark's authorized treating physicians, Dr. Holbrook and Dr. Storick, the greatest weight; they both ultimately concluded Clark had injured his back and at least one of his legs.

Although the Panel declared Clark's woeful credibility befouled his entire medical record, it still agreed with Dr. Holbrook and Dr. Storick that Clark had suffered a twenty percent whole person impairment. Philips contends the Panel rightly treated all of the medical evidence as suspect because Clark did not disclose his 2006 injury. But Dr. Storick deflated this theory when he testified that learning of the 2006 injury did not change his opinion that the 2011 injury caused Clark's injuries. Philips could have offered contrary evidence; without any, the Panel had no basis to discount the objective medical evidence, and *Crane* tells us a vague nod to credibility cannot close the gap. Clark's lack of candor did not corrupt the credibility of his MRI results or the physical examinations of his treating physicians. Commissioner Taylor, the Single Commissioner, understood this. She deemed Clark "not credible at all," yet still fairly and impartially weighed the medical evidence. The Panel concluded the doctors' opinions were based upon "self-serving assertions of the claimant," but no doctor has said this. What people say when seeking medical help is usually self-serving and sometimes unreliable. Doctors are trained to detect such things, and we are confident that if the doctors believed they were duped into their opinions they would have said so.

The Panel's absolutist treatment of Clark's credibility in effect adopts the Latin maxim, well known to lawyers and a stalwart of closing arguments, which translates as "false in one, false in all." The maxim was discredited by *State v. Littlejohn*, 33 S.C. 599, 11 S.E. 638 (1890), and as far as we can tell, last appeared in a reported South Carolina case almost a hundred years ago as an aside in the infamous Upstate moonshine murder saga of *State v. Pittman*, 137 S.C. 75, 134 S.E. 514 (1926). Wigmore denounced the maxim as "primitive psychology" that "is in itself worthless

. . . because in one form, it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the others it is absolutely false as a maxim of life." 3A Wigmore *Evidence* §1008 at 982 (Chadbourn rev. 1970); *see also Virginia Ry. Co. v. Armentrout*, 166 F.2d 400, 405 (4th Cir. 1948) (noting the "harsh" maxim "has little or no place in modern jurisprudence"). Dubious and archaic as the saying may be, we are not aware of any instance where it has been used to disregard not just a party's testimony but their entire array of proof.

We therefore reverse the impairment rating and the finding that Clark injured only one body part and remand to the Panel for further findings. On remand, the Panel shall also revisit its impairment rating of Clark's back and explain how the twenty percent whole person rating does not translate to a higher rating for Clark's back alone.

2. Lost Earning Capacity

We agree with Clark that the Panel's finding that he has not lost earning capacity lacks substantial evidence. The finding—which appears in the "Conclusions of Law" section—floats on air, unsupported by any visible explanation or evidence. The "Findings of Fact" do not discuss either Dr. Brabham's or Ms. Westmoreland's reports, so we have no way of knowing what the Panel used to find Clark's earning capacity was intact. If it was Ms. Westmoreland's report, it would seem the Panel would have to explain why, unlike Dr. Brabham, Ms. Westmoreland chose not to take into account Clark's mental health diagnoses in concluding Clark could return to work. Dr. Brabham concluded Clark's depression and anxiety so affected his concentration and attention that he could not find work in the stable job market. Ms. Westmoreland's report "assumes" Clark can work twenty to forty hours per week. We reverse the Panel's conclusion that Clark has not lost earning capacity and remand for a de novo hearing resulting in conclusions of law supported by findings of fact.

B. Psychological Overlay

The Panel ruled Clark had "pre-existing psychological issues," and had not proven his 2011 injury at Philips aggravated them. *See* S.C. Code Ann. § 42-9-35 (2015). The Panel concluded his "current psychological condition, if any, is unrelated to his work injury."

The Panel pointed to Clark's response of "Yes" on one of his SSDI applications to a question asking whether he had been "seen by a doctor/hospital/clinic or anyone else for emotional or mental problems that limit your ability to work?" Yet, Clark replied, "No," to the same question on his other SSDI application, and in neither did he state he was seeking benefits for a psychological injury. There is no evidence of any pre-existing mental health diagnosis before his 2011 injury. The way the SSDI question is worded does not prove a pre-existing treatment or diagnosis. Nor does it provide any basis to identify the type, nature, or degree of the supposed pre-existing condition.

On the other hand, the objective medical evidence of the existence, causation, and degree of Clark's depression and anxiety is uncontradicted. The record details the chronic pain, sleeplessness, and sense of helplessness and hopelessness Clark has experienced because of his 2011 injury. He has been examined or treated by at least ten medical doctors, several of whom are mental-health experts. Not one of them suggests Clark is malingering or faking. The Panel's conclusion that his concealment of a supposed pre-existing condition undermines this objective medical evidence is another misuse of the credibility metric. We therefore reverse the Panel's finding that Clark suffered no psychological overlay and remand to the Panel for a de novo hearing.

C. Date of MMI

The Panel calculated Clark reached MMI on July 23, 2014. No party pushed this date; Philips argued the correct MMI date was August 27, 2015. The Panel drew the date from a form Dr. Holbrook had filled out, but he had handed Clark off to Dr. Storick, who testified Clark reached MMI on August 27, 2015. Because the Panel did not explain how it resolved the clashing MMI evidence, we vacate and remand this finding to solve the mystery. *See Canteen v. McLeod Reg'l Med. Ctr.*, 400 S.C. 551, 558–59, 735 S.E.2d 246, 250 (Ct. App. 2012) (remanding case where an Appellate Panel failed to make sufficient findings on issue where evidence conflicted: "The findings of fact made by the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings."); *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) ("Where material facts are in dispute, the administrative body must make specific, express findings of fact.").

III. CONCLUSION

We reverse the Panel's decision and remand for a new hearing and findings as to Clark's § 42-9-10 claim for total and permanent disability based on injury to multiple body parts and loss of earning capacity, psychological overlay, date of MMI, and, if appropriate, future medical care and costs. We decide this case without oral argument pursuant to Rule 215, SCACR.

REVERSED AND REMANDED.

WILLIAMS and THOMAS, JJ., concur.