The Supreme Court of South Carolina

In the Matter of the Application of Elizabeth Anne Perkins, Respondent.

Appellate Case No. 2018-000633

ORDER

On May 2, 2018, this Court authorized Respondent to be admitted to practice law subject to certain conditions. She was subsequently admitted to practice law in South Carolina on May 22, 2018.

By order dated March 28, 2019, this Court suspended Respondent from the practice of law for six months based on her failure to comply with the conditions of her admission. This order is to provide the bench, bar, and public with notice of this suspension.

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

Columbia, South Carolina

March 28, 2019

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF CHARLES LEE ANDERSON, PETITIONER

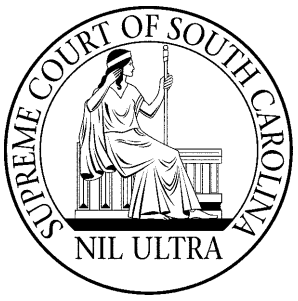
Petitioner was definitely suspended from the practice of law for two (2) years made retroactive to the date of his interim suspension. *In the Matter of Charles Lee Anderson*, 418 S.C. 48, 791 S.E.2d 285 (2016). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
April 3, 2019



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
April 3, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Paula Russell, Claimant, Petitioner,

v.

Wal-Mart Stores, Inc., Employer, and Illinois National Insurance Company, Carrier, Respondents.

Appellate Case No. 2018-000354

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 27875
Heard February 21, 2019 – Filed April 3, 2019

REVERSED

C. Daniel Vega, of Chappell Smith & Arden, P.A., of Columbia, for Petitioner.

Johnnie W. Baxley III, of Willson Jones Carter & Baxley, of Mount Pleasant, for Respondents.

JUSTICE FEW: An appellate panel of the workers' compensation commission remanded Paula Russell's change of condition claim to a single commissioner for what would be a third ruling on the same claim. Russell appealed the remand order to the court of appeals, which dismissed the appeal on the ground the order was not a final decision, and thus not immediately appealable. We find the remand order is immediately appealable because the commission's unwarranted delay in making a

final decision requires immediate review to avoid leaving Russell with no adequate remedy on an appeal from a final decision. We reverse the court of appeals' order dismissing the appeal, reverse the appellate panel's remand order, and remand to any appellate panel of the commission for an immediate and final review of the original commissioner's decision.

I. Facts and Procedural History

Russell injured her back in 2009 while working at a Wal-Mart store in Conway. The commission found Russell suffered a 7% permanent partial disability, and awarded her twenty-one weeks of temporary total disability compensation. In 2011, Russell requested review of her award, claiming there had been a "change of condition caused by the original injury" pursuant to subsection 42-17-90(A) of the South Carolina Code (2015).

A single commissioner conducted a full evidentiary hearing on the 2011 claim on February 11, 2013. In a detailed order dated August 5, 2013, the commissioner found Russell had proven a change of condition. The commissioner ordered Wal-Mart to pay temporary total disability benefits beyond the original twenty-one weeks "through the present date and continuing." The commissioner based the award on Russell's testimony, and the testimony and medical records of two treating physicians. The commissioner explained in her order she relied on testimony of the two physicians who described a "physical, anatomical change" and an "increase in the size of the disc protrusion," demonstrated by an "objective" comparison of MRI images taken before and after the award.

An appellate panel reversed the commissioner. The panel dismissed Russell's testimony on the ground "it is conclusory and self-serving." The panel discounted the testimony and medical records of the two physicians, stating, "Both [physicians] ultimately testified there was no objective or significant radiographical difference to be noted in the MRI scans done before and after the original award." In an order dated January 30, 2014, the panel found Russell "failed to prove by a preponderance of the evidence . . . [she] has sustained a change of condition."

Russell appealed to the court of appeals. The court of appeals found the appellate panel "erred in requiring a change of condition to be established by objective evidence." *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 398, 782 S.E.2d 753, 755 (Ct. App. 2016). The court of appeals reversed the panel and remanded "to the Commission," 415 S.C. at 401, 782 S.E.2d at 757, with no express remand instructions.

The court of appeals remitted the case to the commission on May 3, 2016. On March 20, 2017, a second commissioner filed a detailed order finding Russell "met her burden of proving a change of condition." On September 15, 2017, however, a new appellate panel vacated the second commissioner's order and remanded for what would be a third commissioner to make a third ruling. The panel stated, "At the remand hearing, the Single Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition is found to be compensable."

Russell appealed the September 15, 2017 order to the court of appeals. In an unpublished decision, the court of appeals found the appellate panel's remand order was not immediately appealable and dismissed the appeal. Russell filed a petition for a writ of certiorari with this Court. She argued the commission's repeated remands for new hearings created a "perpetual"[1] "cycle of orders and appeals such that [she] will be deprived of an adequate remedy." We granted the petition, and now reverse.

II. Analysis

One primary goal of the Workers' Compensation Act is to provide quick and efficient resolution of work-related injury claims so neither employers nor employees become bogged down in complicated and protracted litigation. *See Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) (recognizing "Workers' compensation laws were intended by the Legislature to . . . provid[e] sure, swift recovery for workplace injuries regardless of fault"). This Court recently emphasized the goal, stating, "The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) (citing *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 115, 580 S.E.2d 100, 107 (2003)).[2] The court of appeals addressed this goal in

[1] Russell did not use the word "perpetual" in her petition for a writ of certiorari. She did, however, use it in her petition for rehearing to the court of appeals. As we will explain, the term is appropriate.

[2] *See also* 99 C.J.S. *Workers' Compensation* § 16 (2013) (stating "considerations leading to the enactment of the compensation legislation [include] a desire to provide a remedy or form of relief to, or settlement of the claims of, injured workers or their

another case in which the commission unreasonably delayed addressing the merits of claims, stating, "If the claimants were entitled to benefits, they were entitled to receive them many years ago. If the claimants were not entitled to benefits, [the employers] were entitled to have the claims denied many years ago." *Ex parte S.C. Prop. & Cas. Ins. Guar. Ass'n*, 411 S.C. 501, 506, 768 S.E.2d 670, 673 (Ct. App. 2015).

The Administrative Procedures Act limits the role of the judicial branch of government in meeting the goal of quick decisions in limited litigation by restricting appeals to final decisions in most cases. *See* S.C. Code Ann. § 1-23-380 (Supp. 2018) ("A party . . . who is aggrieved by a final decision . . . is entitled to judicial review . . . ."); *Spalt v. S.C. Dep't of Motor Vehicles*, 423 S.C. 576, 583, 816 S.E.2d 579, 583 (2018) (stating "the Administrative Procedures Act permits an appeal only from 'a *final* decision . . .'" (quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010))). Nevertheless, this Court has struggled to foster quick and efficient resolution of work-related injury claims by discouraging the commission from making repeated, unnecessary remands. In *Bone v. U.S. Food Service*, we cited "lingering confusion in this area [of immediate appealability] that has arisen after the passage of the Administrative Procedures Act" as a basis for granting certiorari to review the court of appeals' dismissal of an interlocutory appeal. 399 S.C. 566, 570, 733 S.E.2d 200, 202 (2012), *adhered to on reh'g*, 404 S.C. 67, 744 S.E.2d 552 (2013). Ultimately, we denied an immediate appeal and permitted a remand for a new hearing, 404 S.C. at 84, 744 S.E.2d at 562, but we highlighted the prejudice employers and employees may suffer from delaying appeal of interlocutory orders until after final judgment, 404 S.C. at 82-83, 744 S.E.2d at 561. The dissent in *Bone* addressed the problem even more directly. Justice Hearn wrote, "Moreover, the interests of judicial economy demand a rejection of the majority's view. Taken to its logical conclusion, the majority's position could have cases trapped in a cycle of remands for years." 404 S.C. at 92, 744 S.E.2d at 566 (Hearn, J., dissenting).

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dependents that is prompt and speedy" (footnote omitted)); 82 Am. Jur.2d *Workers' Compensation* § 12 (2013) ("A state's workers' compensation act . . . provid[es] injured employees with an efficient system of rights, remedies, and procedures with the goal of giving them prompt relief. Among the purposes of a workers' compensation act [is] . . . providing prompt justice for injured workers and preventing the delays that might arise from protracted litigation." (footnotes omitted)).

In *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 791 S.E.2d 719 (2016), we again faced the prejudice workers' compensation litigants may encounter when the commission orders repeated remands, and appeal must be delayed until a final decision. We stated, "Under these unique circumstances where the Commission has ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him an adequate remedy." 418 S.C. at 250, 791 S.E.2d at 722; *see* § 1-23-380 ("A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."). We foresaw in *Hilton* precisely what has happened in this case, that "a party could face the possibility of repeated unexplained 'do overs' before a final decision of the Commission." 418 S.C. at 252, 791 S.E.2d at 723. In *Hilton*, we granted an immediate appeal despite the fact the commission's order was not a final decision. *Id.*; *see also* 418 S.C. at 253, 791 S.E.2d at 723 (Kittredge, J., concurring) (contending "the petitioners in *Bone* made the identical argument . . . , that review of a final agency decision would not provide an adequate remedy").

If this Court's role in achieving this goal of the Workers' Compensation Act is limited, however, the commission's role is primary. *See James v. Anne's Inc.*, 390 S.C. 188, 201-02, 701 S.E.2d 730, 737 (2010) (stating the "'workers' compensation commission . . . is, in the first instance, responsible for effectuating the purposes of the workers' compensation act by administering, enforcing, and construing its provisions in order to secure its humane objectives.'" (quoting 100 C.J.S. *Workers' Compensation* § 706 (2000))). The Workers' Compensation Act sets forth the procedure the commission should follow to fulfill its purpose. Subsection 42-17-40(A) of the South Carolina Code (2015) provides, "The commission or any of its members shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner." Section 42-17-50 of the South Carolina Code (2015) provides an "application for review" by an appellate panel must be made "within fourteen days," in which case an appellate panel may, "if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award."

In most instances, therefore, a claim filed with the commission will be assigned to one commissioner who must promptly conduct a hearing and "determine the dispute in a summary manner." § 42-17-40(A). If the commissioner's decision is appealed, an appellate panel must promptly hear the appeal, and "if proper, amend the award." § 42-17-50. In all but rare cases, the appellate panel should proceed promptly to make a final decision without the necessity of any remand. When the commission

follows this procedure, it will have fulfilled the legislatively set goal to "provide[] a . . . system focusing on quick recovery, relatively ascertainable awards, and limited litigation." *Nicholson*, 411 S.C. at 389, 769 S.E.2d at 5.

In this case, however, the commission's unnecessary delays and repeated remands over the almost eight years since Russell filed her change of condition claim frustrated the goals of the Workers' Compensation Act. As we will explain, each of the remands was unnecessary—particularly the remand order on appeal—and thus contributed to the commission's failure to make a final decision in a timely manner.

After the first appellate panel reversed the first commissioner, the court of appeals reversed. *Russell*, 415 S.C. at 397, 782 S.E.2d at 754. The focus of the court of appeals was the error of requiring that only objective evidence may support the claim. *See* 415 S.C. at 398, 782 S.E.2d at 755 ("Russell argues the Commission erred in requiring a change of condition to be established by objective evidence. We agree."). That was an error only in the appellate panel's review of the first commissioner's decision. In fact, as we previously explained, the first commissioner specifically relied on Russell's subjective testimony, and on the subjective impressions of the two physicians, in addition to the objective MRI scans. While the court of appeals did not provide the commission with specific remand instructions, the commission should have been able to determine that its error was in the appellate panel's review of the commissioner—not in the work of the commissioner. It was completely unnecessary, therefore, for the commission to require the case be reheard by a second commissioner. Rather, given the clear description of the error committed by the appellate panel in reversing the original commissioner, the only task for the commission after the court of appeals' decision was to complete a renewed review of the original commissioner's order under proper principles of law.

It was also completely unnecessary for the second appellate panel to remand to a third commissioner after the second commissioner reviewed the evidence and filed a second detailed order. The court of appeals' 2016 opinion required only a new review, not a new hearing. Even before the second commissioner ruled, counsel for Wal-Mart specifically argued there should be no new hearing. In an email to the commission shortly after the court of appeals remitted the case in May 2016—nine months before the second commissioner's March 2017 order—counsel for Wal-Mart wrote,

> Based upon the hearing notice that I have received, it appears as though this matter has been set for a de novo

> hearing before the single commissioner. I believe this to be in error based upon the remand from the . . . court of appeals. . . . There is nothing in the remand . . . which indicates that a new hearing should be held and that new evidence should be taken on the claim; instead, the commission is simply supposed to reconsider the existing evidence and issue new factual findings in accordance with the legal issues raised by the court of appeals. I believe that having a new hearing . . . is improper from a legal and procedural perspective.

Counsel for Wal-Mart continued, specifically raising the concern we foresaw in *Hilton* and upon which we now reverse,

> I am surprised that this matter was not considered by the full commission and that new factual findings were not issued in accordance with the directives of the court of appeals. Any new factual findings coming from a single commissioner will simply necessitate more appeals and more litigation. . . . I certainly don't see any basis for a de novo hearing or consideration of new evidence; the remand from the court of appeals simply directs the commission to reconsider the existing evidence in light of [the court's] legal determination.

Nevertheless, despite the fact counsel for Wal-Mart specifically asked there not be a de novo hearing, despite the fact the issue of a de novo hearing was not raised by either side after the second commissioner's order, despite the fact almost six years had elapsed since Russell's claim for a change of condition was filed, despite the existence of two detailed single commissioner orders awarding Russell additional benefits, the appellate panel remanded to a third commissioner for a third hearing, specifically requiring the very thing the party appealing to it (Wal-Mart) had specifically asked not to have—a new hearing.

In summary, Russell filed her claim for an increase in benefits due to a change of condition in 2011. In 2013, a commissioner found she proved her condition had changed for the worse. As of the writing of this opinion—nearly eight years after Russell filed her claim—Russell has not received any additional benefits, despite two commissioners finding she was entitled to them. *Cf. Rose v. JJS Trucking, LLC*, 411 S.C. 366, 369, 768 S.E.2d 412, 413 (Ct. App. 2015) (finding an interlocutory

order not immediately appealable under the "adequate remedy" provision when the only prejudice was "to delay the payment of money" between insurance providers). If Russell is entitled to additional benefits, she was entitled to receive them many years ago. If she is not entitled to additional benefits, Wal-Mart was entitled to have her claim denied many years ago. *S.C. Prop. & Cas. Ins. Guar. Ass'n*, 411 S.C. at 506, 768 S.E.2d at 673. The commission failed to fulfill its responsibility under the Workers' Compensation Act to promptly decide this case without protracted litigation.

III. Conclusion

We find the commission's unreasonable delay in making a final decision leaves Russell without an adequate remedy on appeal from a final decision under section 1-23-380. Therefore, we find the appellate panel's remand order is immediately appealable. We **REVERSE** the court of appeals' dismissal, **REVERSE** the order remanding to a single commissioner, and **REMAND** to any appellate panel for immediate and final review of the original commissioner's August 5, 2013 order in accordance with the 2016 holding of the court of appeals.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

A. Marion Stone, III, Respondent,

v.

Susan B. Thompson, Petitioner.

Appellate Case No. 2017-000227

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Jocelyn B. Cate, Family Court Judge

Opinion No. 27876
Heard October 16, 2018 – Filed April 3, 2019

REVERSED

Donald Bruce Clark, of Donald B. Clark, LLC, of Charleston, for Petitioner.

Alexander Blair Cash and Daniel Francis Blanchard, III, both of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent.

JUSTICE HEARN: We granted certiorari to determine whether a family court order finding a common-law marriage was immediately appealable under our

general appealability statute, S.C. Code Ann. § 14-3-330. The family court bifurcated the proceedings to first determine whether the parties were married, and has yet to try the remaining issues. The court of appeals held the order was interlocutory because it did not end the case, and further, that it was not immediately appealable under the statute. *Stone v. Thompson*, 418 S.C. 599, 795 S.E.2d 49 (Ct. App. 2016). Because the order involved the merits of the causes of action, we reverse.

FACTUAL BACKGROUND

Stone and Thompson met in 1983 and began a romantic relationship shortly thereafter. Thompson was married to another man at the time and obtained a divorce from him in 1987. Later that year, Stone and Thompson had their first child. After Hurricane Hugo hit Charleston in 1989, the parties had their second child and started living together. They continued to live, raise their children, and manage rental properties together for approximately 20 years, but ultimately ended their relationship after Thompson discovered Stone was having an affair with a woman in Costa Rica.

In 2012, Stone filed an amended complaint in family court alleging, *inter alia*, he was entitled to a declaratory judgment that the parties were common-law married, a divorce, and an equitable distribution of alleged marital property.[1] Thompson answered, contending the parties were not common-law married, asserting several counterclaims, and seeking dismissal of the case. Thompson also asked the court, if it would not dismiss the case, to bifurcate the issues to first determine whether the parties were common-law married. After a hearing, the family court denied Thompson's motion to dismiss but granted her motion to bifurcate, ordering a trial on the sole issue of whether a common-law marriage existed between the parties. The court reasoned that, should it determine no marriage existed, it would not need to address the other issues in the case.

The family court held a 7-day trial that featured 29 witnesses, 12 videotaped depositions, and nearly 200 exhibits. The court determined the parties had expressed the intent and held themselves out to be married beginning in 1989, and accordingly,

[1] Stone also later filed a complaint in circuit court—based on largely the same set of facts—seeking relief for breach of contract and fiduciary duty, quantum meruit, and other temporary and permanent relief. The case was stayed pending resolution of the family court proceedings.

the parties had been married since that time. The family court's judgment stated it was a "Final Order," but also that it did not end the case, as the divorce and equitable distribution actions were still pending.

Thompson appealed, and Stone argued the order was interlocutory and not immediately appealable under section 14-3-330. The court of appeals agreed with Stone. The court determined the order was interlocutory because, although the family court ruled that a common-law marriage existed and captioned the order "Final," it expressly noted the order did not end the case due to the still-pending divorce and equitable distribution causes of action. The court concluded the order did not involve the merits because the family court exercised its discretion to bifurcate the case and adjudicated the preliminary issue of marriage before proceeding to the remaining issues. Moreover, the court determined the order did not affect Thompson's substantial rights because it did not deprive her of a mode of trial, and she would be able to challenge any error in the future. Consequently, the court dismissed Thompson's appeal.

DISCUSSION

Section 14-3-330 of the South Carolina Code provides this Court jurisdiction to review, in relevant part:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.S.C. Code Ann. § 14-3-330(1) (1976).[2] An order involves the merits under § 14-3-330(1) when it finally determines some substantial matter forming the whole or part of a cause of action

[2] *See* S.C. Code Ann. § 63-3-630(A) (2010); *see also Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) (applying section 14-3-330 to determine the appealability of a family court order).

or defense. *Mid-State Distribs, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

The provisions of section 14-3-330 are narrowly construed and serve the underlying policy favoring judicial economy by avoiding "piecemeal appeals." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). However, by its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537–38, 773 S.E.2d 144, 146 (2015).

Thompson argues the order was appealable under section 14-3-330(1) because it finally determined a substantial matter forming part of the cause of action and a defense to it, and therefore, it involved the merits. In response, Stone argues the common-law marriage finding was an embedded element of his claims and a preliminary determination to allow them to go forward. We agree with Thompson.

We believe the text of subsection (1) and our jurisprudence compel the conclusion the order was appealable. Stone's actions for divorce and equitable distribution require a determination the parties are married. This determination is substantial, not only as a part of the causes of action, but also in terms of the larger effects of marriage across other areas of law. Thompson's primary—and, to this point, exclusive—defense to the family court causes of action was that the parties were not married. Accordingly, the court weighed the evidence and finally determined a substantial matter forming part of Stone's causes of action, as well as Thompson's defense, which satisfies the test we clarified in *Mid-State*. 310 S.C. at 334, 426 S.E.2d at 780.

We emphasize the particular circumstances that lead to our holding today, in keeping with our practice of narrowly construing section 14-3-330. *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709. In bifurcating the issues, the family court recognized the central importance of the common-law marriage determination, without which the other causes of action could not proceed. The court conducted an extensive trial on this sole issue, and the vast majority of the evidence adduced likely will not be relevant during any future proceedings for divorce and equitable distribution. While the subsequent proceedings are separate from the common-law marriage trial (by nature of the bifurcation), the existence of a marriage clearly involves the merits of

those issues.[3] Thus, our holding as to appealability would apply only where, following a bifurcated hearing, a claim or defense has been finally determined.

We hold the family court's bifurcated common-law marriage order was appealable under section 14-3-330(1) because it involved the merits. As a result, we need not reach the parties' remaining arguments. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues after reaching a dispositive issue).

CONCLUSION

Accordingly, the court of appeals' decision is **REVERSED**. In the interest of bringing this lengthy litigation on whether a common law marriage existed to a close, we do not remand to the court of appeals; instead, we retain jurisdiction and will proceed to set the remaining issues for oral argument.

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

[3] We also note our decision in *Callen v. Callen*, 365 S.C. 618, 620 S.E.2d 59 (2005), in which we certified an appeal regarding common-law marriage under Rule 204(b), SCACR. In *Callen*, as here, the family court bifurcated divorce and common-law marriage proceedings, and we heard an appeal only from the common-law marriage portion. While we did not hold the family court's order was appealable due to the certification, and the parties did not raise the issue of appealability, nothing in *Callen* suggested an appeal from a bifurcated order of common-law marriage was inappropriate.

CHIEF JUSTICE BEATTY: I concur in the result reached by the majority; however, I write separately to express my displeasure with the manner of trial of this case. In my view, bifurcation in a domestic relations case should be rare if ever at all. The emotional and contentious nature of most domestic relations cases all but guarantees an expensive, long, and tortuous path to resolution. Bifurcation only adds to the expense and delayed resolution. Moreover, bifurcation thwarts this Court's long-held policy to avoid piecemeal appeals. This case is a prime example of this problem.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Conrad Lamont Slocumb, Petitioner.

Appellate Case No. 2015-002031

IN THE ORIGINAL JURISDICTION

Opinion No. 27877
Heard December 12, 2018 – Filed April 3, 2019

RELIEF DENIED

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Chief Appellate Defender Robert Micheal Dudek, Appellate Defender Susan Barber Hackett, Appellate Defender Laura Ruth Baer, all of Columbia, for Amicus Curiae, South Carolina Division of Appellate Defense.

John H. Blume, III and Lindsey Sterling Vann, both of Columbia, for Amicus Curiae, Justice 360 & Cornell Juvenile Justice Project.

Executive Director James Hugh Ryan, III, of Columbia, for Amicus Curiae, South Carolina Commission on Indigent Defense.

Joseph M. McCulloch, Jr., of Columbia, and Seth P. Waxman, of Washington, DC, for Amicus Curiae, The South Carolina State Conference of the National Association for the Advancement of Colored People.

Alexandra V.B. Gordon, Aidan Synnott, Anne O'Toole and Agbeko C. Petty, all of New York, NY, for Amicus Curiae, South Carolina Public Defender Association and South Carolina Criminal Association of Criminal Defense Lawyers.

JUSTICE KITTREDGE: At the age of thirteen, petitioner Conrad Slocumb kidnapped and sexually assaulted a teacher before shooting her in the face and head five times and leaving her for dead. Three years later, following his guilty plea for the first set of crimes, he escaped from custody and raped and robbed another woman in a brutal manner before being apprehended again. For these two sets of crimes, Slocumb received an aggregate 130-year sentence due to the individual sentences being run consecutively.

Following rounds of direct appeals and collateral proceedings, Slocumb now contends an aggregate 130-year sentence for multiple offenses committed on multiple dates violates the Eighth Amendment to the United States Constitution, as extrapolated from the principles set forth in the United States Supreme Court's (Supreme Court) decisions in *Graham v. Florida*[1] and *Miller v. Alabama*,[2] among

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[1] 560 U.S. 48 (2010) (prohibiting courts from imposing a sentence of life without the possibility of parole on a juvenile offender convicted of a nonhomicide offense).

[2] 567 U.S. 460 (2012) (holding mandatory life without parole sentences for juveniles convicted of homicide offenses violated the Eighth Amendment's prohibition against cruel and unusual punishments).

others. We acknowledge ostensible merit in Slocumb's argument, for it is arguably a reasonable extension of *Graham* and *Miller*. Yet precedent dictates that only the Supreme Court may extend and enlarge the protections guaranteed by the United States Constitution. Once the Supreme Court has drawn a line in the sand, the authority to redraw that line and broaden federal constitutional protections is limited to our nation's highest court. Because the decision to expand the reach and protections of the Eighth Amendment lies exclusively with the Supreme Court, we are constrained to deny Slocumb relief.

I.

In 1992, when he was thirteen years old, Slocumb accosted a high school teacher in the school parking lot and forced her into her car at gunpoint, directing her to drive to a wooded area. Slocumb unsuccessfully attempted to force the teacher into the woods before grabbing her, squeezing her breast, and digitally penetrating her vagina through her clothing. He then shot the teacher in the face and head five times and drove off in her car, leaving her on the side of the road. Miraculously, the teacher survived and identified Slocumb as the perpetrator. Eventually, Slocumb pled guilty to criminal sexual conduct in the first degree (CSC-1st) in exchange for the remaining charges being *nol prossed* and was sentenced to thirty years' imprisonment.

Three years later, while returning from an off-site medical visit, Slocumb escaped from custody for a total of forty-five minutes. In the short time he was free, he ran to a nearby apartment complex, located a lone woman, and forced his way into her apartment. Once inside, Slocumb claimed he had a gun and demanded the woman turn over her car keys, money, jewelry, cigarettes, beer, and a change of clothes. After the woman complied with his demands, Slocumb forced her to undress, said "I'm going to have some sex," and, after reminding her he was armed, proceeded to rape her. The woman nonetheless continued to resist, whereupon Slocumb forced her to stand and touch her toes as he raped her from behind. After the rape, Slocumb left the apartment and was apprehended in the parking lot by law enforcement.

After a jury trial and multiple rounds of direct appeals, post-conviction relief applications, and resentencing hearings, Slocumb was ultimately sentenced to life without parole for burglary in the first degree, thirty years' imprisonment for CSC-1st, thirty years' imprisonment for kidnapping, fifteen years' imprisonment for robbery (as a lesser-included offense to armed robbery), and five years' imprisonment for escape, the sentences to be served consecutively.

Subsequently, in 2010, the United States Supreme Court handed down its decision in *Graham v. Florida*, in which it held the Eighth Amendment to the United States Constitution prohibited courts from sentencing a juvenile offender convicted of a nonhomicide offense to life without parole. 560 U.S. at 82. Slocumb immediately filed a federal habeas action, requesting his life sentence for burglary be vacated pursuant to *Graham*. The federal district court granted him relief and remanded the case to the circuit court for resentencing on the burglary charge alone.

On remand, Slocumb requested the circuit court not only resentence him on the burglary charge, but also vacate the remaining eighty-year aggregate sentence for the other crimes and resentence him on all of the charges in accordance "with the spirit and intent of" *Graham* and *Miller*. Acknowledging that a *de facto* life sentence[3] is not expressly prohibited under *Graham* or *Miller*, Slocumb invited the circuit court to follow the spirit of *Graham* and *Miller* and find his aggregate term-of-years sentence was impermissible under the Eighth Amendment. In addition, Slocumb asserted even if his new burglary sentence were run concurrently to his eighty-year aggregate sentence for the remaining crimes, the eighty-year sentence would also not provide him with a meaningful opportunity for release, as specified in *Graham*, because he would be incarcerated long past his projected life expectancy.

In response, the State stressed *Graham* specifically allowed a state to keep a juvenile offender incarcerated for his entire natural life span when the offender failed to demonstrate maturity or rehabilitation. The State informed the circuit court that it had been contacted by the Department of Corrections (DOC) and told that Slocumb, as an adult in his thirties, was an enormous "security risk" with a "horrible" behavioral record, including 218 infractions over a sixteen-year period for actions such as attacking corrections workers, possession of a weapon, and mutilation. According to the State, the DOC's unsolicited contact was the first time in at least twenty-three years the agency had felt it necessary to specifically advise the State of the potential security risk posed by an inmate.[4] The State also

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[3] *See Bunch v. United States*, 685 F.3d 546, 552 (6th Cir. 2012) (describing a *de facto* life sentence as one that is expressed as a lengthy term of years, causing the defendant's eligibility for parole or release to fall outside his projected life expectancy).

[4] Similarly, the solicitor who prosecuted Slocumb for the offenses committed when he was sixteen years old testified Slocumb was "the most violent sexual predator

informed the circuit court Slocumb had failed to complete any educational courses or enroll in any rehabilitative programs while incarcerated.[5] The State argued Slocumb's poor disciplinary record and failure to attempt to rehabilitate himself fell squarely within *Graham*'s language allowing a juvenile offender convicted of a nonhomicide offense to be imprisoned for his natural life span. Stated differently, Slocumb's adult prison record of continuing impulsivity and violence belies the general premises of youth articulated in *Roper v. Simmons*,[6] *Graham*, and *Miller*.

Ultimately, the circuit court found the remand instructions from the federal court encompassed only Slocumb's burglary charge. The court then resentenced Slocumb to fifty years' imprisonment on the burglary charge, the sentence to be run consecutively to the eighty years for the remaining charges, resulting in Slocumb facing a 130-year aggregate sentence.

Slocumb appealed, arguing the sentence violated the spirit and letter of *Graham*, but the court of appeals affirmed. Slocumb then filed a petition for a writ of certiorari with this Court. Because the court of appeals considered only the sentence for burglary in accordance with the limited remand instructions from the federal district court, we denied the petition. However, because the certiorari petition sought review of the entire 130-year sentence, we observed that the constitutionality of the length of Slocumb's aggregate sentence in light of *Graham* was more appropriately raised to this Court by way of a petition for a writ of certiorari in our original jurisdiction. As a result, Slocumb refiled a petition for a writ of certiorari in the Court's original jurisdiction to address whether an aggregate sentence imposed for multiple nonhomicide offenses committed while Slocumb was a juvenile was the equivalent of a sentence of life without the possibility of parole, and if so, whether the aggregate sentence violated the Eighth Amendment as interpreted by *Graham*. We granted the petition.

[she] ha[d] ever prosecuted."

[5] According to the DOC's website, Slocumb still has not earned any education credits while incarcerated.

[6] 543 U.S. 551 (2005) (finding the Eighth and Fourteenth Amendments to the United States Constitution forbid the imposition of the death penalty on juvenile offenders).

II.

In the past fourteen years, the Supreme Court issued three decisions concerning juvenile sentencing practices: *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*. We begin our analysis with a review of this trilogy of cases.

A.

In the earliest of its three recent decisions, *Roper v. Simmons*, the Supreme Court held juvenile offenders could not be sentenced to death if they were under the age of eighteen at the time they committed their crimes. 543 U.S. at 568, 578. Underlying the Supreme Court's holding was its belief that juveniles were fundamentally different from adults, in that they (1) exhibited a lack of maturity and an underdeveloped sense of responsibility, resulting in impetuous and ill-considered actions and decisions; (2) were more susceptible to negative outside influences such as peer pressure; and (3) had personality traits that were more transitory and less fixed than adults. *Id.* at 569–70. Consequently, as the Supreme Court explained, a juvenile's irresponsible conduct was not as morally reprehensible as that of an adult and less indicative of an irretrievably depraved character. *Id.* The Supreme Court concluded that as a result of juveniles' diminished culpability, the penological justifications for the death penalty applied to them with less force than to adults, and therefore the death penalty was an ineffective and inappropriate punishment for juvenile offenders. *Id.* at 571.

B.

Subsequently, in *Graham v. Florida*, the Supreme Court expanded upon its rationale in *Roper* and held the Eighth Amendment prohibited "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. As a result of the differences between juveniles and adults outlined in *Roper* and the perceived moral distinction between homicide and nonhomicide crimes, the Supreme Court concluded that, as compared to an adult murderer, a juvenile nonhomicide offender who did not kill or intend to kill had a "twice diminished moral culpability." *Id.* at 69.

Turning to the appropriate punishment for juvenile nonhomicide offenders, the Supreme Court noted a life without parole sentence was the second most severe penalty permitted by law and shared key features with a death sentence "that are shared by no other sentence," most importantly, the certainty the defendant will die in prison. *Id.* at 69–70. The Supreme Court discounted the penological

justifications—retribution, deterrence, incapacitation, and rehabilitation—for sentencing a juvenile nonhomicide offender to life without parole because juveniles have diminished culpability, are less likely to take possible punishment into consideration when making decisions, and cannot be reliably classified as incorrigible at a young age. *Id.* at 71–75.

As a result, the Supreme Court held "that for a juvenile offender who did not commit homicide[,] the Eighth Amendment forbids the sentence of *life without parole*." *Id.* at 74 (emphasis added). Further,

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing *a life without parole sentence* on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75 (emphasis added).

In dissent, Justice Alito clarified his understanding of the majority's holding, stating that "*[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole*. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional." *Id.* at 124 (Alito, J., dissenting) (emphasis added); *id.* at 123 n.13 (Thomas, J., dissenting) (making a similar observation). The majority in no way acknowledged or responded to either Justice Alito's or Justice Thomas's statements that the majority holding did not apply to juvenile offenders serving lengthy term-of-years sentences.

C.

Finally, in *Miller v. Alabama*, the Supreme Court held that the Eighth Amendment forbade states from imposing on juveniles mandatory sentences of life without the possibility of parole for homicide offenses. 567 U.S. at 489. The Supreme Court reiterated that *Roper* and *Graham* stood for the principle that juveniles are constitutionally different from adults for sentencing purposes due to their diminished culpability and greater prospects for reform. *Id.* at 471–72. Relevant to this appeal, the Supreme Court stated:

> *Graham*'s flat ban on **life without parole** applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So *Graham's* reasoning implicates any **life-without-parole sentence** imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Id. at 473 (bold emphasis added) (internal citations omitted).[7]

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[7] Subsequently, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Supreme Court held its decision in *Miller* announced a new substantive rule of federal constitutional law and was to be applied retroactively. To receive relief, Slocumb must establish the *Graham* decision applies retroactively as well. *See Teague v. Lane*, 489 U.S. 288, 310 (1989). The Supreme Court has never explicitly held *Graham* applies retroactively. However, using our well-established retroactivity analysis, we conclude *Graham*—like *Miller*—applies retroactively because it sets forth a new substantive rule that excludes a certain class of defendants (juvenile nonhomicide offenders) from specific punishment (sentences of life without parole). *See generally Aiken v. Byars*, 410 S.C. 534, 539–44, 765 S.E.2d 572, 575–77 (2014) (setting forth South Carolina's retroactivity analysis and applying it to find discretionary life without parole sentences for juvenile homicide offenders were unconstitutional absent individualized hearings that accounted for the hallmark features of youth, as set forth in *Miller*); *see also In re Williams*, 759 F.3d 66, 70 (D.C. Cir. 2014) (concluding *Graham* applied retroactively to cases on collateral review); *Moore v. Biter*, 725 F.3d 1184, 1190 (9th Cir. 2013) (same).

III.

At his resentencing hearing following the grant of federal habeas relief, Slocumb conceded to the circuit court that *Graham* applied only to *de jure* life sentences. Nonetheless, he now argues the general rationale underlying *Graham* requires us to extend its protections to juveniles serving *de facto* life sentences as well. We agree *Graham*'s explicit holding applies to *de jure* life sentences alone, and its rationale *may* implicate *de facto* life sentences. *See Miller*, 567 U.S. at 473 ("*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile . . . ."). Nonetheless, several factors caution us against extending the reach of *Graham* to provide Slocumb with relief without further input from the Supreme Court.

A.

First, a long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set. *See, e.g.*, *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (per curiam) ("The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon v. Hass*, 420 U.S. 714 (1975)."); *Hass*, 420 U.S. at 719 & n.4 (stating that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them"). As a result, we do not believe it is appropriate for this Court, as an inferior court, to extend federal constitutional protections under the Eighth Amendment beyond the boundaries the Supreme Court set in *Graham*.[8]

Stated differently, while we are duty-bound to enforce the Eighth Amendment consistent with the Supreme Court's directives, our duty to follow binding precedent is fixed upon case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding. *Vasquez v.*

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[8] Slocumb did not argue he would be entitled to relief under our state constitution's cruel and unusual punishments clause. *See* S.C. Const. art. I, § 15 ("[N]or shall cruel, nor corporal, nor unusual punishment be inflicted . . . ."). Accordingly, we do not address the import of state constitutional protections on Slocumb's sentence.

Commonwealth, 781 S.E.2d 920, 926 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016). This is not a subtle distinction, as Chief Justice Marshall long ago emphasized its importance to the judicial process, explaining:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision*. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it[] are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (emphasis added) (rejecting counsel's argument that the Supreme Court should follow the reasoning set forth in dicta in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). The principle enunciated by Chief Justice Marshall has particular force in this case, as a closer examination of the *Graham* majority and dissenting opinions illustrate.

B.

The *Graham* majority began its analysis by observing that "[t]he present case involves an issue the Court has not considered previously: a categorical challenge *to a term-of-years sentence*." *Graham*, 560 U.S. at 61 (emphasis added). The Supreme Court was thus presented with an opportunity to answer the very question Slocumb now presents. Yet the Court—after a lengthy discussion of the changing "mores of society" and "the global consensus"[9]—answered a narrower question by

[9] The so-called consensus against sentencing juvenile offenders to life without parole could not be found in the laws of this country, for the vast majority of states did not forbid such a sentence. *Graham*, 560 U.S. at 82–84 (including an Appendix to the majority opinion which listed thirty-seven states, the Federal Government, and the District of Columbia, all of which permitted *de jure* life sentences for juvenile nonhomicide offenders). Undaunted, the Supreme Court stated that "[t]he evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders." *Id.* at 66. The *Graham* majority found the judgments of other nations "not irrelevant" in determining what the United States Constitution really means,

only "hold[ing] that for a juvenile offender who did not commit homicide[,] the Eighth Amendment forbids the sentence of life without parole." *Id.* at 74. To remove any question as to the holding in *Graham*, the majority concluded with: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82.

Underscoring its narrow holding and the rarity of sentencing juvenile nonhomicide offenders to life without the possibility of parole, the *Graham* majority discussed in detail the number of juveniles nationwide who were serving *de jure* life sentences, counting 123 affected individuals. *Id.* at 62–64. Significantly, the Supreme Court *excluded* from its calculations the number of juveniles serving *de facto* life sentences due to a lengthy term of years. *See id.*; *id.* at 113 n.11 (Thomas, J., dissenting) (noting the majority opinion "exclude[d] from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e.g.*, 70 or 80 years' imprisonment)," and finding the omission anomalous because "such a long sentence[ ] effectively denies the offender any material opportunity for parole," akin to the *de jure* life sentences the majority found prohibited). The Supreme Court made no attempt to quantify whether sentencing juveniles to *de facto* life sentences was "quite rare[]," as it did with those who received *de jure* life sentences. *See id.* at 64. As a result, *Graham*'s categorical bar was limited to those precise 123 juveniles counted by the Supreme Court and, in the future, to those juvenile nonhomicide offenders eligible to receive *de jure* life sentences for their crimes.[10]

Similarly, Justices Thomas and Alito both separately noted their understanding of the *Graham* majority's holding to exclude lengthy term-of-years sentences—statements which the majority failed to acknowledge or rebut. *See id.* at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."); *id.* at 113 n.11, 123 n.13 (Thomas, J., dissenting). Given the dissenting Justices' contemporaneous

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finding persuasive "the global consensus against the sentencing practice in question." *Id.* at 80 (citation omitted).

[10] Several other courts also have found this portion of *Graham* significant in exploring the limited reach of *Graham*'s holding. *See, e.g.*, *Bunch*, 685 F.3d at 552; *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017) (en banc), *cert. denied*, 138 S. Ct. 641 (2018); *State v. Nathan*, 522 S.W.3d 881, 887 n.10 (Mo. 2017) (en banc).

understanding of the reach of the majority decision—to which the majority did not respond—and because we are being asked to extend the explicit reach of *Graham* and find new Eighth Amendment protections, we decline Slocumb's invitation to broaden *Graham*'s holding.[11]

C.

We do not deny the obvious—Slocumb's 130-year sentence is a *de facto* life sentence. The *Graham* Court acknowledged this was the question presented, but it chose not to answer the term-of-years sentencing issue, notwithstanding the dissenting opinions nipping at the heels of the majority on this very question.[12]

In emphasizing that Slocumb's situation is beyond the reach of *Graham*, it may be helpful to state the obvious: Slocumb's case is factually distinct from the circumstances presented in *Graham*. While the juvenile offender in *Graham* was convicted of a single crime and sentenced to a single sentence formally termed "life without parole,"[13] Slocumb committed multiple crimes at two different points in time—the second set after he had escaped from custody and, in the short time he

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[11] A number of other courts have also found the *Graham* majority's failure to respond to those statements by Justices Thomas and Alito a telling sign as to the intended reach of its decision. *See, e.g.*, *Lucero*, 394 P.3d at 1133; *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011); *State v. Brown*, 118 So.3d 332, 336, 341 (La. 2013); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 243 (Mo. 2017) (en banc), *cert. denied*, 138 S. Ct. 304 (2017); *Kinkel v. Persson*, 417 P.3d 401, 409–10 (Or. 2018), *cert. denied*, 139 S. Ct. 789 (2019); *Vasquez*, 781 S.E.2d at 925.

[12] Perhaps the narrow holding of *Graham* was necessary to garner a fifth vote. Regardless of the reasons, the holding of *Graham* is what it is and must be respected.

[13] To be precise, the juvenile in *Graham* was sentenced to fifteen years' imprisonment for one crime and a term of "life imprisonment" for a second, simultaneous crime in a jurisdiction that had abolished its parole system. *Graham*, 560 U.S. at 57. *But see id.* at 53 (describing the second crime as "a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole"). We refer to the *Graham* defendant receiving a single life sentence for a single crime based on the second conviction, which was the Supreme Court's sole focus.

was free, committed another strikingly similar set of crimes to the first one three years earlier. For these crimes, Slocumb received an average per-crime sentence of twenty-six years' imprisonment. The only reason his aggregate sentence exceeds his life expectancy is because he committed so many crimes, not because a single sentence is disproportionately lengthy.[14] Slocumb's case is nothing like *Graham*. *See Graham*, 560 U.S. at 63 ("The instant case concerns *only* those juvenile offenders sentenced to *life without parole* solely for *a* nonhomicide offense." (emphasis added)).[15]

Moreover, Slocumb's crimes reflect a critical difference from the juvenile offender in *Graham*: Slocumb shot his first victim in the face and head five times before leaving her to die on the side of a deserted country road. The *Graham* majority

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[14] *See O'Neil v. Vermont*, 144 U.S. 323, 331 (1892) ("If [a defendant sentenced to an aggregate sentence for multiple offenses] has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that had he committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the [defendant] has committed." (quotation marks omitted) (citation omitted)).

[15] Several other courts have found *Graham* and *Miller* distinguishable on the facts when a juvenile offender committed multiple crimes, committed a series of crimes at different points in time, and/or committed crimes against multiple victims. *See, e.g.*, *Bunch*, 685 F.3d at 551; *State v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011); *Lucero*, 394 P.3d at 1132–34; *Brown*, 118 So. 3d at 341; *Willbanks*, 522 S.W.3d at 242; *Kinkel*, 417 P.3d 411–13; *Vasquez*, 781 S.E.2d at 925–26; *cf. Graham*, 560 U.S. at 63 (explaining juvenile offenders who commit both homicide and nonhomicide crimes "present a different situation for a sentencing judge than juvenile offenders who committed no homicide" because "[i]t is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination").

noted there was a moral distinction between defendants who intend to commit homicide and nonhomicide crimes. *See id.* at 69 ("The Court has recognized that defendants who do not kill, *intend to kill*, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. . . . It follows that, when compared to an adult murderer, a juvenile offender who did not kill or *intend to kill* has a twice diminished moral culpability. The age of the offender *and the nature of the crime* each bear on the analysis." (emphasis added)). While Slocumb may have had a once-diminished moral culpability based solely on his age at the time he committed his offenses, we cannot agree he had a twice-diminished moral culpability like the juvenile offender in *Graham*.

Chief Justice Roberts noted this exact distinction in his concurrence in *Graham*, stating that while he agreed the *Graham* defendant could not be constitutionally sentenced to life without parole—and, thus, he concurred in the majority's result—the categorical bar against *de jure* life sentences for all juvenile nonhomicide offenders was an unnecessarily broad holding. *Id.* at 94 (Roberts, C.J., concurring). In particular, Chief Justice Roberts opined *de jure* life sentences would be appropriate for other "especially heinous or grotesque" crimes, such as in the case of a seventeen-year-old offender who raped an eight-year-old girl and left her to die buried under 197 pounds of rocks. *Id.* at 95 (Roberts, C.J., concurring). As Chief Justice Roberts stated, "The single fact of being 17 years old would not afford [the offender] protection against life without parole if the young girl had died—as [the offender] surely expected she would—so why should it do so when she miraculously survived his barbaric brutality?" *Id.*

D.

For all of these reasons, we decline to extend *Graham*'s explicit holding based solely on the general rationale underlying the opinion without further input from the Supreme Court as to how the Eighth Amendment applies to situations where a juvenile nonhomicide offender commits multiple crimes against multiple victims at multiple points in time.[16] As explained by the United States Court of Appeals for

[16] Approximately half of the courts around the country have similarly declined to find *Graham*, *Miller*, or the Eighth Amendment bars *de facto* life sentences. *See* Appendix, *infra*, Part I. However, notably, the other half of the courts around the country who considered this issue either found *Graham* or *Miller* expressly prohibited *de facto* life sentences or extended *Graham*'s and *Miller*'s rationale to

the Sixth Circuit, a contrary result would lead to a number of unanswered questions:

> At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is "life" or 107 years. Without any tools to work with, however, we can only apply *Graham* as it is written.

Bunch, 685 F.3d at 552 (citation omitted); *Vasquez*, 781 S.E.2d at 928 (explaining that answering this list of questions with any degree of specificity "would require a proactive exercise inconsistent with our commitment to traditional principles of judicial restraint"). As the Sixth Circuit concluded, "[I]f the Supreme Court has more in mind, it will have to say what that is." *Bunch*, 685 F.3d at 553 (citation omitted) (internal alteration marks omitted).

IV.

The *Roper-Graham-Miller* trilogy has resulted in much confusion and conflicting opinions in ascertaining the reach of the Eighth Amendment in the sentencing of juveniles. *See* Appendix, *infra* (showing there is an approximately even split of authority on whether the Eighth Amendment, as interpreted in *Graham* and *Miller*, prohibits *de facto* life sentences). Courts have struggled in good faith in trying to determine the manner in which juveniles may be constitutionally sentenced. We

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bar the imposition of *de facto* life sentences on juvenile offenders. *See* Appendix, *infra*, Part II. We note there are three additional states who have disapproved of *de facto* life sentences for juvenile nonhomicide offenders under their state constitutions, rather than under *Graham*, *Miller*, or the Eighth Amendment. *See* Appendix, *infra*, Part III. Two other states declined to definitively hold whether *Graham* or *Miller* applied to *de facto* life sentences, but denied the juvenile offenders relief anyway for different reasons. *See* Appendix, *infra*, Part IV.

are one of those courts. Rather than predict what the Supreme Court may or may not do, we believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court.

Our holding should in no way be read to signal the end of the debate on the underlying issues raised by aggregate term-of-years sentences imposed on juvenile offenders, whether for homicide or nonhomicide offenses. As the Supreme Court stated in *Graham* in the context of *de jure* life sentences for juveniles, it is for the states, in the first instance, to explore the means and mechanisms for complying with the Eighth Amendment. 560 U.S. at 75.

Many state legislatures have responded to *Roper*, *Graham*, and *Miller* by enacting juvenile sentencing statutes that provide juvenile offenders with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *See State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (noting the "flurry of legislative action that has taken place in the wake of *Graham* and *Miller*"). Our General Assembly has already begun the process of considering a legislative response to juvenile sentencing concerns.

Specifically, the South Carolina General Assembly, with commendable foresight, has taken initial steps toward reforming juvenile sentencing practices in this state. In February 2019, the South Carolina House of Representatives introduced H. 3919 to enact the "Youth Sentencing Act of 2019." H. 3919, 123 Leg., 1st Reg. Sess., as amended Feb. 8, 2019 (S.C. 2019), *available at* https://www.scstatehouse.gov/sess123_2019-2020/bills/3919.htm. In its current form, the bill would: (1) retroactively prohibit juvenile offenders from being sentenced to life without parole; (2) retroactively provide juvenile nonhomicide offenders with parole-eligibility after twenty years' imprisonment, and juvenile homicide offenders with parole-eligibility after twenty-five years' imprisonment; (3) allow for sentences shorter than the mandatory minimums for juvenile nonhomicide offenders; (4) ban solitary confinement for all juvenile offenders; and (5) modify South Carolina's geriatric release program to allow for consideration of parole-like factors for juvenile offenders, *see Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011) (holding Virginia's geriatric release program—eligibility for which requires use of "the factors used in the normal parole consideration process"—satisfied *Graham*'s requirement for a meaningful opportunity for release based on demonstrated maturity and rehabilitation).

Respect for separation of powers compels us to recognize that the General Assembly is the author of our state's public policy for the sentencing of criminal offenders, juveniles and adults. Pending further pronouncement from the Supreme Court, we take no position in the matter, nor should our holding be construed to limit or define the parameters of the legislative discussions and response to this challenge. The judicial role is limited to answering the narrow question raised: whether the aggregate term-of-years sentence imposed on Slocumb categorically violates the Eighth Amendment pursuant to the reach of *Graham*. Because we find it does not, our judicial prerogative is at its end, and the process must continue in the legislature.

V.

Neither *Graham* nor the Eighth Amendment, as interpreted by the Supreme Court, currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a *de facto* life sentence on a juvenile nonhomicide offender. We therefore decline to provide Slocumb relief from his 130-year sentence stemming from his multiple and violent crimes.[17]

DECLARATORY JUDGMENT ISSUED.

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

Appendix

I. Jurisdictions that find *Graham* or *Miller* does not apply to *de facto* life sentences

[17] As we have mentioned previously, our research indicates that jurisdictions around the country are approximately evenly split as to whether *Graham*'s and *Miller*'s holdings apply to *de facto* life sentences, with some denying relief and some granting relief. *See* note 16, *supra*; Appendix, *infra*. We are hopeful the Supreme Court will resolve this question, for it seems it cannot long remain true that ***federal*** constitutional protections vary so widely depending solely on the ***state*** in which a juvenile offender commits his offenses.

United States Court of Appeals for the Fifth Circuit	*United States v. Walton*, 537 Fed. App'x 430, 437 (5th Cir. 2013) (finding *Graham* did not apply to a lengthy term-of-years sentence).
United States Court of Appeals for the Sixth Circuit	*Bunch v. Smith*, 685 F.3d 546, 550–53 (6th Cir. 2012) (explaining *Graham* "did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole").
Arizona	*State v. Kasic*, 265 P.3d 410, 414–16 (Ariz. Ct. App. 2011) (opining *Graham* only applied to juvenile offenders who committed a *single* nonhomicide offense and were specifically sentenced to "life without parole" rather than a term of years).
Arkansas	*Hobbs v. Turner*, 431 S.W.3d 283, 289 (Ark. 2014) (determining a juvenile nonhomicide offender had received a sentence that complied with *Graham* so long as the sentence was "nonlife").
Colorado	*Lucero v. People*, 394 P.3d 1128, 1132–34 (Colo. 2017) (noting the defendant, "unlike the petitioners in *Graham* and *Miller*, did not receive a sentence of life without the possibility of parole. Rather, he received four consecutive sentences to terms of years for four separate convictions. . . . Life without parole is a specific sentence, imposed as punishment for a single crime, which remains distinct from aggregate term-of-years sentences resulting from multiple convictions. Neither *Graham* nor *Miller* concerns or even considers aggregate term-of-years sentences."), *cert. denied*, 138 S. Ct. 641 (2018).

Georgia	*Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) (placing emphasis on Justice Alito's dissent in *Graham*, in which he stated that "nothing in the Court's opinion [in *Graham*] affects the imposition of a sentence to a term of years without the possibility of parole," *Graham*, 560 U.S. at 124 (Alito, J., dissenting) (internal alteration marks omitted)).
Illinois	*People v. Cavazos*, 40 N.E.3d 118, 139 (Ill. App. Ct. 2015) (rejecting *Miller*'s express applicability to *de facto* life sentences and "noting that there are distinct differences between a sentence of natural life without parole and a sentence of a determinate, albeit lengthy, number of years"). *But see People v. Reyes*, 63 N.E.3d 884, 887–88 (Ill. 2016) (per curiam) (agreeing with the State's concession that *Miller*'s rationale applies to **mandatory** term-of-years sentences that indisputably amount to life imprisonment in the case of a defendant who—because of statutory, firearm-sentencing enhancements—received the minimum possible sentence of ninety-seven years' imprisonment).
Kansas	*State v. Redmon*, 380 P.3d 718 (Kan. Ct. App. 2016) (per curiam) (citing *Bunch*, 685 F.3d at 552, for the proposition that applying *Graham* to *de facto* life sentences could result in confusion and uncertainty due to unanswered questions as to what number of years constituted a *de facto* life sentence; whether that number should be affected by race, gender, or socioeconomic status, as those factors all affect life expectancy; and whether the number of crimes committed should be taken into account), *cert. denied*, Aug. 24, 2017.
Louisiana	*State v. Brown*, 118 So. 3d 332, 341–42 (La. 2013) (concluding *Graham* did not apply to cases in which a lengthy term-of-years sentence was the result of multiple convictions for which the sentences were imposed consecutively).

Minnesota	*State v. Ali*, 895 N.W.2d 237, 242, 244–46 (Minn. 2017) (declining to extend *Miller* to *de facto* life sentences resulting from multiple crimes and/or consecutive sentences), *cert. denied*, 138 S. Ct. 640 (2018).
Mississippi	*Mason v. State*, 235 So. 3d 129, 134–35 (Miss. Ct. App. 2017) (holding *Miller* only prohibited the imposition of a sentence of life without parole on a juvenile, not the fifty-year sentence the juvenile there received, and explaining life without parole sentences are legally distinguishable from term-of-years sentences in which the offender is eligible for good-time credit and the like), *cert. denied*, 233 So. 3d 821 (2018).
Missouri	*Willbanks v. Mo. Dep't of Corr.*, 522 S.W.3d 238, 243–46 (Mo. 2017) (en banc) (determining *Graham* did not apply when the lengthy sentence being challenged was an aggregate term-of-years that resulted from multiple convictions, as evidenced by Justice Alito's dissent in *Graham*, as well as Justice Thomas's observation in dissent that the *Graham* majority "exclude[d] from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e.g.*, 70 or 80 years' imprisonment)," *Graham*, 560 U.S. at 113 n.11 (Thomas, J., dissenting)), *cert. denied*, 138 S. Ct. 304 (2017).
New York	*People v. Aponte*, 981 N.Y.S.2d 902, 905 (Sup. Ct. 2013) (determining *Miller* and *Graham* applied only to sentences of life without parole, and because the defendant remained technically parole-eligible despite "the prospect that the aggregate mandatory minimum periods of imprisonment may preclude him from ever being paroled," his sentence was not unconstitutional).
Oregon	*Kinkel v. Persson*, 417 P.3d 401, 409–13 (Or. 2018) ("To date, the [Supreme] Court has not extended its holdings in *Roper*, *Miller*, and *Graham* to lesser minimum sentences [than life without parole]. . . . The [Supreme] Court neither considered nor decided in *Miller* and *Graham* how the categorical limitations that it announced for a single

	sentence for one conviction would apply to an aggregate sentences for multiple convictions."), *cert. denied*, 139 S. Ct. 789 (2019).
Tennessee	*State v. Merritt*, No. M2012-00829-CCA-R3CD, 2013 WL 6505145, at *6 (Tenn. Crim. App. Dec. 10, 2013) (finding the defendant's sentence of 225 years' imprisonment was the equivalent of a life sentence, but that *Graham* did not apply to *de facto* life sentences, only to those actually termed "life imprisonment without the possibility of parole").
Texas	*Teinert v. State*, No. 01-13-00088-CR, 2014 WL 554677, at *3 (Tex. App. Feb. 11, 2014) (explaining the holding in *Graham* was "narrowly tailored" to address sentences of life imprisonment without the possibility of parole for juveniles, and that *Graham* did not apply to "a sentence less severe than life"); *Diamond v. State*, 419 S.W.3d 435, 439–41 (Tex. App. 2012) (refusing to overturn a ninety-nine year sentence for aggravated robbery because the sentence was within the statutory range authorized by the state legislature, and failing to respond to the dissent's charge that such a sentence violated *Graham*).
Virginia	*Vasquez v. Commonwealth*, 781 S.E.2d 920, 925–26 (Va. 2016) (stating *Graham* did not address "multiple term-of-years sentences imposed on multiple crimes that, by virtue of the accumulation, exceeded the criminal defendant's life expectancy"; and declining to grant "precedential treatment to the 'reasoning' in *Graham*" because "the duty to follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding"), *cert. denied*, 137 S. Ct. 568 (2016).

Wisconsin	*State v. Williams*, 842 N.W.2d 536 (Wis. Ct. App. 2013) (per curiam) (finding *Miller* inapplicable to a juvenile who would not be eligible for parole until he had served 101 years' imprisonment because he "was not subjected to a mandatory life-without-parole sentence").

II. Jurisdictions that find *Graham* or *Miller* applies to *de facto* life sentences

United States Court of Appeals for the Seventh Circuit	*McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (finding that because the defendant was sentenced to a *de facto* life sentence, "the logic of *Miller* applies").
United States Court of Appeals for the Ninth Circuit	*Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (determining that a *de facto* life sentence was irreconcilable with *Graham*'s mandate for juvenile nonhomicide offenders to be provided a meaningful opportunity to reenter society).
United States Court of Appeals for the Tenth Circuit	*Budder v. Addison*, 851 F.3d 1047, 1053–60 (10th Cir. 2017) (finding a sentence requiring the juvenile nonhomicide offender to serve 131.75 years before becoming eligible for parole violated the spirit and letter of *Graham*), *cert. denied*, 138 S. Ct. 475 (2017).
California	*People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding a sentence requiring the offender to serve over 100 years before becoming parole-eligible did not allow the offender to demonstrate growth and maturity in an effort to secure release, in contravention of *Graham*'s dictate).
Connecticut	*Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015) (explaining the focus in *Graham* and *Miller* "was not on the label of a life sentence, but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life" (citations omitted) (internal quotation marks omitted)).

Florida	*Henry v. State*, 175 So. 3d 675, 680 (Fla. 2015) (opining "that the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of 'life in prison'").
Maryland	*Carter v. State*, 192 A.3d 695, 725 (Md. 2018) (determining the Eighth Amendment must prohibit *de facto* and *de jure* life sentences alike because "[o]therwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence").
Montana	*Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017) ("A strict application of the State's argument would mean that a sentence that inarguably would not allow for the offender to ever be released could not be considered a life sentence so long as the sentence is expressed in years. Logically, the requirement to consider how 'children are different' cannot be limited to *de jure* life sentences when a lengthy sentence denominated in a number of years will effectively result in the juvenile offender's imprisonment for life." (emphasis added)), *cert. denied*, 138 S. Ct. 1999 (2018).
Nevada	*State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (concluding its holding—that *Graham* applied to *de facto* life sentences—"best addresse[d] the concerns enunciated by the U.S. Supreme Court and this court regarding the culpability of juvenile offenders and the potential for growth and maturity of these offenders," but recognizing that such a holding "raise[d] complex and difficult issues, not the least of which [wa]s when will aggregate sentences be determined to be the functional equivalent of a sentence of life without the possibility of parole").
New Jersey	*State v. Zuber*, 152 A.3d 197, 212, 214 (N.J. 2017) ("To be clear, we find that the force and logic of *Miller*'s concerns apply broadly: to cases in which a defendant commits

	multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and nonhomicide cases."; but rejecting the notion that sentencing judges should rely on general life-expectancy tables when determining the point at which a term-of-years sentence becomes a *de facto* life sentence: "Those tables rest on informed estimates, not firm dates, and the use of factors like race, gender, and income could raise constitutional issues."), *cert. denied*, 138 S. Ct. 152 (2017).
New Mexico	*Ira v. Janecka*, 419 P.3d 161, 163, 166 (N.M. 2018) (determining the Eighth Amendment required consideration of "the cumulative impact of consecutive sentences on a juvenile," but that because the juvenile defendant would become eligible for parole at the age of sixty-two, he had already received a meaningful opportunity for release pursuant to *Graham*).
Ohio	*State v. Moore*, 76 N.E.3d 1127, 1140 (Ohio 2016) ("*Graham* cannot stand for the proposition that juveniles who do not commit homicide must serve longer terms in prison than the vast majority of juveniles who commit murder, who, because of *Miller*, are all but assured the opportunity to demonstrate maturity and rehabilitation at a meaningful point in their sentences."), *cert. denied*, 138 S. Ct. 62 (2017). We note the defendant in this case received a resentencing hearing, whereas his co-defendant—who was the subject of the Sixth Circuit's decision in *Bunch*—failed to receive similar relief.
Pennsylvania	*Commonwealth v. Foust*, 180 A.3d 416, 433–34, 436 (Pa. Super. Ct. 2018) (finding the logical inference of *Miller* was to prohibit *de facto* life sentences, but holding the impermissible *de facto* life sentence must be the result of a single term-of-years sentence, because otherwise "it would open the door to volume sentencing discounts in cases involving multiple juvenile homicide offenses. Juvenile perpetrators convicted of multiple homicides would

	routinely be subject to concurrent terms of imprisonment if the Commonwealth was unable to sustain its burden of proof under *Miller* . . . and juvenile offenders would receive volume discounts for their crimes."), *cert. requested*, Mar. 23, 2018.
Washington	*State v. Ramos*, 387 P.3d 650, 661 (Wash. 2017) ("Regardless of labeling, it is undisputed that [the juvenile defendant] was in fact sentenced to die in prison for homicide offenses he committed as a juvenile. *Miller* plainly provides that a juvenile homicide offender cannot be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation unless the offender first receives a constitutionally adequate *Miller* hearing."), *cert. denied*, 138 S. Ct. 467 (2017).
Wyoming	*Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014) (holding the teachings of *Roper*, *Graham*, and *Miller* require an individualized sentencing hearing when the juvenile defendant receives an aggregate, *de facto* life sentence, and stating, "To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile 'die in prison'" without consideration of his youth and its attendant characteristics (quoting *Miller*, 567 U.S. at 465)).

III. Jurisdictions that find their state constitutions' cruel and unusual punishments clauses bar *de facto* life sentences

Indiana	*Brown v. State*, 10 N.E.3d 1, 4–8 (Ind. 2014) (disapproving of a 150-year sentence, and imposing instead an eighty-year sentence).
Iowa	*State v. Null*, 836 N.W.2d 41, 69–74 (Iowa 2013) (reaching its decision to extend *Miller*'s principles "independently under . . . the Iowa Constitution").
Massachusetts	*Commonwealth v. Perez*, 106 N.E.3d 620, 623 (Mass.

2018) (explaining the state constitution prohibited imposition of a later parole date for juvenile nonhomicide offenders than would otherwise be available for juvenile homicide offenders).

IV. Jurisdictions that declined to rule on the applicability of *Graham* or *Miller* to *de facto* life sentences, but denied the juvenile offenders relief anyway

Nebraska	*State v. Cardeilhac*, 876 N.W.2d 876, 888–90 (Neb. 2016) (rejecting—in the case of a juvenile offender who "was sentenced to imprisonment for a minimum of 60 years to life to be served consecutively to an 8- to 15-year sentence in a separate robbery case that he was already serving"—the juvenile's argument that *Miller* prohibited his lengthy sentence, because, alternatively, (1) the juvenile was not sentenced to "life without parole"; and (2) "in any event, he received the full benefit of *Miller* juvenile sentencing principles" due to his constitutionally-adequate sentencing hearing).
South Dakota	*State v. Springer*, 856 N.W.2d 460, 462, 470 (S.D. 2014) (finding the juvenile offender—who would become parole-eligible after serving thirty-three years of his 261-year sentence—failed to "establish a rule for what constitutes a *de facto* life sentence under which he is entitled to relief"; declining the juvenile offender's invitation for the court to craft its own rule defining the point a term-of-years sentence becomes a *de facto* life sentence; and "further declin[ing] the invitation to join jurisdictions holding *Roper*, *Graham*, and *Miller* applicable or inapplicable to *de facto* life sentences" because the juvenile offender would become parole-eligible at the age of 49 and therefore "did not receive life without parole or a *de facto* life sentence" (emphasis added)).

JUSTICE HEARN: Respectfully, I dissent. I commend the majority's scholarly and well-written opinion and agree with much of its discussion on the trilogy of cases decided by the United States Supreme Court concerning punishment for juvenile offenders. However, I part company with the majority's belief that granting relief in this case would impermissibly extend *Graham*.[18] Instead, as many other state supreme courts have held, I believe an aggregate sentence that amounts to a *de facto* life sentence falls within the scope of *Graham*.

Accordingly, I would follow the rationale of Maryland's highest court in *Carter*,[19] where in a similar context, the court explained that the justification underpinning *Graham* equally applies to a term-of-years sentence. *Carter*, 192 A.3d at 726 (citing *Graham*, 560 U.S. at 71 ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation…provides an adequate justification.")). In examining these basic pillars of criminal law, the *Carter* court noted, "A distinction between [a LWOP and a term-of-years sentence] makes no difference in terms of 'reconciliation with society,' 'denial of hope,' the 'incentive to become a responsible individual,' a 'chance of fulfillment outside of prison walls' or whether a prisoner 'will die in prison[.]'" *Id.* at 727 (quoting *Graham*, 560 U.S. at 79). I agree with this observation, and therefore, we cannot relinquish the protections provided by *Graham*—that Slocumb be afforded a "meaningful opportunity to obtain release." *Id.* at 75. Moreover, as we discussed in *Aiken*, youth has constitutional significance that must be thoroughly considered when the government incarcerates a juvenile for life. *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (2014).

Nevertheless, I do not necessarily quarrel with the sentence in this case, as Slocumb's offenses may very well constitute "truly horrifying" crimes that the *Graham* court noted could subject a juvenile to remain in prison for life. Further, Slocumb's extensive disciplinary history while incarcerated may demonstrate that he is "irredeemable." *See Graham*, 560 U.S. at 75 ("Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives."). However, before reaching that conclusion, Slocumb is entitled to the protections afforded by *Graham* and *Miller*. *See Aiken*, 410 S.C. at 543, 765 S.E.2d at 576–77 ("[I]t is the failure of a sentencing

[18] *Graham v. Florida*, 560 U.S. 48 (2010).

[19] *Carter v. State*, 192 A.3d 695 (Md. 2018).

court to consider the hallmark features of youth prior to sentencing that offends the Constitution.").

Because I believe Slocumb's aggregate 130-year sentence is unconstitutional, the next question concerns the appropriate remedy. I agree with the majority that this issue is best reserved for the General Assembly because that body is better equipped to fashion an appropriate solution in order to bring our juvenile sentencing scheme into constitutional compliance. To accomplish this task, courts and legislatures across the country have reached differing outcomes, including arbitrarily declaring a specific threshold—such as a 50-year sentence, implementing a parole system, using life expectancy tables, or a combination thereof. *See Carter*, 192 A.3d at 727–30 (discussing how courts across the country have resolved this issue). At this point, I would decline to adopt a specific approach and would delay implementation of my ruling until January 1, 2020, to provide the General Assembly with ample time to act in this area and to ensure our juvenile sentencing scheme complies with the Eighth Amendment.

BEATTY, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Demario Monte Thompson, Petitioner.

Appellate Case No. 2017-001992

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lancaster County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 27878
Heard March 28, 2019 – Filed April 3, 2019

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Appellate Defender Joanna K. Delany, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, and Solicitor Douglas A. Barfield, Jr., of Kershaw, all for Respondent.

PER CURIAM: We granted Demario Thompson's petition for a writ of certiorari to review the decision of the Court of Appeals in *State v. Thompson*, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mac Papers, Inc., Appellant/Respondent,

v.

Genesis Press, Inc., Lawrence I. Kudeviz, Barry Zissok, and Lewis Levin, Defendants,

Of whom Lawrence I. Kudeviz is the Respondent/Appellant.

Appellate Case No. 2016-001296

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5634
Heard November 13, 2018 – Filed April 3, 2019

AFFIRMED

Townes Boyd Johnson, III, of Townes B. Johnson III, LLC, of Greenville, for Appellant/Respondent.

Bernie W. Ellis, of McNair Law Firm, PA, of Greenville; and Robert L. Widener, of McNair Law Firm, PA, of Columbia, both for Respondent/Appellant.

SHORT, J.: In this breach of contract action between Mac Papers, Inc. (Mac), Genesis Press, Inc. (Genesis), and one of Genesis's founders, Lawrence I. Kudeviz, Mac and Kudeviz filed cross-appeals. Mac, as Appellant/Respondent, argues the trial court erred in (1) finding Kudeviz's 1991 guaranty agreement was limited by Genesis's credit application, (2) finding Mac failed to prove that Kudeviz intended to be liable for more than $70,000, and (3) not addressing Kudeviz's liability under a 2008 guaranty agreement. Kudeviz, as Respondent/Appellant, argues the trial court erred in finding (1) he failed to terminate his personal guaranty, (2) he was not shielded from liability by equitable estoppel, and (3) he was not shielded from liability by the equitable doctrine of waiver. We affirm.

FACTS

On October 17, 1991, Genesis sought a $70,000 line of credit with Mac to purchase office supplies for its printing business in Miami, Florida. On December 2, 1991, Genesis's three principals, Kudeviz, Barry Zissok, and Lewis Levin, signed a personal guaranty agreement, which stated in part:

> For and in consideration of credit extended or to be extended by [Mac], its successors or assigns, to and at the request of [Genesis,] the undersigned, jointly and severally, do hereby unconditionally guarantee the payment at respective maturity dates of any and all indebtedness of any kind whatsoever, whether now due or which may hereafter become due . . . . This guaranty contains no limitations or conditions except as written herein, may be modified only in writing signed by the parties hereto, and is to remain in full force and effect until written notice of its termination is received by registered mail by [Mac], its successors or assigns, at its office in Jacksonville, Florida, except the written termination of this guaranty by the undersigned shall be effective only as to future credit from and after the date [Mac], its successors or assigns, receives the aforesaid notice, i.e., any termination hereof as aforesaid shall not affect credits extended prior to its effective termination.

In 2007, Genesis moved its operation from Miami to Greenville. Between 1991 and 2008, Mac and Genesis conducted business without incident; however, on March 28, 2008, Genesis's Greenville operation suffered a devastating fire that disrupted their business. While Genesis litigated with its insurance carrier over coverage, Mac extended Genesis significant credit and flexibility so it could maintain its operation by restructuring some of its debt. As part of the restructuring, on December 9, 2008, Kudeviz, on behalf of Genesis, endorsed a note for $303,836.32 and signed a separate personal guaranty containing the same language as the 1991 guaranty. On February 2, 2009, Kudeviz endorsed another note for the sum of the first note, plus additional debt accrued during the interim time frame for a total of $401,852.51. In 2010, Genesis settled with its insurance company and paid Mac in full.

Between 2010 and 2012, Genesis accrued additional financial obligations to Mac, and by September 4, 2012, Genesis owed Mac $432,185.60. Mac filed a complaint for breach of contract against Genesis and breach of guaranty against Genesis's three principals, Kudeviz, Zissok, and Levin, for the unpaid balance of $432,185.60. Genesis filed bankruptcy, Zissok settled separately for $32,500, and Levin is now deceased. Accordingly, Mac sought $399,685.60 from Kudeviz, which was the difference between the outstanding debt and Zissok's settlement.

During trial, Mac called two witnesses, Tonja Van Zandt, its vice president and finance manager, and Craig Boortz, the general manager of its Greenville office and primary salesperson for Genesis's account. Kudeviz testified on his own behalf. Kudeviz claimed he terminated his personal guaranty by an email exchange with Boortz on July 12, 2010. As part of an email to Boortz regarding a sale, Kudeviz asked, "On a separate subject[,] is [Van Zandt] working on releasing my personal note?" Boortz replied, "Yes she is and feel free to call her on anything related to the note."

The trial court found Kudeviz liable for Genesis's debt pursuant to the 1991 guaranty, but held Kudeviz's liability was capped at $70,000 by the terms of the credit application contemporaneously executed. This appeal followed.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 270, 705 S.E.2d 73, 75 (Ct. App. 2010) (quoting *Corley v. Ott*, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997)). "An action for breach of contract is an action at law." *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004).

"In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Id.* "The trial [court's] findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Id.* "The trial court's findings are equivalent to a jury's findings in a law action." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009). "Questions regarding credibility and the weight of the evidence are exclusively for the trial court." *Id.*

"In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). "However, we are not required to disregard the findings of the trial [court] who saw and heard the witnesses and was in a better position to judge their credibility." *Straight v. Goss*, 383 S.C. 180, 192, 678 S.E.2d 443, 449 (Ct. App. 2009). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

LAW/ANALYSIS

I. Kudeviz's Appeal[1]

Kudeviz argues he terminated his continuing guaranty as evidenced by the July 12, 2010 email exchange with Boortz; therefore, he was not liable for any of Genesis's unpaid debt. We disagree.

[1] Although Mac is the Appellant-Respondent, we address Kudeviz's appeal first because he claims his guaranty agreement was duly terminated, whereas Mac's appeal addresses whether the guaranty was limited.

The contract between Kudeviz and Mac was created in Florida, and the parties agree Florida law controls its interpretation.

"The cardinal rule of contract interpretation is that when the language of a contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with the plain meaning." *R.J. Reynolds Tobacco Co. v. Webb*, 187 So. 3d 388, 392 (Fla. Dist. Ct. App. 2016). "This is because the contractual language reveals the intent of the parties, and therefore, the plain language controls." *Razin v. A Milestone, LLC*, 67 So. 3d 391, 396 (Fla. Dist. Ct. App. 2011).

"A guaranty is a promise to pay some debt (or to perform some obligation) of another on the default of the person primarily liable for payment or performance." *New Holland, Inc. v. Trunk*, 579 So. 2d 215, 216-17 (Fla. Dist. Ct. App. 1991). "The law of Florida has recognized that a contract of guaranty [m]ay be continuing in nature." *Fid. Nat'l Bank of S. Miami v. Melo*, 366 So. 2d 1218, 1221 (Fla. Dist. Ct. App. 1979). A guaranty

> is said to be continuing in nature if it contemplates a future course of dealing during an indefinite period, or if it is intended to cover a series of transactions or succession of credits, or if its purpose is to give to the principal-debtor a standing credit to be used by it from time to time.

Id. "Thus, a continuing guaranty covers all transactions, including those arising in the future, which are within the description of contemplation of the agreement." *Id.* "A guaranty which provides it will run until further notice remains in force until revoked by the guarantor." *Brann v. Flagship Bank of Pinellas, N.A.*, 450 So. 2d 237, 239 (Fla. Dist. Ct. App. 1984).

Although the guaranty was continuing, and Kudeviz could unilaterally terminate it, the signed agreement contained explicit instructions for termination. *See Webb*, 187 So. 3d at 392 ("The cardinal rule of contract interpretation is that when the language of a contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with the plain meaning."). In relevant part, the guaranty stated it was "to remain in full force and effect until written notice of its termination [was] received by registered mail by [Mac], its successors or assigns,

at its office in Jacksonville, Florida." At trial, Kudeviz testified he signed the agreement, but admitted he did not comply with the termination requirements outlined in the contract. Accordingly, he failed to terminate the agreement and remained liable for Genesis's debt pursuant to the guaranty. *See Razin*, 67 So. 3d at 396 (noting "the plain language controls" contractual interpretation "because the contractual language reveals the intent of the parties").

Kudeviz also argues he was shielded from liability based on the equitable doctrines of estoppel and waiver. He contends Mac's conduct precluded it from enforcing the guaranty. We disagree.

"In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017) (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 27 (2011)). "The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007).

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position.

Regions Bank v. Schmauch, 354 S.C. 648, 674-75, 582 S.E.2d 432, 446 (Ct. App. 2003) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001)). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." *Evins v. Richland Cty. Historic Pres. Comm'n*, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000). "[R]eliance by the party seeking to assert estoppel must be reasonable." *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993).

"Waiver is a question of fact for the finder of fact." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id.* at 344, 415 S.E.2d at 387-88. "The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position." *Id.* at 344, 415 S.E.2d at 388. "[W]aiver require[s] a party to have known of a right, and known that the party was abandoning that right." *Strickland*, 375 S.C. at 85, 650 S.E.2d at 470-71.

"Where an implied waiver is involved, the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388 (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 134 (1966)). "Whether a party is barred by estoppel or waiver can only be determined in light of the circumstances of each case." *Id.*

First, Kudeviz failed to satisfy the elements for equitable estoppel. Particularly, Kudeviz failed to demonstrate he (1) lacked the knowledge of how to terminate his guaranty and lacked the means of obtaining this knowledge, or (2) that he reasonably relied on Mac's conduct to his detriment. *See Schmauch*, 354 S.C. at 675, 582 S.E.2d at 446 ("Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." (quoting *Zabinski*, 346 S.C. at 589, 553 S.E.2d at 114)). Regarding knowledge of the termination procedure, it is possible Kudeviz legitimately did not know the process to which he agreed in 1991; however, he cannot claim he lacked the means to obtain this knowledge because the means of termination were unambiguously outlined in the guaranty agreement. Kudeviz testified he relied on Boortz's email that Van Zandt was "working on releasing [his] personal note." Even if he did rely on this email, this "reliance" was not reasonable under the circumstances. *See S. Dev. Land & Golf Co.*, 311 S.C. at 34, 426 S.E.2d at 751 ("[R]eliance by the party seeking to assert estoppel must be reasonable."). During trial, Kudeviz testified he knew the guaranty was ongoing,

knew Van Zandt was in charge of releasing guaranties, and admitted he never submitted any written documentation regarding the guaranty to anyone with Mac except the email to Boortz regarding his "personal note." Accordingly, the facts do not support Kudeviz's claim of equitable estoppel.

Second, Kudeviz failed to demonstrate Mac waived its right to enforce the guaranty's termination procedure. Kudeviz again relies on the July 12, 2010 email wherein Boortz stated that Van Zandt was working to release Kudeviz's "personal note." However, this did not amount to a voluntary and intentional abandonment of a known contractual right. *See Janasik*, 307 S.C. at 344, 415 S.E.2d at 387 ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right."). Boortz testified he told Kudeviz to speak directly with Van Zandt regarding the release, which Kudeviz admitted he did not do. Boortz further testified he believed the July 12, 2010 email regarded the note and guaranty connected to the 2008 restructuring of Genesis's debt, rather than the continuing guaranty from 1991. Accordingly, the evidence does not support a finding that Mac waived its right to enforce the termination procedure.

Based on the foregoing, we affirm the trial court's finding that Kudeviz failed to terminate his guaranty in accordance with the plain language of the contract and remained liable for Genesis's debt.

II. **Mac's Appeal**

Mac argues the trial court erred in finding the 1991 guaranty was limited by Genesis's contemporaneous credit application and Kudeviz did not intend to be personally liable for more than $70,000. We disagree.

"A contract is ambiguous when it is susceptible to more than one reasonable interpretation." *Cleveland v. Crown Fin., LLC*, 183 So. 3d 1206, 1209 (Fla. Dist. Ct. App. 2016). "An ambiguous term in a contract is to be construed against the drafter." *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000). Florida law applies "the doctrine of mutual construction," which provides that "two documents executed by the same parties as part of a single transaction regarding the same subject matter must be read and construed together." *Sims v. New Falls Corp.*, 37 So. 3d 358, 361 (Fla. Dist. Ct. App. 2010) (quoting 37 Fla. Jur. 2d *Mortgages and Deeds of Trust* § 94 (2004)). "However, it may not be invoked to override the clear and unambiguous expression of agreement of the parties to a transaction." *Id.*

At trial, Van Zandt admitted the credit application and guaranty agreement were part of the same transaction, so they must be construed together. *See Sims*, 37 So. 3d at 361 (noting Florida law applies "the doctrine of mutual construction," which provides that "two documents executed by the same parties as part of a single transaction regarding the same subject matter must be read and construed together" (quoting 37 Fla. Jur. 2d *Mortgages and Deeds of Trust* § 94)). The credit application stated Genesis sought only $70,000 of credit, whereas Kudeviz, by the guaranty agreement, assumed liability for "any and all indebtedness of any kind whatsoever, whether now due or which may hereafter become due." Therefore, we find this created an ambiguity in the agreement between the parties as to how much debt Kudeviz personally guaranteed. *See Cleveland*, 183 So. 3d at 1209 ("A contract is ambiguous when it is susceptible to more than one reasonable interpretation."). Because of this ambiguity, Florida law mandates the contract be construed against the drafter, in this case Mac, and supports affirming the trial court's finding that Kudeviz's liability was capped at the $70,000 outlined in the initial credit application. *See Johnson*, 760 So. 2d at 84 ("An ambiguous term in a contract is to be construed against the drafter.").

Alternatively, Mac argues Kudeviz is liable for the total debt based on the 2008 guaranty. We disagree.

At trial, Van Zandt explained Mac worked with Genesis to restructure some of its debt and "to help their cash flow situation" following the disruption in their business after the fire. On December 9, 2008, Kudeviz, on behalf of Genesis, endorsed a note for $303,836.32 and signed a personal guaranty containing the same language as the 1991 guaranty. On February 2, 2009, Kudeviz endorsed another note for the sum of the first note, plus additional debt accrued during the interim timeframe for a total of $401,852.51. Van Zandt testified Kudeviz's 2008 personal guaranty regarded only the "specific note" used to restructure Genesis's debt after the fire, which she acknowledged was paid in full after Genesis received its insurance settlement. Accordingly, the 2008 guaranty expired with the payment of the debt after the insurance settlement, and has no bearing on the liability Kudeviz maintained from the continuing guaranty established in 1991.

Based on the foregoing, we affirm the trial court's finding that Kudeviz's personal liability pursuant to the 1991 guaranty was capped at $70,000, and the 2008 guaranty was not applicable.

CONCLUSION

Based on the foregoing, the trial court's finding that Kudeviz is liable to Mac for the sum of $70,000 is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of William D. Paradeses

Georganna Paradeses, as Personal Representative of the Estate of William D. Paradeses, Petitioner,

v.

Georganna Paradeses, Eleanor Glisson (Faye) a/k/a Faye Greeson, Pam Paradeses, Stephanie Starr, Robin Pace, Mary Paradeses and Jim Paradeses, Respondents,

of whom Georganna Paradeses, individually, Pam Paradeses, Stephanie Starr, Robin Pace, Mary Paradeses and Jim Paradeses, are Appellants,

and

Eleanor Glisson (Faye), a/k/a Faye Greeson, is Respondent.

Appellate Case No. 2016-001960

Appeal From Richland County
Amy W. McCulloch, Probate Court Judge

Opinion No. 5635
Heard March 4, 2019 – Filed April 3, 2019

AFFIRMED

Adam T. Silvernail, of Law Office of Adam T. Silvernail, of Columbia, for Appellants.

James S. Murray, of Turner Padget Graham & Laney, PA, and Charles C. Stebbins, III, both of Augusta, Georgia, for Respondent.

LOCKEMY, C.J.: Georganna Paradeses, Pam Paradeses, Stephanie Starr, Robin Pace, Mary Paradeses, and Jim Paradeses appeal the probate court's determination that a deletion to the last will and testament of William D. Paradeses was not properly executed, and thus, invalid. We affirm.

FACTS

William D. Paradeses (Testator) died testate on January 9, 2016. Testator's last will and testament (the Will), dated October 29, 2008, was discovered in his home and submitted to the probate court in Richland County on February 11, 2016. The Will contained a strikeout over the entirety of Item IV(2), which originally provided for a $50,000 bequest to Faye Greeson[1] (Respondent). Next to the deletion was handwritten language stating, "Omit #2 W.D. Paradeses." The Will also contained a handwritten addition to Item IV(1), which placed a condition on Testator's bequest of his interest in the Saluda Investment Company.[2] The beneficiaries affected by this addition agreed to carry out the provisions of the addition, which did not affect the bequest to Respondent. It is undisputed there were no witnesses to either of the changes.

On February 18, 2016, Georganna Paradeses, as personal representative of Testator's estate, filed a petition for declaratory judgment seeking an order from the probate court declaring the rights of the parties under the terms of the Will and the effect of the markings thereon. Respondent filed an answer denying the deletion was made by Testator and asserting the deletion failed due to improper attestation. Georganna Paradeses, Pam Paradeses Greeson, Stephanie Starr, Robin Pace, and Mary Paradeses (Appellants) answered and admitted Testator made the changes with the intent to change the Will.

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[1] "Faye Greeson" refers to Eleanor Glisson.

[2] The handwritten addition states, "A.D. and J.D. Paradeses will have control until it is sold and no one else. W.D. Parades (sic)."

A hearing was held before the probate court on July 27, 2016. At the hearing, Respondent argued there was insufficient proof Testator struck Item IV(2) from the Will, and, even assuming he did, the deletion was ineffective because it was an attempt to create a codicil without the required signatures of two witnesses. Appellants argued section 62-2-506 of the South Carolina Code (Supp. 2018) provides for the revocation of any part of a will by, among other things, cancellation. Citing several cases from other jurisdictions, Appellants argued the probate court should compel the acceptance of Testator's revocation of the $50,000 bequest by his cancellation of the same by striking it out of the Will, which was in his possession at the time of his death.

In an August 2016 order, the probate court found the addition and deletion to the Will were made after the Will was properly executed in the presence of two witnesses. The court determined the changes were consistent with an attempted codicil and required proper execution. The court held there were no known witnesses to the changes, and thus, they were not properly executed. Accordingly, the court found Respondent's right to the bequest of $50,000 remained valid. The probate court subsequently denied Appellants' motion to alter or amend. In its order, the court noted it analyzed the addition and the deletion together in determining the changes were an attempted codicil and not merely a revocation of part of the Will. This appeal followed.

STANDARD OF REVIEW

The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity. *Howard v. Mutz*, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993). This is an action at law. *NationsBank of S.C. v. Greenwood*, 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App. 1996) (holding an action to construe a will is an action at law). If a proceeding in the probate court is in the nature of an action at law, review by this court extends merely to the correction of legal errors. *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by, In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

LAW/ANALYSIS

Appellants argue the probate court erred in finding the handwritten deletion on the face of the Will was improperly executed and, thus, invalid. We disagree.

"A will is an expression of a testator's intent to dispose of the testator's property after death." *In re Estate of Pallister*, 363 S.C. 437, 448, 611 S.E.2d 250, 256 (2005). Pursuant to section 62-1-201(53) of the South Carolina Code (Supp. 2018), the term "will" includes codicils and any testamentary instruments that merely appoint an executor or revoke or revise another will. Except as provided for writings within section 62-2-512 and wills within section 62-2-505, every will shall be:

> (1) in writing;
> (2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and
> (3) signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

S.C. Code Ann. § 62-2-502 (Supp. 2018).

"A will may be freely modified or revoked by a mentally competent testator, acting of the testator's own volition, until the testator's death." *Pallister*, 363 S.C. at 448, 611 S.E.2d at 256 (citing *Lowe v. Fickling*, 207 S.C. 442, 447, 36 S.E.2d 293, 294 (1945); S.C. Code Ann. § 62-2-506 (1987) (revocation of will by writing or act)). Pursuant to section 62-2-506(a), a will or any part thereof is revoked:

> (1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in the testator's presence and by the testator's direction.

S.C. Code Ann. § 62-2-506(a) (Supp. 2018).

Appellants contend the probate court erred in considering both the deletion of the bequest to Respondent and the added language in Item IV(1) in determining whether Respondent's bequest had been revoked. Appellants maintain the language of section 62-2-506(a) evidences the legislature's intent to allow testators to partially revoke a will without the signatures of two witnesses.

We find the probate court did not err in considering the addition and deletion to the Will together, and finding the changes were an attempted codicil. First, we note that although section 62-2-506(a) provides a testator can partially revoke a will without attestation by two witnesses, the statute specifically provides the revocation must be made "by the testator or another person in the testator's presence and by the testator's direction." Here, the parties dispute whether the Testator made the alterations to the Will. [3] Appellants cite *Brown v. Brown*, 91 S.C.101 (1912) to support their argument that the Testator could revoke part of his Will by striking out the section to be revoked. However, in *Brown*, it was stipulated that the purported alteration to the will at issue was made by the testator.

The present case, which concerns both an addition and a deletion, is more akin to *Stevens v. Royalls*, 223 S.C. 510, 77 S.E.2d 198 (1953). In *Stevens*, our supreme court held where changes to a will included additions and deletions, the changes were more than the revocation of a devise, and therefore, they were invalid in view of the fact that formalities necessary to a codicil did not exist. *Id.* at 516-17, 77 S.E.2d at 201-02. The court held "[t]he general rule . . . is that when an attempt has been made by erasure or obliteration to make a different disposition of the estate, the attempt will be abortive if made without the attestation required by law, and the will as originally drawn will be given effect." *Id.* at 515, 77 S.E.2d at 201.

The changes to the Will in this case were more than the revocation of a devise. The changes included an addition that modified the bequest to Appellants of the Testator's interest in the Saluda Investment Company. In light of the supreme court's holding in *Stevens*, we find the probate court properly considered all of the alterations to the Will in holding the changes were an attempted codicil and required the signatures of two witnesses.

CONCLUSION

The order of the probate court is

AFFIRMED.

SHORT and MCDONALD, JJ., concur.

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[3] The probate court did not reach the issue of whether the alterations were made by the Testator.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Win Myat, Appellant,

v.

Tuomey Regional Medical Center, Respondent.

Appellate Case No. 2016-000774

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

Opinion No. 5636
Heard February 12, 2019 – Filed April 3, 2019

AFFIRMED

William R. Padget and Francis M. Hinson, IV, of Finkel Law Firm, LLC, of Columbia, for Appellant.

David Cornwell Holler, of Lee, Erter, Wilson, Holler & Smith, LLC, of Sumter, for Respondent.

SHORT, J.: In this premises liability action resulting from injuries suffered by Dr. Win Myat while working at Tuomey Regional Medical Center (Hospital), Myat appeals, arguing the trial court erred in (1) permitting Hospital to amend its answer to assert a new affirmative defense; (2) allowing Hospital to reopen its case and offer new evidence in support of its charitable affirmative defense; and (3)

concluding Hospital was qualified to receive the protections of the South Carolina Solicitation of Charitable Funds Act (the Act)[1]. We affirm.

FACTS

On July 6, 2011, Myat fell while walking through Hospital as a result of liquid on the floor. Myat suffered a broken patella and torn tendon. Myat was employed by Hospital as the Medical Director of Infectious Disease and also worked at Hospital as a physician for his private medical practice. Myat claimed his injuries left him with severe pain, which rendered him unable to continue his medical practice.

Myat filed a personal injury action against Hospital on October 15, 2012. Myat amended his complaint on November 5, 2012. Hospital filed its answer on January 16, 2013. On August 21, 2015, Hospital moved to amend its answer to assert the protections of the Act. Myat's initial and amended complaints asserted, and Hospital's answer conceded, that Hospital was an eleemosynary corporation.[2] On August 24, 2015, the trial court granted Hospital's motion to amend its answer to assert the Act as a defense.

The case was tried before a jury August 31 to September 2, 2015. At the close of Hospital's case, Myat moved for a directed verdict on Hospital's failure to offer evidence of its Section 501(c)(3) of Title 26 of the United States Code[3] tax status and the application of the Act's limitation on liability.[4] Hospital moved to reopen its case and requested the court take judicial notice of its 501(c)(3) tax status and the Act's charitable cap. Hospital also offered to present evidence of its tax status. The court took the issue under advisement and continued with the presentation of evidence and testimony to the jury. The parties agreed Hospital's tax status and the application of the Act were not questions of fact for the jury.

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[1] S.C. Code Ann. §§ 33-56-10 to -200 (2006 & Supp. 2018).

[2] Black's Law Dictionary defines eleemosynary as: "Of, relating to, or assisted by charity; not-for-profit." Black's Law Dictionary 538 (7th ed. 1999). The Dictionary further defines an eleemosynary corporation as: "A nonprofit corporation that is dedicated to benevolent purposes and thus entitled to special tax status under the Internal Revenue Code." Black's Law Dictionary at 341.

[3] 26 U.S.C.A. § 501(c)(3) (2011).

[4] S.C. Code Ann. § 33-56-180(A) (2006).

Prior to receiving the jury's verdict, the trial court granted Hospital's motion to reopen its case on the issues of its 501(c)(3) tax status and the application of the Act. The court also allowed Myat to conduct discovery prior to a hearing on Hospital's tax status and the Act. The jury returned a verdict for $2.5 million in actual damages for Myat.

On March 8, 2016, the trial court held a hearing on Hospital's tax status and the application of the Act. On April 7, 2016, the court filed its order reducing the verdict to $300,000 pursuant to the Act's liability cap, entering judgment, and denying Myat's outstanding motions. This appeal follows.

LAW/ANALYSIS

I. Motion to Amend

Myat argues the trial court erred in permitting Hospital to amend its answer to assert a new affirmative defense of the Act. We disagree.

Rule 15(a), SCRCP, provides:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

"Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge." *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRCP). "Ordinarily, amendments to conform to proof should be liberally allowed." *Id.* "However, if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance reasonably necessary to allow

the opposing party to meet the amendment." *Id.* "Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Id.* "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998). "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).

The case was set for trial to begin on August 24, 2015. Hospital filed its motion to amend on August 21, 2015, and a hearing on the motion was held on August 24, 2015. Hospital filed an amended answer on August 24, 2015, asserting the Act as a defense, and specifically, the limit on recoverable damages. Myat argues the amendment prejudices him because the Act limits his damages to $300,000 for a single occurrence. S.C. Code Ann. §§ 33-56-180(A) (2006) & 15-78-120(a)(1) (2005).

Section 33-56-180(A) provides:

> A person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization, when the employee is acting within the scope of his employment, may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15. An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by the claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, [willful], or grossly

> negligent manner, and the employee must be joined properly as a party defendant. A judgment against an employee of a charitable organization may not be returned unless a specific finding is made that the employee acted in a reckless, [willful], or grossly negligent manner. If the charitable organization for which the employee was acting cannot be determined at the time the action is instituted, the plaintiff may name as a party defendant the employee, and the entity for which the employee was acting must be added or substituted as party defendant when it reasonably can be determined.

Section 15-78-120(a)(1) provides "no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

In *James v. Lister*, 331 S.C. 277, 282-85, 500 S.E.2d 198, 201-03 (Ct. App. 1998), this court determined the statutory limit on recovery from charitable organizations was an affirmative defense the defendant hospital was required to plead prior to trial in a medical malpractice action because although the charitable status was not a jury issue, invocation of that protection triggered alternative remedies for the plaintiff patient. Thus, the hospital's failure to raise its charitable status as an affirmative defense affected the parties involved in the case and the way the case was tried to the jury. *Id.* at 282, 500 S.E.2d at 201. As a result, the court held the hospital was not entitled to amend its answer to assert the limit on recovery from charitable organizations because the amendment would prejudice the plaintiff patient, as he had no notice that another party was necessary and the plaintiff would be required to prove a greater degree of negligence to recover damages in excess of the statutory limit. *Id.* at 285-86, 500 S.E.2d at 203.

Myat asserts he has suffered the same prejudice as in *James* because Hospital sought to invoke the defense after discovery had closed and witnesses' memories had faded. Further, the statute of limitations had run against potential individual defendants, i.e., the employee(s) that created the dangerous condition that Myat could have pursued to avoid the statutory cap. Moreover, Myat asserts he lost the opportunity to evaluate alternative remedies, including a potential worker's

compensation claim and loss of consortium claim, because Hospital did not plead the statutory cap as a defense.

Hospital argues this case is different from *James* because in *James*, the hospital did not seek to amend its answer and raise the statutory cap until its post-trial motions, giving the Jameses no opportunity to conduct additional discovery before trial. *Id.* at 281, 500 S.E.2d at 200. Here, Hospital amended its answer prior to trial, and Myat was aware of the statutory cap during discovery. Also, Myat had an opportunity to seek additional discovery but failed to make a request prior to trial.

Myat's initial and amended complaints asserted, and Hospital's answer conceded, that Hospital was an eleemosynary corporation. Additionally, at the August 24, 2015 motion to amend hearing, Hospital's counsel's affidavit on the issue of Myat's knowledge of the charitable cap was the only evidence submitted to the court. The affidavit stated counsel for both parties had numerous conversations about the $300,000 statutory cap. Counsel's affidavit stated he moved to amend Hospital's answer to assert the statutory cap as soon as he realized he had failed to assert it. No other affidavits, testimony, or evidence was offered to the trial court to refute Myat's knowledge of the statutory cap. Further, Myat did not move to amend his complaint to add a gross negligence claim or request a continuance to conduct additional discovery before trial.

The trial court held Myat had not satisfied his burden of establishing prejudice. In contrast, the court found Myat's complaints coupled with the affidavit of Hospital's counsel showed that Myat was on notice of the statutory cap and had ample opportunity to attempt to refute it.

We find the trial court did not err in allowing Hospital to amend its answer because there was no prejudice to Myat. Myat knew Hospital was a charitable entity and should have known the statutory cap would apply. He further had notice before trial that the statutory cap was pled and had an opportunity to refute it.

II. New Evidence

Myat argues the trial court erred in allowing Hospital to reopen its case and offer new evidence in support of its charitable affirmative defense. We disagree.

"The decision whether to reopen a record for additional evidence is within the trial

court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." *Brenco v. S.C. Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008). "The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case." *Id.*

Myat asserts that even after filing an amended answer, Hospital had not disclosed any evidence or witnesses in support of its defense of the Act. Further, Myat asserts Hospital did not present any evidence at trial that it qualified for the protections of the Act. After Myat moved for a directed verdict, arguing Hospital had not met its burden of proving it qualified as a tax-exempt charitable organization under South Carolina Code § 33-56-170 (2006), Hospital moved to reopen its case to introduce new documents and a new witness. The court granted Hospital's motion and gave the parties ten days to file post-trial motions. A hearing on the motion was held on March 8, 2016, during which Tom Moran testified as Hospital's Rule 30(b)(6)[5] witness, and Myat testified on his own behalf.

Myat argues Hospital's decision to focus solely on its liability defenses was a choice of its own. He asserts allowing Hospital to reopen the case gave Hospital a "second bite at the apple" to prove its defense, which was prejudicial to Myat.

We find the trial court did not abuse its discretion in allowing Hospital to reopen its case to present additional evidence. The trial court allowed Myat to conduct discovery on the issue of Hospital's 501(c)(3) status and the charitable cap, and a hearing was held to present testimony and evidence on the issue of Hospital's charitable immunity. Therefore, Myat was not prejudiced by the new evidence.

III. Charitable Organization

Myat argues the trial court erred in concluding Hospital was qualified to receive the protections of the Act. We disagree.

"Statutes must be read as a whole and sections that are part of the same statutory scheme must be construed together." *Hughes v. W. Carolina Reg'l Sewer Auth.*,

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[5] Rule 30(b)(6), SCRCP, provides: "A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested."

386 S.C. 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2010). "The issue of interpretation of a statute is a question of law for the court" and this court is "free to decide a question of law with no particular deference to the [trial] court." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). The Act defines a "charitable organization" as "any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code, as amended." S.C. Code Ann. § 33-56-170(1) (2006).

Myat argues Hospital is not entitled to the protections of the Act because it has not conducted itself as a charitable organization. Myat references another case against Hospital, *United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, in which Hospital was found to have violated the Stark Law and the False Claims Act through improper and illegal contracts and arrangements with physicians employed by Hospital.[6] Myat further alleges Hospital has not been forthright in its reporting to the Internal Revenue Service (IRS) of the findings in that case. Myat states that because Hospital has not properly reported its violations of the Stark Law and False Claims Act to the IRS, the matter of whether Hospital still qualifies to receive tax-exempt status by the IRS has never been adjudicated by the IRS. Further, Myat states that because Hospital was purchased by Palmetto Health in January 2016 and the remaining entity is winding down its affairs, there is likely no forthcoming inquiry by the IRS as to Hospital's classification as a 501(c)(3) entity. Regardless, Myat asserts section 33-56-170 of the Act makes no mention of a determination by the IRS being of any importance in determining whether an organization qualifies to receive a limitation on liability. Section 33-56-20(1)(a)(i)[7] of the Act defines a "charitable organization" as one that is "determined by the [IRS] to be a tax exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code," and Myat argues by using different language in the two sections, the Legislature meant that "charitable organization" under section 33-56-170 is not synonymous with the definition found in section 33-56-20. As a result, Myat maintains the court must determine whether Hospital meets the requirements of an organization that is exempt from taxation pursuant to section 501(c)(3).

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[6] 976 F. Supp. 2d 776, 784 (D.S.C. 2013), *aff'd*, 792 F.3d 364 (4th Cir. 2015). The *Drakeford* action was filed on October 4, 2005, alleging violations by Hospital between January 1, 2005, and November 15, 2006. *Id.* at 779-81.

[7] S.C. Code Ann. § 33-56-20(1)(a)(i) (Supp. 2018).

Myat asserts Hospital has not shown it operates solely to provide a "community benefit" to qualify for section 501(c)(3) status. Myat further argues the trial court erred in evaluating Hospital's charitable status solely on the date of Myat's fall and injury. He asserts it should have been based on the status at the time of recovery, which he contends was the date of the entry of judgment.

Hospital asserts the *Drakeford* case does not properly address the IRS's definition of charitable entity, and the trial court properly declined to consider it in this case. Hospital argues an evidentiary hearing was not necessary, and the trial court should have taken judicial notice of Hospital's 501(c)(3) status and applied the charitable cap. Hospital states the trial court was permitted to take judicial notice of its 501(c)(3) charitable organization status under Rule 201(d), SCRE. Rule 201(d), SCRE, provides "[j]udicial notice may be taken at any stage of the proceeding." Hospital argues its 501(c)(3) status is self-authenticating under Rule 902, SCRE, and was public information available to the public at all times before and since Myat's date of injury. Rule 902(1) & (5), SCRE, provide that a "document bearing a seal purporting to be that of the United States, or of any State" and "[b]ooks, pamphlets, or other publications purporting to be issued by public authority" are self-authenticating. *Cf. Hughes v. United States*, 953 F.2d 531, 540 (9th Cir. 1992) (holding tax forms were admissible as self-authenticating domestic public documents under Rule 902(1) of the Federal Rules of Evidence because they were certified under seal).

The trial court agreed with Myat that if Hospital was acting in a manner inconsistent with its stated charitable purposes such as would invalidate its 501(c)(3) status, the trial court had the authority to deny Hospital the protections of the Act. However, the trial court found no evidence supported a finding that Hospital acted in a manner inconsistent with its stated charitable purpose. Further, the court found the IRS had not taken any action to revoke Hospital's 501(c)(3) status. The court noted Hospital's tax counsel testified that on the date of Myat's injury, July 6, 2011, and the date of the final hearing in the case, March 8, 2016, Hospital met the definition of a charitable organization under both sections 33-56-20 and 33-56-170. Therefore, the trial court determined Hospital was a 501(c)(3) organization exempt from taxation at the time of Myat's injury, and Hospital's 501(c)(3) status qualified it as a charitable organization under that Act to which the statutory limit applied.

We find the statute, when read as a whole, intends for any organization that is tax exempt by the IRS pursuant to Section 501(c)(3) to be a charitable organization. Further, we find the trial court properly found Hospital was a 501(c)(3) corporation exempt from taxation at the time of Myat's injury. Therefore, the trial court did not err in finding Hospital qualified for the protections of the Act.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lee B. Moore, Respondent/Appellant,

v.

Debra L. Moore, Appellant/Respondent.

Appellate Case No. 2016-000531

Appeal From Greenville County
Tarita A. Dunbar, Family Court Judge

Opinion No. 5637
Heard October 9, 2018 – Filed April 3, 2019

REVERSED AND REMANDED

J. Falkner Wilkes, of Greenville, for Appellant/ Respondent.

Elizabeth Kimberly Berry, of Mooneyham Berry LLC, of Greenville, for Respondent/Appellant.

SHORT, J.: In this divorce action involving cross-appeals, Debra Moore (Wife) appeals, arguing the family court erred in reducing the amount of her alimony. Lee Moore (Husband) also appeals, arguing the family court erred in (1) not sufficiently reducing his alimony obligation and (2) finding Husband presented no evidence to support his claim that Wife cohabitated for 90 consecutive days with her boyfriend and any periods of separation were intended to circumvent the 90-

day rule. Both parties argue the court erred in awarding attorney's fees. We reverse and remand.

FACTS

Husband and Wife were divorced on July 15, 2003. Husband was ordered to pay Wife $3,800 per month in permanent periodic alimony. The parties agreed the amount of alimony was determined "by the circumstances of Husband having a gross yearly income of approximately $150,000" and allowed Wife "the right to earn up to $28,000 per year from employment without same being a change of circumstances as to her independent income status as affecting the issue of alimony."

On July 7, 2009, Husband filed an action seeking elimination or reduction of alimony. Husband stated he had changed jobs and was earning $130,000, which was comprised of a guaranteed base salary of $80,000 and commissions that were not guaranteed. Wife earned $20,789 in 2010. The parties reached an agreement to reduce Husband's alimony to $3,250 per month, beginning February 2011.

On July 29, 2013, Husband filed a second action seeking elimination or reduction of alimony. His request was based on a reduction in his income and Wife's continued cohabitation with a man she was romantically involved with. Husband asserted his current employment enabled him to earn up to $80,000 per year. Wife asserted Husband was changing jobs for lower pay to avoid paying his alimony obligations. After a temporary hearing, the court found there had been a substantial change in Husband's circumstances that warranted reducing his alimony payments to $2,000 per month, beginning August 2013. A hearing was held April 1-2 and June 17, 2015. The court issued its final order on September 22, 2015. The court declined to terminate Husband's alimony obligation, but it reduced Husband's alimony obligation to $2,275. The court also ordered Husband to pay $10,000 of Wife's attorney's fees.

In October 2015, Wife and Husband filed separate motions to alter or amend the September 22, 2015 judgment. A hearing on the motions was held on November 30, 2015. The court issued its order on January 20, 2016, amending the September 22, 2015 order. In its order, the court further reduced Husband's alimony

obligation to $1,800 per month. On February 9, 2016, the court issued a corrective order regarding the January 20, 2016 order. These appeals followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. *Stoney v. Stoney*, 422 S.C. 593, 594, 813 S.E.2d 486, 486 (2018); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Stoney*, 422 S.C. at 595, 813 S.E.2d at 487; *Lewis*, 392 S.C. at 384-85, 709 S.E.2d at 651-52. "[D]e novo standard of review does not relieve an appellant from demonstrating error in the [family] court's findings of fact." *Lewis*, 392 S.C. at 385, 709 S.E.2d at 652 (italics omitted). Thus, "the family court's factual findings will be affirmed unless [the] 'appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court.'" *Id*. at 392, 709 S.E.2d at 655 (quoting *Finley v. Cartwright*, 55 S.C. 198, 202, 33 S.E. 359, 360-61 (1899)).

LAW/ANALYSIS

I. Husband's Appeal

Husband argues the family court erred in (1) not sufficiently reducing his alimony obligation and (2) finding Husband presented no evidence to support his claim that Wife cohabitated for 90 consecutive days with her boyfriend and any periods of separation were intended to circumvent the 90-day rule. We agree.

"Alimony is a substitute for the support normally incidental to the marital relationship." *Crossland v. Crossland*, 408 S.C. 443, 451, 759 S.E.2d 419, 423 (2014). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Id.* (quoting *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001)).

South Carolina Code section 20-3-130(B)(1) (2014) provides that alimony terminates "on the remarriage or continued cohabitation of the supported spouse." "'[C]ontinued cohabitation' means the supported spouse resides with another

person in a romantic relationship for a period of [90] or more consecutive days." S.C. Code Ann. § 20-3-130(B) (2014). Our courts have determined that a supporting spouse must prove by a preponderance of the evidence that a supported spouse continuously resided with a paramour for at least 90 consecutive days. *See McKinney v. Pedery*, 413 S.C. 475, 485, 776 S.E.2d 566, 571 (2015) ("[B]ecause [wife] sought termination of her alimony obligation to [husband], she bore the burden to show by a preponderance of the evidence that [girlfriend] resided with [husband] for at least [90] days."); *Strickland v. Strickland*, 375 S.C. 76, 89, 650 S.E.2d 465, 472 (2007) ("We find that the phrase 'resides with' in the context of § 20-3-150 sets forth a requirement that the supported spouse live under the same roof as the person with whom they are romantically involved for at least [90] consecutive days."). "The family court may also find 'that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than [90] days and the two periodically separate in order to circumvent the [90]-day requirement.'" *McKinney*, 413 S.C. at 487, 776 S.E.2d at 572-73 (quoting S.C. Code Ann. § 20-3-130(B) (2014)).

Husband asserts the family court correctly determined there was a substantial change in his circumstances so that a modification of his alimony was necessary and that his changes in jobs and income were not purposefully intended to lower his alimony. However, he argues once the court found he had proven a substantial change in circumstances, the court should have imputed income to Wife when she had no legitimate basis for her not making efforts to become financially self-supporting since the parties' divorce and erred in imputing $90,000 income to Husband when he was making $60,000 at the time of the hearing.

Husband also asserts Wife lived with her boyfriend, Scott Erickson, but they separated before 90 days to avoid violating the statute. During the April 1, 2015 hearing, the parties' daughter, Stephanie Brown, testified she thought Wife lived with Erickson because when she went to Wife's house, there was furniture that belonged to Erickson, a different television, his clothes and shoes were in a closet upstairs, a lot of Erickson's other belongings were in the house, he sometimes parked his car in her garage with the garage door closed, and Wife and Erickson were picking out paint colors for the house. She also testified Erickson moved bedroom furniture and a television with a video game system into a spare room for Erickson's son to play with when he was at the house. To her knowledge, Brown testified Erickson did not have anywhere else he stayed during the time she

perceived he was living with Wife. However, in cross-examination, she testified she could not say for sure if Wife and Erickson lived together for more than 90 consecutive days in June 2013. She also stated she was not aware that Erickson maintained he had his own residence at that time and had put some of his belongings into storage. Brown testified Wife put pressure on her to not testify and told her if she was deposed, Wife "would know that we were choosing to side with [Husband] and that she didn't know if she would want a relationship with us anymore because she would feel like we were siding with him." Brown stated her relationship with Wife had not been good since her deposition in March 2014, and she currently did not have any contact with Wife. After the deposition, Wife told her daughters they "threw her under the bus" with their testimony about Wife's living arrangements.

The parties' other daughter, Lauren Kott, testified she was at Wife's house on a daily basis in 2013. She stated Wife lived with Erickson from March to July 2013[1], and they strategically planned nights apart so they were not together for 90 consecutive days — Erickson stayed at his parents' house for a night or Wife went on a running trip with her friends. Kott testified Wife and Erickson bought groceries together and he kept his food at her house; Erickson kept his furniture, clothes, shoes, toiletries, and his son's toys at Wife's house; Erickson purchased a new television for Wife's house; and Wife and Erickson were decorating together, including painting and selecting material to recover some chairs to match Erickson's furniture. Kott testified Erickson's son stayed the night at Wife's house. Kott also testified her daughter was moving clothes from Wife's washer to the dryer when she saw Erickson's underwear in the washer. Wife said she was doing some laundry for Erickson, and when Kott told Wife she knew Erickson was living there, Wife told her "not to say it too loud. She didn't want the girls to hear because they might tell [Husband]." Kott said Wife did not deny Erickson was living with her, and she smirked at the question. Kott also stated Erickson kept his car in Wife's garage. Kott testified Wife told her she tried to get her sister to take money from Erickson and write Wife a check so it would look like her sister was helping her pay her bills instead of her boyfriend. Wife also told Kott, "If you get

[1] Kott testified she first noticed Erickson's personal belongings in Wife's house at the beginning of March 2013, and she noticed his belongings were gone in September 2013. She said his belongings were definitely still at Wife's house in July 2013.

deposed, I know whose side you're on, and don't expect a relationship with me." Kott testified that during her deposition, she answered only the "literal part" of the questions in an effort to protect Wife. Regardless, after her deposition, Wife yelled at Kott and Brown and said they "threw her under the bus." Kott, Brown, and Wife went to counseling after the depositions in March 2014 to help with their relationships. At the time of her testimony, Kott stated she had not had any contact with her mom, Wife, since their attempts at counseling ended, and she lost her relationship with Wife because of her testimony.

Erickson testified he had a key to Wife's house; he moved his clothes, shoes, toiletries, and furniture into Wife's house; he moved some of his son's toys, a television, and a video game system into Wife's house for his son; and he took showers at her house. However, he denied living at Wife's house. Erickson admitted he was in a romantic relationship with Wife, and if his testimony had any impact on her maintaining her alimony, it would create a conflict in his relationship with Wife.

Wife's ex-fiancé, Andy Cromer, also testified. He stated he and Wife began living together in 2004 or early 2005. He testified he and Wife were living together when Husband filed an action to terminate alimony in 2009, and they lived together until the summer of 2011. Cromer testified that during his deposition, he gave vague answers because he was engaged to Wife and did not want to hurt her case against Husband. Wife told Cromer she did not want to get a full-time job because Husband should have to take care of her. Cromer said he and Wife had conversations about the 90-day rule, and Wife was well-versed in the South Carolina family court guidelines. Further, Wife's daughter Brown testified Wife told her "she knew she had to stay somewhere when she was with [Cromer], that she could not stay at his house 90 consecutive days because that was in their original divorce agreement." Brown testified that her perception was Wife lived with Cromer because she had things at his house, she was always there when she called, and they had family functions at his house. While we note Cromer's relationship pre-dates the February 2011 order adopting the parties' settlement agreement, we find it does show Wife had a pattern of separating to avoid the 90-day rule.

In *McKinney*, 413 S.C. at 485, 776 S.E.2d at 571-72, our supreme court noted "the facts indicate that Pedery and Hamby's living situation is a permanent arrangement

of a romantic nature"; however, the court "focus[ed] on the specific requirement under the plain language of section 20-3-130(B)." "If the statute merely required the supported spouse to 'reside with' his paramour, then termination of McKinney's alimony obligation would be proper. However, the statute mandates cohabitation for [90] consecutive days." *Id.* at 485-86, 776 S.E.2d at 572. "During the time in question, Hamby lived at her son's house in Duncan approximately two days of every week, which means that under a literal interpretation of the statute, Pedery and Hamby could not have lived 'under the same roof' for [90] consecutive days." *Id.* at 486, 776 S.E.2d at 572. Further, the supreme court found "McKinney presented no evidence that Pedery and Hamby periodically stayed apart from each other before the litigation began to circumvent the [90]-day requirement of section 20-3-130(B)." *Id.* at 488, 776 S.E.2d at 573.

The family court in this case found Husband did not carry his burden of proof to merit termination of alimony paid to Wife because Husband did not prove by a preponderance of the evidence that Wife cohabitated with a paramour for a period of 90 consecutive days. While it is true Husband did not present proof that Wife cohabitated with a paramour for a continuous period of 90 days, contrary to the family court we find he did present testimony that Wife intentionally separated from Erickson to avoid the 90-day requirement. After our de novo review, we find substantial evidence was presented in this case that Wife had a history of living with her boyfriends and separating to avoid the 90-day rule. *See* S.C. Code Ann. § 20-3-130(B) ("The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than [90] days and the two periodically separate in order to circumvent the [90]-day requirement."). Therefore, we find the family court erred in not terminating Wife's alimony.

Husband also argues he is entitled to reimbursement for his alimony payments to Wife since the 2013 pendente lite order. He asserts he has paid Wife $52,500 in alimony and court costs from August 2013 through September 2015. Since September 2015, he asserts he has paid $19,800. In *Butler v. Butler*, 385 S.C. 328, 342-43, 684 S.E.2d 191, 198 (Ct. App. 2009), the family court required the former wife to reimburse her former husband for alimony payments, which was necessitated by a change in the former wife's circumstances. This court affirmed the decision to order the wife to reimburse the husband for alimony payments; however, this court remanded the issue to the family court for clarification of

whether the reimbursement related back to the husband's initial filing date or his amended filing date. *Id.* Therefore, we remand this issue to the family court to determine whether Husband is entitled to reimbursement from Wife for his alimony payments under *Butler*, and if so, how much money Wife must reimburse to Husband.

II. Wife's Appeal

Wife argues the family court erred in reducing Husband's alimony obligation. We find we do not need to reach this issue based on our determination that the family court erred in not terminating Wife's alimony. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

III. Attorney's Fees and Costs

Wife and Husband both argue the family court erred in awarding attorney's fees and costs. Because we find Husband presented substantial evidence in this case that Wife had a history of living with her boyfriends and separating to avoid the 90-day rule, and therefore terminate Husband's alimony obligation, we reverse the family court's award of attorney's fees. We remand the issue to the trial court for a determination of fees based on our reversal.

CONCLUSION

We find the family court erred in not terminating Wife's alimony, and reverse and remand the case to the family court to determine whether Husband is entitled to reimbursement from Wife for his alimony payments. We also reverse the family court's award of attorney's fees and remand the case to the family court for a determination of fees based on our reversal.

REVERSED and REMANDED.

HUFF and WILLIAMS, JJ., concur.