The Supreme Court of South Carolina

Re: Extension of Pilot Program for the Designation of Secure Leave Periods by Lawyers

Appellate Case No. 2018-000122

ORDER

By Order dated November 16, 2022, this Court adopted a Pilot Program for the Designation of Secure Leave Periods by Lawyers. On March 13, 2024, the Court requested written public comment on the Pilot Program. The Court received forty-nine written comments from lawyers, clerks of court, and judges.

Based on positive comments from lawyers and other data collected during the Pilot, this order extends the current Pilot for the calendar years of 2025 and 2026. Furthermore, the Pilot is amended to increase the number of weeks a lawyer may designate for secure leave from three to four weeks and to provide that leave must be requested at least sixty days, rather than ninety days, in advance of the secure leave period. These changes are effective immediately, such that lawyers may designate a total of four secure leave periods in 2024, and all future secure leave periods may now be designated at least sixty days in advance.

This Court is also reviewing a number of other potential changes to the Pilot, some of which were suggested in written comments. Others were approved for submission to this Court by the South Carolina Bar. These potential changes include, among other things, allowing individual days of secure leave and creating other forms of leave, such as medical and parental. If adopted, these sorts of changes will require more extensive modifications to the Attorney Information System (AIS), which is the mechanism to designate and communicate secure leave to various courts. As such, these suggestions must be further studied to ensure any modifications to the current processes function properly.

We also take this opportunity to re-emphasize two points. First, lawyers are encouraged to use secure leave to purposefully schedule times when they are free from the urgent demands of professional responsibility in the legal profession, which may serve to enhance not only the overall quality of their personal and family lives, but also permit lawyers to better fulfill their professional obligations.

Second, and consistent with the South Carolina Bar's original proposal, the procedures in the Pilot Program are intended to supplement, rather than replace, the current processes of honoring letters and orders of protection in individual matters on a day or period of days. Accordingly, judges should not decline to issue letters or orders of protection solely on the basis of the existence of this Pilot Program. Nevertheless, we continue to be hopeful that the secure leave process will reduce the volume of requests for protection that judges are requested to consider.

Designation of Secure Leave

(a) Authorization; Application. Any lawyer who is admitted to practice in South Carolina may designate secure leave periods as provided by this order, during which that lawyer is protected from appearing in a trial, hearing, or other court proceeding. Designated secure leave applies in any court in the Unified Judicial System.

(b) Length; Number. A secure leave period shall consist of one complete calendar week, from Monday to Friday. Lawyers may not designate single days or portions of weeks for secure leave. A lawyer may designate up to four calendar weeks of secure leave during a calendar year.

(c) Designation; Service. A lawyer shall utilize the functions of the Attorney Information System (AIS) to electronically designate a secure leave period. Secure leave must be designated in AIS at least sixty days before the beginning of the secure leave period and before any trial, hearing, deposition, or other proceeding has been scheduled during that designated secure leave period. The lawyer may print or save a .pdf version of the secure leave designation using the features of AIS.

> **(1) Electronic Transmission to Certain Courts.** Designations entered into AIS by a lawyer will be electronically shared by AIS to certain courts and

will be viewable by court personnel in the Case Management System (CMS) of that court. AIS will electronically share secure leave designations to:

(A) the court of common pleas;
(B) the court of general sessions;
(C) the office of the master-in-equity;
(D) the magistrates courts;
(E) those municipal courts which utilize the statewide CMS.

(2) Submitting Secure Leave Designations to the Family and Probate Courts. In order to avoid scheduling issues in the family courts and the probate courts, a lawyer shall, within one business day of entering secure leave in AIS, mail or otherwise submit a court-approved secure leave designation form, together with a copy of the secure leave designation confirmation from AIS, to:

(A) the clerk of the family court of the county where that lawyer predominantly practices;[1] and

(B) each probate court in which the lawyer is counsel of record at the time the lawyer designates secure leave in AIS.

(3) Service. A lawyer who makes a secure leave designation shall promptly serve that designation upon all parties of record in cases where that lawyer has made an appearance. The version to be served may be accessed by utilizing the "Print Confirmation" feature in AIS, which will produce a .pdf document that includes all of that lawyer's current and future secure leave designations. Service may be made in any form authorized by the rules applicable to that matter.

(d) Effect. Except as provided in paragraph (g), upon the electronic designation of a secure leave period in accordance with this order, the secure leave designation shall be deemed allowed without further action of any court, and neither the lawyer

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[1] Since the entry of a secure leave designation by single clerk will be shared with all other clerks in the family court case management system, lawyers should submit a single secure leave designation to the county family court in which they predominantly practice.

nor any party represented by the lawyer shall be required to appear at any in-court or remote proceeding, including a deposition or court-annexed alternative dispute resolution proceeding, unless the lawyer consents. Once final in AIS, a secure leave designation may not be amended by the lawyer[2] or by the court, except as provided in paragraph (g) of this order. A lawyer is not required to file or submit a secure leave designation with any court, except as provided in paragraphs (c)(2) and (e) of this order.

(e) Proceedings Scheduled During Designated Secure Leave Period. If a proceeding is scheduled during a designated secure leave period, and the lawyer wishes to exercise the right to secure leave, the lawyer shall promptly file and serve on all parties to that matter a copy of the designation and a request that the proceeding be continued or rescheduled. If the proceeding was scheduled by a person or agency who is not a party to the action or is not a clerk of court, the lawyer shall, in addition to filing the notice and serving all parties to the action, serve notice of the designation on that person or agency. The proceeding shall be rescheduled unless the court finds the designation did not comply with the provisions of this order or that the secure leave designation was made solely to hinder the timely disposition of a matter. No motion fee shall be charged for filing proof of a secure leave designation.

(f) Filing and Service Deadlines. A secure leave designation shall not toll or otherwise extend the deadlines to file and/or serve pleadings and other papers or documents in the courts.

(g) Action by Court. The court may enter an order revoking a secure leave designation upon a finding that the designation did not comply with the provisions of this order or that the secure leave designation was made solely to hinder the timely disposition of a matter.

(h) Inherent Power. Nothing in this order shall prevent a court from employing its inherent power to permit a lawyer to be protected from appearing in a proceeding or proceedings on a day or period of days or from continuing a proceeding where

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[2] Lawyers are advised to exercise care in selecting a secure leave period. Since a secure leave designation will be electronically shared with courts that rely on these designations in scheduling proceedings, a designation may not be withdrawn or amended once it is final.

appropriate. Furthermore, the procedures in this order are not intended to supplant the current procedures for requesting protection for other reasons.

(i) Period; Forms. Unless modified, extended, or rescinded by order of this Court, this Pilot Program shall be effective until December 31, 2026. The attached revised forms are approved for use in the family and probate courts.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
June 19, 2024

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF	)	
	)	**NOTICE OF**
	)	**SECURE LEAVE**
In re: Secure Leave for Lawyers	)	
	)	
	)	
	)	
[Attorney Name and Bar Number]	)	
	)	

Pursuant to the Supreme Court of South Carolina's Order dated June 19, 2024, *Re: Extension of Pilot Program for the Designation of Secure Leave Periods by Lawyers*, , [ATTORNEY NAME AND BAR NUMBER] provides notice that the attorney has designated the week(s) of for secure leave. A copy of the secure leave designation confirmation from AIS is attached.

Attorney certifies that the secure leave was designated in AIS at least sixty days before the beginning of the secure leave period and before any trial, hearing, deposition, or other proceeding has been scheduled during this designated secure leave period.

____

Attorney Name: __________________
S.C. Bar No.: __________________
Address: __________________
Phone: __________________
Email: __________________

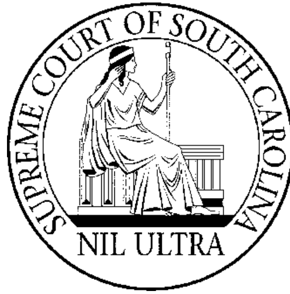
STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
	)	JUDICIAL CIRCUIT
COUNTY OF	)	
	)	**NOTICE OF**
	)	**SECURE LEAVE**
In re: Secure Leave for Lawyers	)	
	)	
	)	
	)	
[Attorney Name and Bar Number]	)	
	)	

Pursuant to the Supreme Court of South Carolina's Order dated June 19, 2024, *Re: Extension of Pilot Program for the Designation of Secure Leave Periods by Lawyers*, , [ATTORNEY NAME AND BAR NUMBER] provides notice that the attorney has designated the week(s) of for secure leave.

Attorney is providing this notice to the Clerk of Court for the Family Court in this County because this is the county of predominant practice for the lawyer. A copy of the secure leave designation confirmation from AIS is attached.

Attorney certifies that the secure leave was designated in AIS at least sixty days before the beginning of the secure leave period and before any trial, hearing, deposition, or other proceeding has been scheduled during this designated secure leave period**.**

____
Attorney Name: __________________
S.C. Bar No.: __________________
Address: __________________
Phone: __________________
Email: __________________



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 20, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

28207 – In the Matter of Shelton Martin Tate 17

28208 – In the Matter of Candy M. Kern 21

28209 – In the Matter of Brian Austin Katonak 25

28210 – The State v. Charles Wakefield, Jr. 30

Order – Rule 10, South Carolina Family Court Rules 34

UNPUBLISHED OPINIONS

2024-MO-015 – Anthony Whitfield v. David Swanson
(Charleston County, Judge Diane Schafer Goodstein)

PETITIONS - UNITED STATES SUPREME COURT

28183 – William B. Justice v. State Denied 6/17/24

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

28185 – The State v. Tommy Lee Benton Denied 6/20/24

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

6063 – The State v. Shawn D. Custer 35

6064 – Associated Receivables Funding, Inc. v. Dunlap, Inc. 42

6065 – Kathleen Carter v. Joseph Carter 57

UNPUBLISHED OPINIONS

2024-UP-212 – Barbara Jones v. Lucius Walters
(Filed June 14, 2024)

2024-UP-213 – The State v. Dabry A. James

2024-UP-214 – The State v. Ricky D. Edwards, Jr.

2024-UP-215 – The State v. Mark A. Brown

2024-UP-216 – Anthony Wise v. Kenneth Leap

2024-UP-217 – SCDSS v, Nathan Chambers
(Filed June 17, 2024)

PETITIONS FOR REHEARING

6055 – Archie Patterson v. SCDEW	Pending
6057 – Khalil Abbas-Ghaleb v. Anna Ghaleb	Pending
6058 – SCCCL v. SCDHEC	Denied 6/13/2024
6060 – Charles Blanchard v. 480 King Street, LLC	Pending

EXTENSIONS TO FILE PETITION FOR REHEARING

None

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5933 – The State v. Michael Cliff Eubanks	Pending
5965 – National Trust for Historic Preservation v. City of North Charleston	Pending
5975 – Rita Glenn v. 3M Company	Pending
5986 – The State v. James E. Daniels, Jr.	Pending
5987– The State v. Tammy C. Moorer	Pending
5992 – Rufus Rivers v. James Smith, Jr.	Pending
5994 – Desa Ballard v. Admiral Insurance Company	Pending
5995 – The State v. Kayla M. Cook	Pending
5996 – Palmetto Pointe v. Tri-County Roofing	Pending
5999 – Jerome Campbell v. State	Pending
6001 – Shannon P. Green v. Edward C. McGee	Pending
6004 – Joseph Abruzzo v. Bravo Media Productions, LLC	Pending
6007 – Dominic A. Leggette v. State	Pending
6011 – James E. Carroll, Jr. v. Isle of Palms Pest Control, Inc.	Pending
6016 – Vista Del Mar v. Vista Del Mar, LLC	Pending
6017 – Noel Owens v. Mountain Air Heating & Cooling	Pending
6019 – Portfolio Recovery Associates, LLC v. Jennifer Campney	Pending
6025 – Gerald Nelson v. Christopher S. Harris	Pending

6028 – James Marlowe v. SCDOT	Pending
6029 – Mark Green v. Wayne B. Bauerle	Pending
6030 – James L. Carrier v. State	Pending
6031 – The State v. Terriel L. Mack	Pending
6032 – The State v. Rodney J. Furtick	Pending
6034 – The State v. Charles Dent	Pending
6037 – United States Fidelity and Guaranty Company v. Covil Corporation	Pending
6038 – Portrait Homes v. Pennsylvania National Mutual Casualty	Pending
6039 – Anita Chabek v. AnMed Health	Pending
6042 – Renewable Water Resources v. Insurance Reserve Fund	Pending
6044 – Susan Brooks Knott Floyd v. Elizabeth Pope Knott Dross	Pending
6047 – Amazon Services v. SCDOR	Pending
6048 – Catherine Gandy v. John Gandy, Jr.	Pending
6052 – Thomas Contreras v. St. John's Fire District Commission (3)	Pending
6056 – The Boathouse at Breach Inlet, LLC v. Richard S. W. Stoney	Pending
2022-UP-380 – Adonis Williams v. State	Pending
2022-UP-415 – J. Morgan Kearse v. The Kearse Family Education Trust	Pending
2022-UP-425 – Michele Blank v. Patricia Timmons (2)	Pending
2022-UP-429 – Bobby E. Leopard v. Perry W. Barbour	Pending

2023-UP-138 – In the Matter of John S. Wells	Pending
2023-UP-143 – John Pendarvis v. SCLD	Pending
2023-UP-151 – Deborah Weeks v. David Weeks	Pending
2023-UP-201 – Nancy Morris v. State Fiscal Accountability Authority	Pending
2023-UP-241 – John Hine v. Timothy McCrory	Pending
2023-UP-246 – Ironwork Productions, LLC v. Bobcat of Greenville, LLC	Pending
2023-UP-258 – The State v. Terry R. McClure	Pending
2023-UP-260 – Thomas C. Skelton v. First Baptist Church	Pending
2023-UP-261 – Mitchell Rivers v. State	Pending
2023-UP-264 – Kathleen A. Grant v. Nationstar Mortgage, LLC	Pending
2023-UP-283 – Brigette Hemming v. Jeffrey Hemming	Pending
2023-UP-289 – R-Anell Housing Group, LLC v. Homemax, LLC	Pending
2023-UP-290 – Family Services Inc. v. Bridget D. Inman	Pending
2023-UP-291 – Doretta Butler-Long v. ITW	Pending
2023-UP-293 – NCP Pilgrim, LLC v. Mary Lou Cercopely	Pending
2023-UP-295 – Mitchell L. Hinson v. State	Pending
2023-UP-311 – The State v. Joey C. Reid	Pending
2023-UP-321 – Gregory Pencille, #312332 v. SCDC (2)	Pending
2023-UP-329 – Elisa Montgomery Edwards v. David C. Bryan, III	Pending

2023-UP-343 – The State v. Jerome Smith	Pending
2023-UP-346 – Temisan Etikerentse v. Specialized Loan Servicing, LLC	Pending
2023-UP-352 – The State v. Michael T. Means	Pending
2023-UP-365 – The State v. Levy L. Brown	Pending
2023-UP-366 – Ray D. Fowler v. Pilot Travel Centers, LLC	Pending
2023-UP-369 – Harland Jones v. Karen Robinson	Pending
2023-UP-375 – Sharyn Michali v. Eugene Michali	Pending
2023-UP-392 – Trina Dawkins v. Fundamental Clinical	Pending
2023-UP-393 – Jeffrey White v. St. Matthews Healthcare	Pending
2023-UP-394 – Tammy China v. Palmetto Hallmark Operating, LLC	Pending
2023-UP-396 – Kevin Greene v. Palmetto Prince George Operating, LLC	Pending
2023-UP-397 – Jennifer Rahn v. Priority Home Care, LLC	Pending
2023-UP-398 – The State v. Rashawn M. Little	Pending
2023-UP-399 – The State v. Donnielle K. Matthews	Pending
2023-UP-400 – Paulette Walker v. Hallmark Longterm Care, LLC	Pending
2023-UP-406 – Carnie Norris v. State	Pending
2024-UP-003 – The State v. Quintus D. Faison	Pending
2024-UP-005 – Mary Tisdale v. Palmetto Lake City – Scranton Operating, LLC	Pending
2024-UP-007 – Shem Creek Development Group, LLC v. The Town of Mount Pleasant	Pending

2024-UP-018 – Mare Baracco v. County of Beaufort Pending

2024-UP-022 – ARM Quality Builders, LLC v. Joseph A. Golson Pending

2024-UP-024 – Kacey Green v. Mervin Lee Johnson Pending

2024-UP-033 – The State v. David A. Little, Jr. Pending

2024-UP-037 – David Wilson v. Carolina Custom Converting, LLC Pending

2024-UP-044 – Rosa B. Valdez Rosas v. Jorge A. Vega Ortiz Pending

2024-UP-046 –The State v. James L. Ginther Pending

2024-UP-049 – ARO-D Enterprises, LLC v. Tiger Enterprises Pending

2024-UP-052 – Vicki Vergeldt v. John Vergeldt Pending

2024-UP-053 – R. Kent Porth v. Robert P. Wilkins, Jr. Pending

2024-UP-056 – Joe Clemons v. Peggy H. Pinnell Agency, Inc. Pending

2024-UP-057 – Natalie Barfield v. Michael Barfield Pending

2024-UP-060 – The State v. Andres F. Posso Pending

2024-UP-062 – Rachel Polite v. Karen Polite Pending

2024-UP-070 – The State v. Sean D. James Pending

2024-UP-072 – The State v. Mark Gilbert Pending

2024-UP-077 – Brittany C. Foster v. State Pending

2024-UP-078 – Stephanie Gardner v. Berkeley County Sheriff's Office Pending

2024-UP-086 – Carr Farms, Inc. v. Susannah Smith Watson	Pending
2024-UP-126 – Kenneth Curtis v. Cynthia Glenn	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Shelton Martin Tate, Respondent.

Appellate Case No. 2023-001642

Opinion No. 28207
Submitted June 4, 2024 – Filed June 20, 2024

DEFINITE SUSPENSION

Disciplinary Counsel William M. Blitch, Jr., and Senior Assistant Disciplinary Counsel Kelly Boozer Arnold, both of Columbia, for the Office of Disciplinary Counsel.

Harvey M. Watson, III, of Ballard & Watson, Attorneys at Law, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of a public reprimand or a definite suspension of up to a year, and agrees to pay costs and other conditions of discipline. We accept the Agreement and suspend Respondent from the practice of law in this state for six months, retroactive to the date of interim suspension. The facts, as set forth in the Agreement, are as follows.

I.

Respondent was admitted to practice law in South Carolina in 2013, and he has no prior disciplinary history. On January 19, 2022, Respondent was arrested and charged with first-degree domestic violence, a felony. Respondent failed to self-report his arrest to ODC. On October 4, 2022, the Seventh Judicial Circuit Solicitor informed ODC of Respondent's arrest. Respondent was placed on interim suspension on October 7, 2022.

On December 12, 2022, Respondent pled guilty to second-degree domestic violence, a misdemeanor. Respondent was sentenced to a determinate term of time served (one day) and was required to pay court costs of $128.13, which he paid on May 2, 2023. As part of his sentence, Respondent is prohibited from possessing, transporting, receiving, or shipping a firearm or ammunition. The facts supporting Respondent's guilty plea indicate that in Spartanburg County, on January 14, 2022, Respondent assaulted his wife, striking her in her head and face multiple times, leaving visible injuries. Respondent's three minor children, ages nine, six, and three, witnessed Respondent's assault of their mother, and Respondent's nine-year-old son ran to a nearby home for help.

II.

Respondent admits that his failure to report his arrest violated Rule 8.3(a), RPC, Rule 407, SCACR (requiring a lawyer who is arrested for a "serious crime" to notify ODC within fifteen days); *see* Rule 1(o), RPC (defining "serious crime" as any felony); S.C. Code Ann. § 16-25-20(B) (defining first-degree domestic violence as a felony punishable by ten years in prison). Respondent also admits that his conduct violated Rule 8.4(a), RPC (prohibiting violations of the Rules of Professional Conduct); and Rule 8.4(b) (prohibiting criminal acts that reflect adversely on the lawyer's fitness as a lawyer).

Respondent acknowledges his misconduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (establishing that a violation of the Rules of Professional conduct is a ground for discipline); Rule 7(a)(5) (providing that conduct tending to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law is a ground for discipline).

In his affidavit in mitigation, Respondent expresses regret and remorse and explains that since the incident, he has completed approximately 125 hours of therapy and counseling services, including a program on Domestic Violence and Healthy Relationships with a certified anger management specialist. He also states that his divorce is now final, and that he has unsupervised visitation and shares joint legal and physical custody of his three children. Respondent asks that any period of suspension be made retroactive to the date of his interim suspension and without the requirement that he appear before the Committee on Character and Fitness prior to any reinstatement to the practice of law.

III.

We find a definite suspension of six months is appropriate as a sanction for Respondent's misconduct in committing criminal acts and failing to self-report his arrest to ODC. Accordingly, we accept the Agreement and suspend Respondent from the practice of law for a definite period of six months, retroactive to October 7, 2022, the date of his interim suspension. As a condition of discipline, Respondent agrees as follows:

A. To continue to comply with the terms of his monitoring contract with Lawyers Helping Lawyers (LHL) dated September 29, 2023, which shall include an ongoing relationship with a monitor designated by LHL;

B. To report monthly to the Commission on Lawyer Conduct for the duration of the monitoring contract, beginning within thirty days of the date of Respondent's execution of the Agreement. The report shall include Respondent's affidavit of compliance and a statement from the monitor designated by LHL; and

C. To file a final report with the Commission from the LHL monitor regarding Respondent's compliance with the LHL contract within thirty days of the end date of the monitoring contract. The report must also contain the monitor's recommendations for future monitoring, if any. If further monitoring is recommended, the Commission shall determine whether the terms of the LHL agreement should be extended for another year.

Within thirty days, Respondent shall pay or enter into a reasonable payment plan to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Candy M. Kern, Respondent.

Appellate Case No. 2023-001650

Opinion No. 28208
Submitted June 4, 2024 – Filed June 20, 2024

DISBARRED

Disciplinary Counsel William M. Blitch, Jr., and Assistant Disciplinary Counsel Maggie Raines Chappell, both of Columbia, for the Office of Disciplinary Counsel.

Peter Demos Protopapas, of Rikard & Protopapas, LLC, of Columbia, for Respondent.

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

I.

Respondent provided legal and escrow services through her law firm, Upstate Law Group (ULG), in connection with an illegal structured cash flow business wherein the investor (buyer) purchased future payments of a veteran (seller). Respondent represented the buyers in these improper transactions. The future payments came from either a pension, paid to the veteran by the Defense Finance Accounting

Service, or disability benefits, paid to the veteran by the Department of Veterans Affairs. However, these payments were unassignable pursuant to federal statute.

As a result of Respondent's involvement in the illegal structured cash flow business, on or about September 7, 2017, ODC received a news article about a federal lawsuit against Respondent for inducing veterans to sell their retirement benefits or disability benefits for a lump sum. On or about February 1, 2019, ODC received a complaint from a life insurance agent whose clients had stopped receiving payments pursuant to their veterans' contracts. On or about May 12, 2020, ODC received a complaint from a South Carolina lawyer representing veterans who had assigned their military benefits in exchange for payments and who Respondent sued when they defaulted on the contracts to sell their military pensions.

In 2018, the Securities Division of the Arizona Corporation Commission filed an enforcement action alleging that the income stream investments involved in Respondent's scheme were unregistered securities that were prohibited by federal and state law. Respondent and ULG were among the named parties, and both Respondent and ULG were ordered to pay restitution totaling $2,943,438 plus administrative penalties totaling $560,000.

In a separate civil action, on January 1, 2021, the federal district court in South Carolina entered an order permanently restraining Respondent from brokering, offering or arranging purported sales of pensions and disability benefits; any related collection activity; and engaging in any financial services business in the state of South Carolina. The federal court also entered a judgment against Respondent and the other defendants, jointly and severally, in the amount of $725,000.

On May 1, 2023, Respondent pled guilty to violating 18 U.S.C. § 371, admitting she participated in a conspiracy with objects of mail and wire fraud. Specifically, Respondent admitted that she used ULG to represent buyers in the structured cash flow business in which material information regarding the anti-assignment statute, the lump sums received by the sellers, and other important information were misrepresented or concealed from both buyers and sellers. On August 21, 2023,

the federal court issued an order requiring Respondent to forfeit $1,446,336, along with costs and interest. On August 30, 2023, the federal court sentenced Respondent to five years' probation, with Respondent being on home detention for the first five hundred days.

II.

Respondent admits that her conduct in these matters violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(d) (prohibiting a lawyer from counseling or assisting a client to engage in conduct the lawyer knows is criminal or fraudulent); Rule 4.1 (requiring truthfulness in statements to others in the course of representing a client); Rule 8.4(a) (prohibiting violations of the Rules of Professional Conduct); Rule 8.4(d) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation); and 8.4(e) (prohibiting conduct prejudicial to the administration of justice).

Respondent also admits her conduct is grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (providing a violation of the Rules of Professional Conduct is a ground for discipline); and Rule 7(a)(5) (providing conduct bringing the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law constitutes a ground for discipline).

III.

We find disbarment is the appropriate sanction for Respondent's egregious misconduct. Accordingly, we accept the Agreement and disbar Respondent from the practice of law in this state. Within fifteen days of the date of this opinion, Respondent shall surrender her Certificate of Admission to the Practice of Law to the Clerk of this Court. Within thirty days of the date of this opinion, Respondent shall enter into a payment plan with the Commission on Lawyer Conduct to repay the costs incurred by the Commission and ODC in investigating and prosecuting this matter.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Brian Austin Katonak, Respondent.

Appellate Case No. 2023-001936

Opinion No. 28209
Submitted June 4, 2024 – Filed June 20, 2024

PUBLIC REPRIMAND

Disciplinary Counsel William M. Blitch, Jr., Assistant Disciplinary Counsel Jeffrey Ian Silverberg, and Assistant Disciplinary Counsel Kristina Jones Catoe, all of Columbia, for the Office of Disciplinary Counsel.

Brian Austin Katonak, of Aiken, pro se.

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

I.

By opinion dated December 15, 2021, this Court suspended Respondent from the practice of law for a definite period of one year as sanction for his misconduct in

eight client-related matters. *In re Katonak*, 435 S.C. 272, 866 S.E.2d 812 (2021). Respondent's misconduct in this case occurred in approximately the same time frame as the misconduct for which he was previously suspended, and he has not been reinstated from that disciplinary suspension. The current Agreement involves three complaints of additional misconduct that occurred immediately prior to and immediately after Respondent's December 15, 2021 suspension.

Matter A.

On March 19, 2022, ODC received R.W.'s allegations of misconduct against Respondent, who represented R.W. in a divorce case. R.W. retained Respondent in July 2021 and paid him $1,040 to prepare and file divorce proceedings. Respondent filed a Summons and Complaint for divorce with the Lexington County Family Court on July 12, 2021. The process server completed an affidavit of non-service on August 10, 2021, after he was initially unable to serve the Defendant on August 8, 2021. However, Respondent subsequently received notification from his process server on August 31, 2021, that the Defendant had been served the Summons and Complaint on August 26, 2021. Respondent never filed the affidavit of service with the Clerk of Court. Instead, Respondent subsequently filed a request for a hearing on October 1, 2021, which included the August 10, 2021 affidavit of non-service.

The Lexington County Family Court notified Respondent on December 15, 2021 that a hearing was scheduled in R.W.'s case for January 5, 2022. This notice was issued the by the family court the same day that Respondent was suspended from the practice of law. R.W. denies ever receiving notice from Respondent about the January 5, 2022 hearing, and Respondent does not have any documentary evidence showing that he or his assistant notified R.W. of the hearing. Respondent also does not have any documentation that he notified R.W. of his suspension. Respondent failed to keep R.W. reasonably informed about the status of his case. Respondent also failed to take steps reasonably practicable to protect R.W.'s interests upon Respondent's suspension.

Neither Respondent nor R.W. appeared at the hearing on January 5, 2022, and the presiding judge dismissed the action. The order of dismissal states that the case was dismissed because neither party appeared and that the court lacked jurisdiction to issue an order, noting the affidavit of non-service in the case file.

Respondent admits that his conduct in this matter violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (requiring diligence); Rule 1.4 (requiring a lawyer to keep a client reasonably informed about the status of a matter); and Rule 1.16(d) (requiring a lawyer, upon termination of representation, to take the steps reasonably practicable to protect a client's interests).

Matter B.

On August 22, 2022, ODC received F.W.'s allegations of misconduct against Respondent, who represented F.W. in a family court case. F.W. hired Respondent in January 2021 to file an action to modify his court-ordered child support. Respondent subsequently filed a Summons and Complaint with the Aiken County Family Court for modification of child support based upon a change in circumstances. A hearing for temporary relief was held in February 2021, and a temporary order was filed on April 29, 2021. The temporary order reduced F.W.'s child support obligation and required both parties to send discovery within thirty days, with a goal of mediating the case by the end of May 2021.

Mediation did not occur in May 2021. Meanwhile, F.W. as deployed out of the country between May 29, 2021, and August 2021. Upon F.W.'s return, F.W. contacted Respondent numerous times between August 2021 and December 2021 for an update on his case without any response. Respondent failed to respond to F.W.'s reasonable requests for information about his case and failed to keep F.W. reasonably informed about the status of his case.

F.W. received an email from Respondent on December 21, 2021, stating that Respondent had been suspended from the practice of law on December 15, 2021, and instructing clients how to retrieve their files from Respondent's office. F.W. responded to the email, requesting to arrange a time to pick up his file. F.W. subsequently requested that his file be mailed to him. Respondent never complied with F.W.'s request that the file be mailed.

In February 2022, the Aiken County Family Court issued an order dismissing F.W.'s case because a final hearing was not held within 365 days after the filing of the complaint. As a result, F.W.'s child support obligation increased to the amount

ordered prior to April 22, 2021. At no point during the representation, or upon his suspension, did Respondent advise F.W. that if a final hearing was not scheduled within a year, the case would be dismissed and the amount of F.W.'s child support payments would increase.

Respondent admits that his conduct in this matter violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (requiring diligence); Rule 1.4 (requiring a lawyer to keep a client reasonably informed about the status of a matter); and Rule 1.16(d) (requiring a lawyer, upon termination of representation, to take the steps reasonably practicable to protect a client's interests).

Matter C.

On January 11, 2023, ODC received a complaint from S.D. that Respondent had mishandled her husband T.S.'s criminal case. T.S. hired Respondent in April 2021. Respondent communicated his representation of T.S. to the solicitor's office but never filed a notice of appearance with the Court. Respondent subsequently received notification from the Eleventh Circuit Solicitor's Office that T.S. was required to appear for a roll call on August 30, 2021. Respondent drafted a letter advising the solicitor's office that he had a conflict and would be unable to attend the roll call; however, it is unclear whether the letter was received by the solicitor's office.

S.D. maintains that Respondent never communicated to T.S. that he had to attend the August 30, 2021 roll call. Respondent does not have any documentary evidence that he communicated with T.S. about the need to attend the roll call. T.S. did not attend the roll call, and a bench warrant was subsequently entered for his failure to appear. Respondent was not aware of the bench warrant because Respondent had never filed a notice of appearance on behalf of T.S. Thus, Respondent never advised T.S. that the bench warrant had been issued.

On December 15, 2021, Respondent was suspended from the practice of law. T.S. was arrested on the bench warrant in January 2023 and was incarcerated at the time the complaint was submitted to ODC. According to the public index for T.S.'s criminal matter, T.S. subsequently pled guilty and received a time-served sentence.

In addition to failing to file a notice of appearance on behalf of T.S., ODC's investigation revealed Respondent also failed to file a request for information pursuant to Rule 5, SCRCrimP, and that Respondent failed to notify T.S. of his suspension.

Respondent admits that his conduct in this matter violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (requiring diligence); and Rule 1.4 (requiring a lawyer to keep a client reasonably informed about the status of a matter).

II.

Respondent also admits his misconduct as set forth above constitutes grounds for discipline under Rule 7(a)(1), Rule 413, SCACR (providing a violation of the Rules of Professional Conduct is a ground for discipline).

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State of South Carolina, Petitioner,

v.

Charles Wakefield, Jr., Respondent.

Appellate Case No. 2024-000434

COMMON LAW WRIT OF CERTIORARI

Alex Kinlaw, Jr., Circuit Court Judge

Opinion No. 28210
Submitted May 8, 2024 – Filed June 20, 2024

DECLARATORY JUDGMENT ISSUED
ORDER VACATED

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Deputy Attorney General Melody Jane Brown, all of Columbia, for Petitioner.

Joshua Snow Kendrick, of Kendrick & Leonard, P.C., of Greenville, S.C.; and Christine C. Mumma, of N.C. Center on Actual Innocence, of Durham, N.C., for Respondent.

PER CURIAM: This matter is before the Court of General Sessions for the Thirteenth Judicial Circuit on a motion for a new trial based on after-discovered evidence pursuant to Rule 29(b), SCRCrimP. Following an order of discovery, the State petitioned this Court for extraordinary relief, including a common law writ of certiorari, declaratory relief, and a writ of prohibition. The State also asked this Court to stay the proceedings in the circuit court and/or remove the proceedings from the circuit court to this Court and expedite the proceedings in this Court. We grant the petition for extraordinary relief, issue a common law writ of certiorari, grant the request for declaratory relief, and hold discovery cannot be ordered on a Rule 29(b), SCRCrimP, new trial motion. We deny the remainder of the requested relief.

Respondent was convicted of two counts of murder, armed robbery, robbery, and larceny of Frank and Rufus Looper and was sentenced to death. His convictions were affirmed on direct appeal, but the case was remanded for the imposition of a life sentence because the death penalty statute under which Respondent was sentenced was later determined to be unconstitutional. *State v. Wakefield*, 270 S.C. 293, 295, 242 S.E.2d 219, 220 (1978). Although he sought post-conviction relief (PCR) in the courts of this state and habeas corpus relief in the federal courts, Petitioner received no relief in any of the collateral actions.

In 2020, Respondent filed a Rule 29(b), SCRCrimP, motion for a new trial based on after-discovered evidence. The evidence includes a .32 Rossi revolver found decades after the crimes that was consistent with the murder weapon and letters found in a file at the Greenville County Law Enforcement Center that Respondent alleges indicate he was framed for the Looper murders by corrupt law enforcement officers.[1]

The circuit court granted a hearing on the motion for a new trial based on after-discovered evidence and issued a discovery order. The discovery order requires the State to disclose all case files maintained by the Greenville Police Department, SLED, and the Thirteenth Circuit Solicitor's Office relating to the investigation of the murders of the Loopers and the prosecution of Respondent; all evidence that

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[1] Respondent represents that the folder has since been lost by law enforcement; however, Respondent has obtained an audio recording of a Greenville City Council meeting where the information in the file was discussed.

may be favorable to Respondent in the State's possession or the existence of which is known or may, by the exercise of reasonable diligence, become known by the State; any promises, rewards, or inducements made to witnesses in the case; any offers or grants of immunity to any witnesses in the case; and copies of all memoranda, reports, and correspondences between state, local, and federal law enforcement agencies regarding the investigation of the case. In the order, the circuit court stated it was "committed to ensuring justice was served to [Respondent] and the Looper family. That cannot be done without full transparency and disclosure of all evidence."

Rule 29(b), SCRCrimP, provides for a motion for a new trial based on after-discovered evidence. To prevail on a motion for a new trial based on after-discovered evidence, the moving party must show the evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Spann,* 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Our decisions discussing the requirements for a new trial based on after-discovered evidence indicate that in deciding these motions, the circuit court is limited to reviewing the transcript of, and evidence presented at, the defendant's trial and any other evidence the party moving for a new trial presents as after-discovered evidence. *See, e.g.*, *id.* at 619–20, 513 S.E.2d at 99 (requiring after-discovered evidence to be "such that *it* would probably change *the result* if a new trial were granted" (emphasis added)); *see also Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129–30 (2014) (noting the traditional after-discovered evidence test "presumes that [the circuit court] is in a position to *weigh the new testimony against that provided at the prior trial* and assess whether an acquittal verdict would enter based upon new evidence" (emphasis added)); *State v. Strickland*, 201 S.C. 170, 22 S.E.2d 417, 419 (1942) ("The contents of the circuit order evidence the painstaking care with which the learned [j]udge considered the motion [for a new trial based on after-discovered evidence] and supporting papers. Like him, this Court has reviewed the *[t]ranscript of [r]ecord in the former appeal and the proceedings upon the motion* . . . " (emphasis added)). There is no provision of law or decision of this Court allowing for additional discovery—other than a party's use of the court's subpoena power—after a hearing on the new trial motion has been ordered. We hold discovery cannot be ordered on a motion for a new trial based on after-discovered evidence.

The discovery order issued in this matter exceeds the limits of a motion for a new trial based on after-discovered evidence. Therefore, we vacate the order and direct the circuit court to consider only the after-discovered evidence presented by Respondent in support of his motion for a new trial and the evidence presented at Respondent's trial in deciding the motion.

VACATED.

BEATTY, C.J., FEW, JAMES and HILL, JJ., concur. KITTREDGE, J., not participating.

The Supreme Court of South Carolina

Re: Rule 10, South Carolina Family Court Rules

Appellate Case No. 2024-000804

ORDER

Pursuant to Article V, Section 4 of the South Carolina Constitution, the South Carolina Family Court Rules are amended to delete Rule 10 of these rules. This amendment is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
June 20, 2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Shawn Douglas Custer, Appellant.

Appellate Case No. 2019-000292

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

Opinion No. 6063
Heard October 18, 2023 – Filed June 20, 2024

REVERSED AND REMANDED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Ambree Michele Muller, both of Columbia, for Respondent.

BROMELL HOLMES, A.J.: Shawn Douglas Custer appeals his conviction for receiving stolen goods valued in excess of $10,000 and sentence of seven years' imprisonment. On appeal, Custer argues the trial court erred by (1) denying his motion for a directed verdict, (2) instructing the jurors that his knowledge and possession may be inferred because the stolen property was found on real property under his control, and (3) failing to suppress global position system (GPS) evidence of the stolen property's movement. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

An employee of High Hills Rural Water Company (High Hills) reported to work on Monday, September 21, 2015, and discovered a dump truck, backhoe, and trailer were missing from the premises. John Loney, the executive director of High Hills, tracked the dump truck with a tracking device that became activated when the vehicle started and reported the location to police. Police went to the location—Custer's property—and did not see the dump truck. When police returned to tell Loney they did not see the truck, Loney provided a printed-out map that showed the truck's location. A tracking device on the dump truck generated a report, which detailed when the truck turned on and off and its route of travel. Loney testified the report showed that early Monday morning at 12:27 a.m., the truck started and drove until 12:54 a.m.

After giving police the map with the truck's location, Loney went to Custer's property and identified the equipment. Loney stated the backhoe, which was found underneath some trees, had been separated from the truck and was covered with "brush that appeared to have been cut and put on top of the trailer." Loney acknowledged he had no evidence to connect Custer to the equipment other than the fact it was found on his property.

Officer Randall Hilliard with the Sumter County Sheriff's Office responded to High Hills regarding the stolen equipment. After Loney supplied him with a general location of the dump truck, Officer Hilliard went to the location and saw a house but did not see anyone or the equipment. Officer Hilliard returned to High Hills and asked Loney for a topographical map with an aerial view; Loney gave him a photograph with an orange dot marking the GPS tracker of the dump truck and provided Custer's address. Officer Hilliard stated that when he returned to the location and attempted to turn down the driveway, an individual was locking the gate. He told the individual what he was looking for, but "there was no further discussion." Officer Hilliard then contacted his supervisor, who decided to get a search warrant for the property. He acknowledged he found no evidence connecting the equipment to Custer.

Officer Wayne Dubose, who assisted with serving a search warrant at Custer's property, stated that when he arrived at Custer's house, he saw a closed and locked gate. Custer came down to the gate, and when the police explained they were looking for a stolen dump truck, trailer, and backhoe, Custer stated he did not know anything about the equipment. Officer Dubose recalled the police subsequently found the backhoe approximately 150 feet from the corner of Custer's residence. He stated he was able to see the backhoe from the side of the house and

the police noticed it as soon as they got out of their vehicles. Officer Dubose recalled they found the trailer and the dump truck after following matted-down grass and walking 150 yards down a trail. He stated there were limbs on the back of the trailer "camouflaging it." Officer Dubose explained there were a few dogs in the yard who barked at police when they arrived. Officer Dubose acknowledged he was only "guesstimating" the distance from the backhoe to the house. Although he could not say Custer saw the backhoe, he opined there was "no way he couldn't." He further acknowledged police took no photographs that showed the backhoe was visible from Custer's house.

Custer recalled that when law enforcement arrived, Officer Hilliard walked him to where the backhoe stood, in an area "covered by woods all around." Custer stated this was the first time he saw the backhoe, which was pulled up underneath a tree. He explained he measured the distance from his house to the backhoe and found it was eighty yards away if you walked through the trees but 120 yards away if you walked around the wood line. According to Custer, the dump truck and trailer were 322 yards from his house.

Custer owned sixty-five acres of land in Sumter County, which he bought after being honorably discharged from the Air Force. He sold a portion of the land to a friend, and by September 2015, Custer owned fifty-five acres of land that were wooded and contained multiple entrances and various paths. Custer and his wife went out of town on Saturday, September 19, 2015, to attend a wedding in Greenville. They returned to their home around 8:00 p.m. on Sunday, September 20. It was dark when they arrived home. Prior to retiring for the night, Custer brought the dogs inside the garage located underneath the house. He went to bed around 9:15 p.m. Custer woke up on Monday, September 21st between 6:45 a.m. and 6:55 a.m. He left for work by 7:45 a.m. According to Custer, he did not hear any noises during the night.

In 2016, a Sumter County grand jury indicted Custer for receiving stolen goods valued in excess of $10,000 and receiving stolen goods valued between $2,000 and $10,000.[1] In 2019, at trial, Loney admitted that while he had downloaded and printed the GPS report that showed the route the dump truck took to Custer's property in preparation for Custer's bond hearing in 2015, he was unable to find the printed report after the bond hearing. He further indicated, however, he located the

[1] The jury also found Custer guilty of receiving stolen goods or other property valued at more than $2,000, but less than $10,000; however, the State agreed to *nolle prosequi* this indictment prior to sentencing.

report in his office shortly before taking the stand on the day of Custer's trial while the trial court had been recessed for lunch. The report was created by a private company and had not been in the possession of the police at any time or seen by the State prior to trial.

Custer requested a mistrial, arguing the report was "extremely prejudicial" to him. He asserted he could not study the report and its accuracy, nor could he disprove what was contained in the report; Custer stated the report "could be at a minimum very, very helpful to [his] case and at a maximum could be exculpatory." The State responded a mistrial was inappropriate because it never possessed the report and the solicitor did not know it existed until the day of trial. The trial court ruled the report was admissible, finding it did not violate Rule 5 of the South Carolina Rules of Criminal Procedure.[2]

Custer moved for a directed verdict, asserting the State failed to present any evidence connecting him to the stolen equipment or showing he knowingly received goods that he believed to be stolen. He asserted the State only presented circumstantial evidence that he "should have" seen the equipment. The State responded that the offense also included possessing stolen goods, not just receiving them. The State further asserted it presented circumstantial evidence that someone drove the equipment onto Custer's property, unloaded the backhoe, and drove the dump truck to a different location, all in an area where the dogs on Custer's property would have noticed the movement and barked. The trial court denied Custer's motion for a directed verdict, finding the State presented sufficient circumstantial evidence. The trial court further found that whether or not Custer saw the backhoe in the backyard was a question of fact for the jury to decide and acknowledged this was a "close case."

Custer requested a jury charge on mere presence. The trial court stated it planned to charge constructive possession, actual possession, and mere presence. Before charging the jury, the trial court read its proposed instructions aloud to the parties and stated it intended to charge the following: "The defendant's knowledge and possession may be inferred when a, when the property is found on the property under the defendant's control." When the trial court asked if the attorneys had any issue with the instructions, Custer initially requested that the trial court charge mere presence as the final instruction prior to charging the inference instruction. He then questioned whether the trial court's charge was "the proper standard" and argued such instruction was "for a drug case" and stated "I think that's a little bit of

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[2] The trial court did not rule on Custer's mistrial motion.

a different situation." Custer asserted the trial court's proposed charge applied in circumstances when "[a] person charged with possession[of drugs] argu[es the drugs were] not his, but [the drugs were found] in his car, . . . not somebody else's car with him in the car." The trial court then pointed out, "But it[wa]s on his property." Custer responded that because the stolen goods were found "out on the real estate" as opposed to "being in a car," his case was different. Custer then stated, "I'm not gonna—Judge, if you say that's what it's gonna be, that's fine." The trial court stated, "I understand your argument, but I just don't know how to deal with it in another way because if the jury can't make the inference that it was on his property, there is no other evidence that connects him to it. That's the only other thing that gets him there. . . . [bec]ause they don't have anything else . . . ." Custer replied, "Yes, sir. I'm not gonna argue, Judge, with you. . . . If you'll just note my, if that's just noted and let's just go from there." The trial court again expressed it understood his issue.

After charging the jury on actual possession, constructive possession, and mere presence, the trial court issued the following instruction: "The defendant's knowledge and possession may be inferred when the stolen property is found on the property under the defendant's control." The trial court further told the jury that this instruction was "an inference simply and not an evidentiary fact to be taken in[to] consideration by you along with all the other evidence in this case and to be given the weight that you decide it should be given."

At the conclusion of the jury instructions, Custer stated, "Judge, just so I would repeat the thing about the presence charge that comes from the drug cases." The trial court responded, "I understand, but you asked me to charge mere presence and I charged that him having mere presence on the scene doesn't get him there." Custer replied, "Yes, sir" and, "Thank you, Judge."

The jury found Custer guilty of receiving stolen goods or other properties valued at $10,000 or more. The trial court sentenced him to seven years' imprisonment, suspended to time served, with probation for three years and forty hours of community service. This appeal followed.

STANDARD OF REVIEW

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *State v. Lemire*, 406 S.C. 558, 565, 753 S.E.2d 247, 251 (Ct. App. 2013) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual

conclusions, is without evidentiary support." *Id.* (quoting *Clark*, 339 S.C. at 389, 529 S.E.2d at 539). "In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013).

LAW/ANALYSIS

Custer argues the trial court erred by instructing the jurors that his knowledge and possession of the equipment could be inferred because the stolen equipment was found on real property under his control. Custer contends that none of the State's witnesses provided evidence connecting him to the stolen equipment, other than the fact that the items were found on his land, while the State argued in closing that it "merely" had to prove the stolen items were within Custer's control on his property. He asserts the trial court's instruction negated the mere presence charge, improperly weighed the evidence, and did not allow the jurors to determine what inferences, if any, should be drawn from the equipment being recovered on his land. We agree.

As an initial matter, we hold Custer's argument is preserved for appellate review because he raised the issue to the trial court sufficiently and the trial court ruled on the issue. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue "must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). We acknowledge Custer did not use express language such as "objection" or "I object" when he addressed the proposed instruction. However, in reviewing his exchange with the trial court, we find his statements questioning whether the inference charge was the proper standard and arguing it did not apply in this context were sufficient to convey that he was challenging the trial court's decision to give such charge. Further, by rejecting Custer's argument, the trial court ruled upon Custer's challenge to the charge. In addition, Custer asked the trial court to "note" his concerns and the trial court stated it understood his issue. Finally, after the trial court charged the jury, Custer stated he would repeat his concern "about the presence charge that comes from the drug cases." The trial court again rejected his challenge when it stated "I understand." We find the foregoing demonstrates Custer raised the issue to the trial court at the appropriate time and the trial court ruled upon the issue. We therefore hold Custer's statements to the trial court were sufficient to preserve this issue for appellate review.

Two years after Custer's conviction, in *State v. Stewart*, 433 S.C. 382, 390, 858 S.E.2d 808, 812 (2021), our supreme court found the trial court erred in charging the jury that "[t]he defendant's knowledge and possession may be inferred when a

substance is found on the property under the defendant's control." Specifically, our supreme court held that "[t]he jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given." *Id*. at 391, 858 S.E.2d at 813. The court found this instruction to be improper and expressly overruled prior, contradictory caselaw on this point. *Id*. at 391, 858 S.E.2d at 813 (overruling the holding in *State v. Adams*, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987), that "[t]he proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control")). The instruction at issue in *Stewart* is almost identical to the instruction the trial court gave here. Pursuant to our supreme court's holding in *Stewart*, we hold the circuit court erred by instructing the jury it could infer Custer's knowledge of the stolen equipment based upon the fact that it was found on his property. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final . . . ."). Further, we hold this error prejudiced Custer when the only evidence of his guilt was the fact the stolen property was found on his land. *See Stewart*, 433 S.C. at 392, 858 S.E.2d at 813 (holding that '[t]he improper explanation of the inference of knowledge and possession permitted the jury to find [the appellant] guilty . . . without the State proving knowledge and intent"). Accordingly, we reverse and remand for a new trial in compliance with *Stewart*.

Because our determination as to this issue is dispositive of the remaining issues on appeal, we decline to address those issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address an appellant's remaining issues when the determination of a prior issue was dispositive).

CONCLUSION

For the foregoing reasons, we reverse Custer's convictions and remand the case to the trial court for a new trial.

REVERSED AND REMANDED.

VINSON, J., and LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Associated Receivables Funding, Inc., Respondent,

v.

Dunlap, Inc.; James Stephen Dunlap, an Individual; Dunlap Industrial Coating Services, Inc.; Dunlap Industrial Services, Inc.; Classic Industrial Services, Inc.; and Mark Beuerle, an Individual, Defendants,

Of Which Classic Industrial Services, Inc. is the Appellant.

Appellate Case No. 2020-000320

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 6064
Heard March 7, 2024 – Filed June 20, 2024

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Steven Edward Buckingham, of The Law Office of Steven Edward Buckingham, LLC, of Greenville, for Appellant.

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

MCDONALD, J.: In this action to enforce a security interest, Classic Industrial Services, Inc. (Classic)[1] argues the circuit court erred in finding it liable under South Carolina's Uniform Commercial Code (UCC), the common law theory of negligent misrepresentation, and the equitable theory of promissory estoppel. Classic further asserts the circuit court erred in calculating Associated Receivables Funding, Inc.'s (ARF)[2] damages. We affirm in part, vacate in part, and remand.

Facts and Procedural History

On September 24, 2010, ARF and Dunlap, Inc. (Dunlap)[3] contracted for ARF to provide Dunlap with funding in exchange for receivables (the Factoring Agreement). Pursuant to its terms, the Factoring Agreement was executed under and governed by South Carolina law. As consideration for entering the Factoring Agreement, Dunlap gave ARF a security interest in its accounts receivable and contract rights, "represented by a UCC Financing Statement (UCC-1) filed with the South Carolina Secretary of State."

In April 2014, ARF began purchasing Dunlap's accounts receivables for which Classic was the account debtor. For these receivables (the Dunlap Invoices), each invoice Dunlap provided to Classic stated, "For value received, this invoice has been assigned to, owned by and payable to Associated Receivables Funding, Inc. PO Box 16253, Greenville, SC 29606. Any offsets, claims, etc. must be reported to Associated Receivables Funding, Inc. immediately upon receipt of this Invoice." On each Dunlap Invoice, Dunlap also stamped this language:

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[1] Classic is a Delaware corporation operating as a contractor out of Louisiana.

[2] ARF is a South Carolina factoring company principally engaged in making accounts receivable financing available to customers. A factoring agreement allows a small business to sell outstanding invoices to a third party in exchange for upfront cash.

[3] Defendants Dunlap, James Stephen Dunlap, Dunlap Industrial Coating Services, Inc., Dunlap Industrial Services, Inc., and Mark Beuerle are not parties to this appeal. Dunlap, which is no longer in business, was a South Carolina company principally engaged in providing industrial coating services.

> For value received, we hereby assign and transfer this invoice and its proceeds to Associated Receivables Funding, Inc. who is the owner of this invoice unencumbered by any other security or claims, and pursuant to the master agreement. The undersigned does herewith assign all lien rights, chooses [sic] in action, chattel paper or contract rights. We further certify that the goods have been shipped and/or services have been rendered in agreement with all terms and conditions.

In late 2014, Classic hired Dunlap as a subcontractor on a project for American Electric Power in Pittsburg, Texas (the Project). In October 2015, Classic and Dunlap entered a written agreement memorializing their relationship (the Subcontract).[4] Under subsection K of the Subcontract, Classic agreed "[t]he terms, and provisions of this subcontract shall extend to and be binding upon the heirs, successors, executors, administrators, trustees and assigns of the parties hereto."

Upon receipt of each Dunlap Invoice, Classic also completed and emailed ARF's "Work Completion Form" directly to ARF. Classic's certifications included this language:

> This is to certify that the below work as described has been satisfactorily completed and to acknowledge that payment for this invoice is not contingent upon any other work being completed.
>
> I understand that payment will not be processed until this form is completed and returned to the above address.
>
> I certify that the above work has been completed in full, all invoicing for material used has been provided to project designee. The work performed has been

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[4] ARF's executive vice president of operations (VPO), Kevin Gilbert, testified that he never saw the Subcontract until his deposition. He explained he did not need to see the Subcontract because ARF "only purchased invoices [from Dunlap] once we received confirmation [from Classic] that the invoice was going to pay."

> inspected and complete payment should be processed to PO Box 16253, Greenville, SC 29606.

From April 2014 until February 2016, Classic paid ARF for monies advanced on at least forty Dunlap Invoices totaling over a million dollars. Beginning with two March 28, 2016 invoices, however, Classic failed to remit payment on fifteen invoices—totaling $202,390.92—that Classic had certified ARF should pay. No later than April 2016, Classic became suspicious that Dunlap had not paid certain suppliers Dunlap used to satisfy its obligations under the Subcontract. Classic immediately demanded proof of payment from Dunlap to address these concerns.[5] Yet, Classic continued to represent to ARF that complete payment should be processed on the Dunlap Invoices through May 9, 2016. It was not until July 2016 that ARF learned Classic was not going to pay the remaining Dunlap Invoices. At the time of trial, ARF was owed $323,718.31 on the unpaid invoices.[6]

ARF filed this action against Dunlap, Classic, and others, and the circuit court held a nonjury trial. The parties agreed to dismiss Dunlap without prejudice; the remainder of the case involved ARF's claims against Classic. At the conclusion of the testimony, both parties moved for directed verdicts. The circuit court invited the parties to submit post-trial briefs and subsequently issued an order finding in favor of ARF as to all three causes of action asserted against Classic. Citing sections 36-9-607 and 36-9-404 of the South Carolina Code (2003 & Supp. 2023), the court ruled:

> [A] secured party may enforce the obligations of an account debtor and exercise the rights of the debtor with

[5] Initially, Dunlap provided Classic written assurances that it was or would be paying its suppliers, including Carboline and Hertz Equipment Rental Company. When these assurances proved to be false, Classic issued Dunlap a May 12, 2016 notice of default, giving Dunlap five days to provide conclusive assurance that the suppliers had been paid. Because Dunlap was unable to cure its default, Classic terminated Dunlap on May 17, 2016. Classic subsequently paid Hertz approximately $142,000 and Carboline approximately $37,000 to satisfy any lien claims they might have against the Project.

[6] This figure included the balance on the unpaid invoices, plus interest at the rate of 24.64% set forth in the Factoring Agreement.

> respect to the obligation of the account debtor. A secured party's rights, however, are subject to all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract unless an account debtor has made an enforceable agreement not to assert defenses or claims.
> In the matter at hand, [Classic], the account debtor, agreed not to assert defenses or claims against payment of each Dunlap Invoice to [ARF], the secured party, when [Classic] represented to [ARF] that the work was inspected and "complete payment should be processed" to [ARF]. This Court finds that the ordinary, plain meaning of "should" is the past tense of shall and, accordingly, connotes a duty or obligation. As [Classic] obligated itself to process complete payment to [ARF], [ARF], in accordance with South Carolina Code Ann. § 36-9-607, is entitled to enforce [Classic's] obligations under the Dunlap Invoices. [Classic], accordingly, is liable to [ARF] for the Dunlap Invoices in the amount of Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars ($202,390.92).

(internal citations omitted). The circuit court also ruled against Classic on ARF's claims for negligent misrepresentation and promissory estoppel, awarding ARF judgment in the amount of $323,718.31. Classic filed no post-trial motion, but timely appealed.

Standard of Review

"An action to construe a contract is an action at law reviewable under an 'any evidence' standard." *Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 195, 791 S.E.2d 321, 326 (Ct. App. 2016) (quoting *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001)). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Id.* (quoting *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009)). "The Court will not disturb the trial court's findings unless they are found to be

without evidence that reasonably supports those findings." *Id.* (quoting *Temple*, 381 S.C. at 600, 675 S.E.2d at 415). "When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006). "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, Rec. & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008).

Analysis[7]

I. Enforcement of Security Interest/Existence of a Contract

Classic first argues the circuit court erred in finding it liable for ARF's damages under section 36-9-607, in derogation of Classic's rights under section 36-9-404. We disagree.

Regarding the rights acquired by—and the claims and defenses against—an assignee, § 36-9-404 states in pertinent part:

> (a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:
>
> (1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

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[7] ARF argues Classic failed to preserve most of its arguments because it filed no Rule 59(e), SCRCP, motion. We disagree. As Classic properly notes, Rule 52 governs in this nonjury context. *See* Rule 52(b), SCRCP ("When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.").

> (2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.
>
> (b) Subject to subsection (c) and except as otherwise provided in subsection (d), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes.
>
> . . . .
>
> (d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this chapter requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.
>
> . . . .

S.C. Code Ann. § 36-9-404 (2003 & Supp. 2023).

Under section 36-9-102(73)(A) and (D) of the S.C. Code Ann. (2003 & Supp. 2023), a "secured party" means a "person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding" or a "person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold." An "account debtor" is "a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper." S.C. Code Ann. § 36-9-102(a)(3) (2003 & Supp. 2023). In distinguishing a debtor from an account debtor, the UCC

defines a "debtor" as "a seller of accounts, chattel paper, payment intangibles, or promissory notes." S.C. Code Ann. § 36-9-102(a)(28)(B) (2003 & Supp. 2023).

Here, ARF is the assignee/secured party, Dunlap is the assignor/debtor, and Classic is the account debtor. Classic argues the work completion certification language is neither valid nor enforceable against Classic by ARF, but we find evidence supports the well-reasoned findings of the circuit court.

VPO Gilbert testified that when ARF "factor[s] a receivable, our client provides us an invoice. Once we verify and confirm that invoice is a valid invoice, we will purchase that invoice and advance the money to our client." Gilbert explained that Classic emailed ARF directly regarding the Dunlap Invoices and attached both "a work completion form signed by Classic" and "a copy of the actual invoice submitted to Classic by Dunlap." He stated, "We funded each and every one of these invoices based on this confirmation." Prior to July 2016, ARF "had no reason to believe that [Classic] would not pay, since all confirmations prior to that had been paid."

Regarding the Dunlap Invoices, Gilbert agreed on cross-examination that "nowhere on here does it say that [Classic] is waiving any defenses." This exchange followed:

> Q: Okay. If there is no waiver of the defenses in the contract and there is no indication that this is a complete—that this is a complete and final obligation for payment on behalf of Classic, would you agree with me that this does not waive any defenses?
>
> A: I do not agree with you.
>
> Q: Okay. Did you provide any consideration to Classic Industrial for waiving defenses?
>
> A: We provided funding for them for and to continue work.
>
> Q: You provided funding to Dunlap, correct?

A: Correct.

Q: Did you pay consideration to Classic Industrial Services, as required by the UCC?

A: Nothing was paid to Classic Industrial.

Q: In fact, you don't have any other agreement, other than these certifications, you had no other agreement with Classic Industrial Services, correct?

A: Correct.

Q: You didn't have them sign a guarantee, correct?

A: No guarantee.

Q: You didn't have them sign a promissory note?

A: No note.

Q: And there is nothing contained in this language that says you waive your defenses under the UCC, correct?

A: Nothing that I read, no.

On redirect, Gilbert stated, "If we didn't fund Dunlap, they would have no money to continue" and noted Classic benefitted from Dunlap continuing to work on the Project. Gilbert testified ARF would not have purchased any of the Dunlap Invoices without Classic's representations on the Work Completion Form.

Controller Jessica DeLaune testified on behalf of Classic and admitted that even after Classic had notice Dunlap was not paying its subcontractors and suppliers in April 2016, Classic continued to certify to ARF that the work was complete and ARF should pay Dunlap. However, DeLaune explained, "We were of the understanding that Carboline had been paid and it was remedied." After being questioned about the definition of the word "should" and reading the definition from the Oxford English Dictionary, DeLaune agreed "should" is "used to indicate

an obligation, duty, or correctness typically when criticizing someone's actions." DeLaune testified Classic did not certify any Dunlap Invoice after May 5, 2016.

On re-cross, DeLaune testified, "I'm a CPA and I have been in business a very long time and this certification doesn't waive any of our rights of offset, based on my experience, so I don't know why they would rely on just the work completion certification." When asked whether ARF changed its position based on Classic's certification, she said, "I don't know that I can agree to that. I don't know."

Initially, we note the existence of a contract is a question of fact and our scope of review in this action at law tried without a jury, "extends merely to the correction of errors of law." *Miller Constr. Co.*, 418 S.C. at 195, 791 S.E.2d at 326 (quoting *Pruitt*, 343 S.C. at 339, 540 S.E.2d at 845). Here, secured party ARF offered to fund Dunlap's receivables and keep Dunlap at work on Classic's Project. ARF persuasively argues Classic accepted ARF's offer of payment on each of the Dunlap Invoices and received the benefit of Dunlap remaining at work on its Project. *See Regions Bank v. Schmauch*, 354 S.C. 648, 660–61, 582 S.E.2d 432, 439 (Ct. App. 2003) ("A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct."). In emailing each executed Work Completion Form to ARF, Classic represented that it had inspected Dunlap's work and that "complete payment should be processed."

Although Classic admits "should" and "shall" share a common origin, and "should" is "technically" the past tense of "shall," Classic argues there is disagreement "as to whether and what extent 'should' carries the force of a mandate." While South Carolina courts have not specifically ruled on the meaning of the word "should" in this context, the Fourth Circuit has noted that when standing alone, the term "can express the notion of requirement or obligation." *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 700 n.12 (4th Cir. 2019) (citing *Should*, Webster's Third New International Dictionary Unabridged (2002) ("used . . . to express duty, obligation, [or] necessity")).

We find it problematic to construe "should" as discretionary in the context of processing a payment for work certified to be complete and payable in the course of an ongoing business relationship. Instead, it seems logical to construe "should" as a requirement or obligation in such a contractual context. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) ("Generally, a contract is 'interpreted according to the terms the parties have

used, and the terms are to be taken and understood in their plain, ordinary, and popular sense.'" (quoting *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008))). Therefore, we find no error in the circuit court's determination that by emailing the work completion forms certifying Dunlap's work to ARF, Classic obligated itself to complete payment to ARF. We further agree with the circuit court's finding that ARF is entitled to enforce Classic's obligations under the Dunlap Invoices. *See* § 36-9-607(a)(1) (providing that if "so agreed, and in any event after default," a secured party "may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party).[8]

Even if the Work Completion Forms did not contractually bind Classic, ARF and Classic mutually intended to be bound through their conduct. *See Stanley Smith & Sons v. Limestone Coll.*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984)

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[8] Classic encourages us to follow the decision reached in *Factor King, LLC v. Block Builders, LLC*, which Classic argues is "substantially identical to the circumstances of the instant case in both law and fact." 192 F. Supp. 3d 690 (M.D. La. 2016). But we find *Commercial Capital Holding Corp. v. Team Ace Joint Venture*, 2000 WL 726880 (E.D. La. June 2, 2000), which *Factor King* distinguishes, more persuasive. There, the Louisiana district court granted summary judgment to the plaintiff (Commercial Capital), against the general contractor (Team Ace). *Id*. at *1. Team ACE had entered subcontracting agreements with SIMS, and SIMS assigned receivables from its Team Ace subcontract agreements to Commercial Capital in return for money advanced to SIMS pursuant to a factoring agreement. *Id*. Before Commercial Capital would advance funds to SIMS, Team Ace would approve the sub's request and "then execute the 'Invoice Acknowledgement Agreement' wherein Team Ace would acknowledge that the invoice presented would be paid and specifically waived any right of setoff, defense, counterclaim, or recoupments against SIMS in connection with that invoice." *Id*. Commercial Capital also required that SIMS sign the Invoice Acknowledgement Agreement and this process continued until SIMS breached its contract with Team Ace. *Id.* Team Ace then refused payment to Commercial Capital on forty-two invoices approved by Team Ace's project managers. *Id.* at *6. As Commercial Capital had advanced over a million dollars to SIMS based on representations made by Team Ace—and twenty-nine prior such invoices were submitted and approved by Team Ace project managers without question—the district court found Team Ace was "equitably estopped from avoiding the agreements it entered into with" Commercial Capital. *Id*. at *5.

("If agreement is manifested by words, the contract is said to be express. If it is manifested by conduct, it is said to be implied. In either case, the parties must manifest a mutual intent to be bound." (internal citations omitted)). ARF extended a line of credit to Dunlap for the completion of work on the Project and Classic availed itself of the benefits. Considering that ARF remitted payment to Dunlap on more than forty Dunlap Invoices certified by Classic—totaling over a million dollars from April 2014 through February 2016—we agree with the circuit court that a contract existed between Classic and ARF. The substance of this agreement was that ARF advanced money to Dunlap so Dunlap could complete the work Classic needed on the Project. When Classic failed to pay ARF on the Dunlap Invoices that Classic itself certified should be paid, Classic breached the agreement. Accordingly, we affirm the circuit court's finding that Classic is liable to ARF for the $202,390.92 owed on the unpaid invoices. *See Miller Constr. Co.*, 418 S.C. at 195, 791 S.E.2d at 326 (holding an appellate court will not disturb the trial court's findings unless there is no evidence to support those findings).

II. Negligent Misrepresentation

Next, Classic argues the circuit court erred in finding it liable to ARF under a common law theory of negligent misrepresentation. Classic contends the circuit court misapplied the essential elements of this cause of action and failed to substantiate its determination of liability with evidentiary support. We disagree.

In *Quail Hill, LLC v. County of Richland*, our supreme court explained that to prove a claim for the common law tort of negligent misrepresentation, a plaintiff is required to establish the following elements:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)).

"There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Id.* (quoting *AMA Mgt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992)). "[W]hile issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" *Id.* (quoting *McLaughlin v. Williams*, 379 S.C. 451, 457–58, 665 S.E.2d 667, 671 (Ct. App. 2008)). "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties." *Id.*

Here, Classic misrepresented to ARF on the work certification forms accompanying the fifteen unpaid Dunlap Invoices that "complete payment should be processed" despite learning as early as April 2016 that Dunlap had not paid its subcontractors or suppliers. Classic made these representations in the course of its business and had a pecuniary interest in making them. *See, e.g.*, *Winburn v. Ins. Co. of North America*, 287 S.C. 435, 442, 339 S.E.2d 142, 146–47 (Ct. App. 1985) ("The fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time." (quoting Restatement (Second) of Torts § 552, Cmt. d, at 129–30 (1977)). Hence, the circuit court properly found ARF satisfied the first two elements—"(1) the defendant made a false representation to the plaintiff [and] (2) the defendant had a pecuniary interest in making the statement"—of its negligent misrepresentation claim. *Id.* at 240, 692 S.E.2d at 508 (quoting *West*, 341 S.C. at 134, 533 S.E.2d at 337).

The duty of care necessary for a negligent misrepresentation claim does not require a defendant to take every possible care, but it is a duty to use the care necessary to communicate truthful information. *Quail Hill*, 387 S.C. at 240, 692 S.E.2d at 508. Classic had the specialized knowledge to determine any necessary offsets to the Dunlap Invoices as well as whether it would pay the Dunlap Invoices and underlying claims thereto. *See AMA Mgmt.*, 309 S.C. at 223, 420 S.E.2d at 874 ("[I]f the defendant has a pecuniary interest in making the statement and he possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or ability to make careful enquiry, the law places on him a duty of care with respect to representations made to plaintiff."). Even after learning Dunlap was not meeting its obligations, Classic represented to ARF on fifteen separate occasions that "complete payment should be processed."

Classic's proper disclosure of Dunlap's breach would have enabled ARF to avoid the resulting foreseeable harm of advancing funds for invoices that went unpaid.

As to the final elements of negligent misrepresentation—that "the plaintiff justifiably relied on the representation" and "the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation"—there is evidence in the record that ARF justifiably relied on Classic's representations that the work had been completed and it should process payment just as it previously had on more than forty Dunlap Invoices certified by Classic. *Quail Hill*, 387 S.C. at 240, 692 S.E.2d at 508. Evidence supports the finding that ARF suffered pecuniary loss as the proximate result of its reliance on Classic's representations. For these reasons, the circuit court properly awarded ARF damages for Classic's negligent misrepresentations.

III. Promissory Estoppel

Classic further contends the circuit court erred in finding for ARF on its promissory estoppel claim. Because we affirm the circuit court's findings as to ARF's breach of contract and negligent misrepresentation claims, and ARF may have only one damages recovery, we decline to further consider the promissory estoppel claim. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting a reviewing court need not address remaining issues when resolution of a prior issue is dispositive).

IV. Damages

Finally, Classic contends the circuit court erred in awarding damages by failing to consider that ARF's contract was with Dunlap and by disregarding the inequitable consequences resulting from an award of interest on the unpaid invoices from Classic to ARF. While we agree with the circuit court that ARF is entitled to some interest, we find problematic the circuit court's use of the 24.64% interest rate from the Factoring Agreement between ARF and Dunlap in calculating the interest due from Classic.

Classic properly notes it was not a party to the Factoring Agreement or any other agreement to pay ARF at a specified interest rate. Because the record does not offer evidence to suggest that prior to this litigation Classic was aware of the interest terms in the Factoring Agreement, we vacate the interest award and

remand for the circuit court to calculate the interest Classic owes on the $202,390.92 in unpaid invoices at the 8.75% statutory interest rate. *See*, *e.g.*, *Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Grp., LLC*, 372 S.C. 89, 99, 641 S.E.2d 459, 464 (Ct. App. 2007) (remanding for determination of interest at 8.75% statutory rate where evidence in the record supported that general contractor and subcontractor contractually agreed to higher interest rate of 18% per annum but owner did not contract for the higher rate); S.C. Code Ann. § 34-31-20(A) (Supp. 2023) (setting statutory interest rate of 8.75% in cases of accounts stated and monies due).

Conclusion

For the foregoing reasons, the circuit court's order is

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

THOMAS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kathleen S. Carter, Respondent,

v.

Joseph R. Carter, Appellant.

Appellate Case No. 2021-000030

Appeal From Florence County
Timothy H. Pogue, Family Court Judge

Opinion No. 6065
Heard February 6, 2024 – Filed June 20, 2024

AFFIRMED IN PART, REVERSED IN PART

Rebecca Brown West, of Harling & West, LLC, of Lexington, and Michele Dahl Sturkie, of Sturkie Law, LLC, of Florence, for Appellant.

Marian Dawn Nettles, of Nettles, Turbeville & Reddeck, of Lake City, and Brendan Padgett Barth, of Barth, Ballenger & Lewis, LLP, of Florence, both for Respondent.

THOMAS, J: Joseph Carter (Husband) appeals the family court's Final Divorce Decree (the Decree) dividing the marital estate, awarding $2,700 per month in alimony to Kathleen Carter (Wife), and requiring him to pay Wife's attorney fees. Specifically, Husband argues the family court erred in entering the Decree

because: (1) the family court lacked jurisdiction to divide Husband's nonmarital retirement accounts; (2) the dates on which the family court valued certain debts and assets were incorrect; (3) the values assigned to Wife's vehicle and jewelry are not supported by the greater weight of the evidence; (4) the amount of alimony awarded to Wife was excessive; and (5) the court erred in awarding fees to Wife. Husband also appeals the family court's order denying his motion for reconsideration. We affirm in part and reverse in part.

FACTS

Husband and Wife were married on May 15, 1999. Throughout the duration of the parties' nineteen-year marriage, the couple adopted four children, one of whom ("ZZ") is incapacitated due to disability.[1] Prior to and during the marriage, Husband worked as a self-employed chiropractor. Wife worked as a homemaker and cared for the children throughout the marriage. Wife left the marital home without notice to Husband. Wife then filed an action for separate maintenance and support seeking alimony, equitable apportionment of the marital estate, an order prohibiting the parties from selling or disposing of marital assets pending a merits hearing, and attorney fees. Husband responded seeking a divorce on the ground of continuous separation for one year, equitable apportionment of the marital estate, and an award of attorney's fees. Wife filed a motion for temporary relief, and a temporary order was filed. A final hearing took place and the Decree was signed. Neither party alleged fault in the divorce.

Between the filing of the action and the final hearing, Husband paid Wife $1,300 per month in spousal support. Husband also continued to pay for Wife's health insurance, car insurance, and cell phone through his business. The marital estate included a home, an investment account, personal property, several bank accounts, and two credit card debts.

Prior to the temporary hearing, the parties agreed upon and signed a limited agreement, which was approved by the court. The limited agreement provided: (1) ZZ shall continue to reside with Wife, and Wife will continue to receive ZZ's SSI check to be used in her support; (2) Husband shall be solely responsible for paying 100% of ZZ's therapy, counseling, and dental bills; (3) Husband and Wife shall

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[1] In the years leading up to this action, all of the children except ZZ had emancipated.

both have access to ZZ's medical providers, therapists, and counselors, and both retain the right to discuss ZZ's treatment options; (4) Husband shall have sole and exclusive possession of the marital home, but the home must immediately be placed on the market, and any offer must be presented to both parties; and (5) Wife is entitled to sole and exclusive ownership of the couple's coin collection and piano if she so desires.

Of particular interest to the parties at the final hearing was the character of three retirement accounts in Husband's name, the Stifel Accounts, which were funded from the rollover of two vested retirement plans that Husband acquired prior to the parties' marriage. Wife believed these retirement accounts were marital in nature and cited to conversations with Husband during the marriage that led her to believe the accounts were preparing them both for retirement. However, Husband testified that no contributions were made to the accounts during the marriage. Husband testified to the history of the accounts at trial as follows:

> Well, back in the eighties and nineties we had a pension and profit-sharing plan. Back in 1997 it came—it became cost prohibitive to be able to do that plus provide health insurance for the employees and so health insurance [premiums] back then were just like now, they were just going astronomical, and so I sat the staff down and I said we've got to make tough decisions here, what do you want to do, and so they agreed that they—we would provide health insurance for the employees.

Husband explained that no contributions had been made during the marriage, and he provided pension and profit-sharing statements for 1994, 1995, and 1996. Wife did not present testimony or documents showing that the parties contributed to the profit-sharing plan and pension during the marriage. Wife offered no evidence contradicting Husband's testimony that he made no contributions to the profit-sharing plan, the pension, or the Stifel Accounts during the marriage. Husband testified that the plans became Stifel Nicolaus accounts sometime between 2004 and 2006 when it became too hard for him to work and manage his pension and profit-sharing accounts. The accounts were rolled over into IRA accounts at Stifel Nicolaus. At trial, Husband placed into evidence Certificates for the profit-sharing plan and pension showing his vested interests in the plans as of December 31, 1996, were valued at $309,907.99 and $219,619.17, respectively. During

discovery, Husband provided Wife with statements from the profit-sharing plan and pension for 1994, 1995 and 1996 showing the value of the plans for several years immediately prior to the marriage. Neither party was able to acquire statements from the profit-sharing plan or pension reflecting the balance of the accounts on May 15, 1999, which was the date of the parties' marriage. Husband testified that some records burned in a fire and some records were no longer available from the administrator because they were too old. Prior to Husband moving the assets to Stifel in 2004, the investments were managed by an Edward Jones advisor. Husband was unable to produce documents tracing the flow of his profit-sharing plan and pension plan assets to the Stifel Nicolaus IRAs because so much time had elapsed since the investments were rolled to Stifel Nicolaus. Husband and Wife stipulated that the total value of the three Stifel Accounts as of the date of filing was $767,910.51 and the total value at the time of trial was $757,058.96.

After the two-day trial, the family court granted the parties a divorce on the ground of continuous separation for one year. The marital home mortgage balance was valued at the date of trial rather than the date of filing. Wife was awarded $40,000 from Husband's nonmarital retirement accounts. The court accepted Wife's testimony of value for nearly all of the remaining marital property and debt. Wife was awarded monthly alimony of $2,700 and $10,000 in attorney's fees. Husband filed a motion for reconsideration. After a hearing, the family court denied Husband's motion and awarded Wife additional attorney's fees of $1,200. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, [the appellate c]ourt reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *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. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651-52.

LAW/ANALYSIS

I. Husband's Nonmarital Retirement Accounts

Husband argues the family court erred when it awarded Wife $40,000 from his three nonmarital retirement accounts. Specifically, Husband argues: (1) the family court lacked jurisdiction to divide his nonmarital retirement accounts; and (2) Wife is not entitled to special equity in his nonmarital retirement accounts. We agree.

Section 20-3-630(A) of the South Carolina Code (2014) defines the term "marital property" as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held . . . ." "A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital." *McMillan v. McMillan*, 417 S.C. 583, 591, 790 S.E.2d 216, 220 (Ct. App. 2016) (citation omitted). "If the party presents evidence to show that the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." *Id.* "If the opposing spouse can show that the property was acquired before the marriage or falls within a statutory exception, this rebuts the prima facie case for its inclusion in the marital estate." *Id.* (citation omitted). Once the family court determines that property is nonmarital, it lacks jurisdiction and authority to apportion it. S.C. Code Ann. § 20-3-630(B) (2014); *see Bowen v. Bowen*, 327S.C. 561, 566, 490 S.E.2d 271, 273 (Ct. App. 1997) (finding the family court was not permitted to address real estate excluded from the marital estate by a prenuptial agreement).

Wife may gain an interest in Husband's nonmarital property if she proves that she contributed to the assets' value after the parties married. *See* S.C. Code Ann. § 20-3-630(A)(5) (2014) ("any increase in value in nonmarital property, except to the extent that the increase resulted directly or indirectly from efforts of the other spouse during marriage [constitutes nonmarital property]"). The "special equity doctrine" was described by this court as follows:

> "Where a wife has made a material contribution to the husband's acquisition of property during coverture, she acquires a special equity in the property." *Wilson v. Wilson*, 270 S.C. 216, 241 S.E.2d 566, 568 (1978) (quoting 27B C.J.S. Divorce § 293 (1950)). Therefore, one spouse acquires a special equity in the property of the other if (1) the property was acquired during coverture, (2) the spouse contributed to the acquisition of

the property, and (3) the spouse's contribution was material.

Webber v. Webber, 285 S.C. 425, 427-28, 330 S.E.2d 79, 81 (Ct. App. 1985).

Here, the family court found the three Stifel Accounts to be nonmarital in nature, yet the court still required Husband to pay Wife $40,000 out of the accounts. Because Wife was the party trying to claim an equitable interest in the asset, she bore the burden of proving the accounts were marital in nature. We find Wife did not meet this burden because the only evidence she provided to prove the accounts were marital in nature was testimony of conversations between the parties discussing their retirement plans. Wife claims she understood these conversations to mean Husband was contributing to the accounts throughout the marriage in preparation for their retirement.

We find the record does not support Wife's contentions that the three Stifel Accounts were marital in nature; therefore, she did not satisfy her burden of proof. Because the retirement accounts were nonmarital in nature, the family court erred when it awarded Wife $40,000 from such accounts. Husband is entitled to the $40,000 allocated from the accounts due to their nonmarital nature and his sole ownership of each account. Accordingly, we reverse.

II. Valuation Dates of Assets and Debt

Husband argues the family court erred in valuing: (1) the mortgage debt on the date of the trial; (2) the marital investment account on the date of filing; and (3) the IHG credit card on the date of trial. We disagree.

"A 'marital debt' is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable." *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005). "Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution." *Id.* By statute, the general rule is that marital property subject to equitable distribution is presumptively valued at the date of the divorce filing. § 20-3-630(A). Nevertheless, the parties may be entitled to share in any appreciation or depreciation in marital assets occurring after the commencement of marital litigation but before the final decree. *Moore v. Moore*, 414 S.C. 490, 522, 779 S.E.2d 533, 550 (2015) (citing *Burch v. Burch*, 395 S.C. 318, 325, 717 S.E.2d 757,

761 (2011)). The burden of proof is properly on the party seeking a deviation from the statutory filing date. *Burch*, 395 S.C. at 329, 717 S.E.2d at 763. A spouse seeking to use the value of an appreciated asset on the date of trial must show that the increase in the asset's value is due to passive, or market, forces. *Teeter v. Teeter*, 408 S.C. 485, 499, 759 S.E.2d 144, 151 (Ct. App. 2014). The only activities relevant to the passive/active analysis are those which occur after the date of filing. *Burch*, 395 S.C. at 327-28, 717 S.E.2d at 762. Our courts have long recognized that valuing a marital asset on the date of filing may not necessarily result in a fair outcome if the value of the asset changes during the pendency of the action. *See id.* (acknowledging that it is not unusual for the value of assets to change in the period of time between an action being filed and disposition). In order to fairly value an asset that appreciates or depreciates between the date of filing and the date of trial, courts prior to *Burch* tended to look to the reason for the increase or decrease in the asset's value when determining the appropriate date of valuation. *Id*. at 326, 636 S.E.2d at 762. When an asset increased in value due to the financial or managerial contribution of one of the spouses, courts generally valued the asset on the date of filing. *Id*. An asset that increased in value due to passive forces out of the control of either spouse tended to be valued on the date of trial. *Id*.

A. Mortgage Debt at Date of Trial

Here, the court valued the mortgage debt on the marital home as of the date of trial. Husband was in exclusive possession of the home and made mortgage payments during the pendency of the action.

Husband argues the family court erred in its failure to apply the active appreciation analysis in *Burch*. Husband voluntarily paid the first and second mortgages on the marital home during the pendency of the action without contribution from Wife. The first mortgage balance on the date of filing was $109,160.00, and it was $63,917.00 on the date of trial. Husband was solely responsible for reducing the first mortgage balance by $45,243.00 between the date of filing and the date of trial. The second mortgage was an interest-only payment credit line and the principal balance remained the same throughout the litigation.

In its final order, the court valued the mortgage balance on the date of trial and ordered the parties to equally divide the proceeds generated from the sale of the home. In making this finding, the court reasoned that 1) Husband's payment of the

first mortgage during the pendency of the action maintained the status quo from the marriage; and 2) had Husband not been living in the marital home and paying the mortgages during the parties' separation, he would have incurred housing expenses "for which he would have received no equity."

We find support for the family court's ruling in *Barrow v. Barrow* 394 S.C. 603, 716 S.E.2d 302 (Ct. App. 2011), for the proposition that the active/passive analysis is not the sole criterion for justifying a deviation from the filing date valuation. This court in *Barrow* found that the husband was not entitled to a credit for mortgage payments he made post-separation. *Barrow*, 394 S.C. at 617, 716 S.E.2d at 309. The *Barrow* court considered each party's housing expenses post-separation and concluded the husband was not entitled to special credit. *Id.*

We find the court did not err by using the *Barrow* analysis rather than an active/passive analysis. Throughout the marriage, Wife was a homemaker and family caretaker, and Husband was the breadwinner. The law protects a homemaker's interest in marital property by assigning value to her indirect contribution to the accumulation of the martial estate. *Johnson v. Johnson*, 296 S.C. 289, 298, 372 S.E.2d 107, 112 (Ct. App. 1988). A homemaker's indirect contributions to a marriage in the form of caring for the parties' home and children enables the other spouse to work outside the home and accumulate wealth for the parties' mutual benefit. *Id*. We are not persuaded by Husband's argument that Wife's contribution to the marriage necessarily ends when the homemaker moves out of the marital home and leaves the marriage. Wife spent the entire marriage tending to the children and the home, and this duty continued after she left the marriage because she was still solely responsible for caring for the couple's incapacitated adult daughter, ZZ. Her full-time duties as caretaker prohibited her from making financial contributions to the marital home, but nevertheless constituted a contribution to the marriage. Additionally, after Wife moved out of the marital home, she was required to find new housing. Husband remained in the home and was not burdened by additional housing expenses. The family court acknowledged this in the Decree by stating:

> If the Defendant had not been living in the marital home during the pendency of this action, he would have had to pay rent somewhere else for which he would have received no equity. Therefore, the Court is rejecting the Defendant's request that he receive $45,000 out of the net

> proceeds of the sale of the marital residence. The Court does not believe that the Defendant receiving the same would be fair or equitable.

We find the family court did not err in valuing the mortgage debt of the marital home at the date of trial.

B. Marital Investment Account (#2142) at Date of Filing

We find the family court was justified in using the date of filing value for the marital investment account. The account #2142 was funded from the money Husband was awarded after an accident ten years prior to the hearing. The parties agree the account was marital in nature, and both parties were aware that the accident money went into that account. At the temporary hearing, Husband was ordered to pay $5,000 in temporary attorney's fees to Wife. Husband withdrew $40,000 from the #2142 marital account to make necessary repairs on the marital home before putting it up for sale. Husband further testified that he used $5,000 of the withdrawal to pay the temporary attorney's fees. Husband did not seek permission from Wife before making the withdrawal from the marital account. Therefore, his act of withdrawing from the marital account was in direct violation of the temporary order, which stated: "Each of the parties shall be restrained and enjoined from disposing of, placing liens upon, hiding, injuring, selling, alienating, liquidating, or otherwise decreasing, in value any assets, pending a final hearing on the merits, unless the parties mutually agree otherwise in writing." If the family court valued the account on the date of the hearing, Husband would face no repercussions from his willful violation of the temporary order. We find the family court did not err in using the date of filing value for the Stifel marital investment account #2142.

C. IHG Credit Card at Date of Trial

Husband argues Wife failed to carry her burden of proving that a debt incurred on the IHG credit card after filing but before the Decree was incurred for the joint benefit of both parties. We disagree.

"When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for marital purposes, i.e. for the joint benefit of

both parties during the marriage." *Wooten v. Wooten,* 364 S.C. 532, 547, 615 S.E.2d 98, 105 (2005). "When a debt is incurred after marital litigation begins, the burden of proving the debt is marital rests upon the party who makes such an assertion." *Id*.

In the Decree, the court found the following:

> As to the IHG Credit Card, the Court finds that the current balance on the IHG Credit Card is marital in nature. Although [Husband] testified that this card had a balance of zero at the time of filing, there was ample testimony and evidence at trial that [Wife] continued to utilize this card during the pendency of this case in a similar manner to how the parties had always utilized this card—including for medical bills and gas. There was also evidence and testimony that the parties had agreed during this case that [Wife] could utilize this card for certain charges and expenses during the pendency of this action. Taking all of this evidence and testimony into consideration, the Court finds that the current balance of $6,120.00 is a marital debt . . . . [Husband] shall be solely responsible for paying this debt and he shall hold [Wife] harmless as to the same.

At trial, Wife testified that the parties agreed upon her continued use of the credit card for charges similar to those she used it for during the marriage.[2] During the marriage, Husband would typically pay $500 on this account each month. For a period of time prior to the temporary hearing, but after the filing of the action, Husband continued to pay $500 per month. The payments eventually dwindled until Husband stopped making payments altogether. Wife testified she utilized the credit card in the same manner she did during the marriage. We believe Wife met her burden of showing the debt incurred was for the joint benefit of both parties, and it is therefore marital in nature. We find the family court did not err when it valued the IHG credit card debt on the date of trial.

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[2] Such charges included medical appointments for ZZ, trips to visit the other children, gas, and food.

III. Wife's Vehicle and Jewelry Values

Husband argues the family court erred when valuing Wife's vehicle and jewelry because the values assigned are not supported by the greater weight of the evidence. We disagree.

"The family court has broad discretion in valuing the marital property. A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." *Lewis*, 392 S.C. at 393, 709 S.E.2d at 656 (quoting *Pirri v. Pirri*, 369 S.C. 258, 264, 631 S.E.2d 279, 283 (Ct. App. 2006)).

At trial, Husband valued Wife's 2003 Toyota Land Cruiser at $6,800. Wife valued the vehicle at $3,000 and testified that she came up with this figure by subtracting the estimated repairs from the Kelley Blue Book value. Wife also obtained an estimate for the vehicle from Creel Tire Company. Wife knew of and testified to several issues with the vehicle that would decrease its value on the market. Husband offered no evidence to back up his claim that the vehicle was worth $6,800, and he even conceded at trial that Wife would be in a better position to know about the extensive maintenance issues plaguing the vehicle.

Similarly, Wife testified to and provided receipts at trial pertaining to the valuation of her jewelry. Wife testified that there were only two pieces of jewelry in the marital estate that were of any consequence. She believed these pieces were worth $1,000. One piece was an estate piece given to her by Husband for their first Christmas. The second piece was from Husband's jewelry inheritance from his father, which he allowed Wife to choose because she helped work on the jewelry. She had created an itemized list of values, so she was in a position to know the value of the item she selected. Husband testified there were more than two pieces at issue and he valued the jewelry at $20,000. At trial, Husband provided one "partial receipt" for the jewelry for $4,734. He claimed this partial receipt was half of what he paid for the 1999 necklace, but he provided no other evidence of additional payments. The court valued Wife's jewelry at $4,500 and allocated this asset to her. The court came to this amount because it was a number between the two values testified to by the parties, and the court considered the age of the jewelry. Accordingly, we find no error in the family court's assignment of value to Wife's vehicle or jewelry.

IV. Alimony Award

Husband argues the amount of alimony awarded to Wife exceeds what is reasonably supported by the evidence. He argues the family court erred in its assessment of several of the statutory factors when it ordered Husband to pay Wife alimony of $2,700 per month. Husband further claims the court erred specifically when it found that: (1) an $80,000 annual income should be imputed to Husband; (2) Husband *has the ability* to pay alimony of $2,700 per month; (3) Wife *needs* alimony of $2,700 per month; and (4) the parties lived an upper middle-class lifestyle. We disagree.

A. Imputed annual income of $80,000

Husband argues the family court erred in imputing an annual income of $80,000 to him because the evidence does not support such imputation. We disagree.

There are generally two circumstances where a family court is justified in imputing income to a spouse for purposes of awarding alimony. First, when a spouse intentionally underreports earnings, typically from non-traditional or self-employment sources, the family court may impute income from unreported sources or in amounts commensurate with the benefits the spouse receives from the source. *See Stoney v. Stoney*, 425 S.C. 47, 70-71, 819 S.E.2d 201, 214 (Ct. App. 2018) (holding that the court must take into account money paid by the husband's company to him or on his behalf for his travel, his child's private school, his life insurance premiums, his residential and farm mortgage payments, and money the company paid employees to perform work for the husband outside of their company duties); *Grumbos v. Grumbos*, 393 S.C. 33, 43, 710 S.E.2d 76, 82 (Ct. App. 2011) (holding that in the absence of credible information about a spouse's income, the court is justified in imputing an amount of income equivalent to the household expenses the spouse historically paid). Second, when a spouse has the ability to earn more income than he is actually earning, the court may impute income at a level appropriate for the person's work history, occupational qualifications, job opportunities, and earning levels in the community. *Sanderson v. Sanderson*, 391 S.C. 249, 255-56, 705 S.E.2d 65, 68 (Ct. App. 2010).

Here, the family court imputed an income of $80,000 to Husband based upon Husband's personal banking accounts, personal expenses he paid with business funds, and Social Security and Medicare earnings. The court found Husband's

average annual income "in the several years prior to 2018 was over $86,000.00." However, upon reconsideration, the family court imputed "minimum income" to Husband of $80,000.00 per year.

The record reflects Husband is the sole owner of his chiropractic business; thus, he sets his own salary. In the year before separation, Husband reported earnings of $95,350. The year of the separation, he reported $70,300, and the year following he reported earnings of $57,000. Husband attributes his decline in income to his age and his inability to work as hard as he did in the past. Despite his claimed inability to work as hard, Husband testified that he still works full time and his patient list has not been cut. Further, Husband claimed the COVID-19 pandemic negatively impacted the gross receipts to the business in the months leading up to the trial; however, in April 2020, the business deposited $103,918.34 into its account. At trial, Husband denied any knowledge of federal COVID assistance for his business. However, in his final brief, Husband reports his business received more than $17,000 in April 2020 for stimulus and Small Business Administration assistance. At trial, Husband filed Financial Declarations indicating that he earned gross annual income of $61,892.04 and he testified that he earns gross income of approximately $5,000 per month.

Based on our own view of the evidence, we find the family court was justified in imputing income to Husband because of the dramatic fluctuations in his reported income over the years. We find the evidence presented at trial supports an imputed income of $80,000 to Husband.

B. $2,700 monthly in alimony →Ability of Husband/Necessity of Wife

Husband argues the family court erred when it found both that Husband *had the ability* to pay $2,700 per month in alimony and that Wife *needed* $2,700 per month in alimony. We disagree.

"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 practical, in the same position as enjoyed during the marriage." *Craig v. Craig*, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

Section 20-3-130(C) of the South Carolina Code (2014) provides the factors for the family court to consider in making an award of alimony and instructs the family court to "give weight in such proportion as it finds appropriate" to each of the following factors:

> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce . . . ; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse . . . ; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce . . . ; (9) custody of the children . . . ; (10) marital misconduct or fault of either or both parties . . . ; (11) the tax consequences to each party as a result of the particular form of support awarded; (12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and (13) such other factors the court considers relevant.

In considering an alimony award, "[n]o one factor is dispositive." *See Pirri v. Pirri*, 369 S.C. 258, 267, 631 S.E.2d 279, 284 (Ct. App. 2006) (quoting *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 425 (Ct. App. 2001)).

Here, the court considered each factor when determining a fair alimony award for Wife. Husband and Wife were married at forty-four and forty-six years of age respectively, and they were married for a total of nineteen years. Despite Husband's accident, both parties remain in fair physical and emotional health, and Husband provided no evidence that he is contemplating retirement. Husband also testified that he planned to return to his lecturing job, which would supplement his income. Wife has a B.S. in psychology while Husband has a doctorate degree in chiropractic medicine and an additional degree and certification in acupuncture medicine. Throughout the marriage, Husband was the breadwinner while Wife

took care of the home and children. Wife has not worked for more than twenty years. Wife's only source of income at the time of the Decree was her social security check of $874.60 per month, plus the $670 SSI payment that she receives as sole guardian and on behalf of ZZ. After our own review of the evidence, we find the factors weigh heavily in favor of Wife, and we do not find the alimony award amount to be excessive. We find the evidence presented at trial sufficiently proves Wife's need and Husband's ability to pay. Accordingly, we find the family court did not err when it assigned Wife's alimony award.

C. Parties' standard of living

Husband also argues the court erred when it deemed the couple's standard of living as upper-middle class, as suggested by Wife. We disagree.

We find the court did not err when it endorsed Wife's description of the standard of living the couple enjoyed throughout their marriage. The objective factors in the record prove the couples' standard of living would fall into this category, therefore we affirm the family court's decision. The parties lived in a home with a pool valued between $500,000 and $550,000 according to Husband. Further, the couple took family vacations to places such as Lake Geneva, Wisconsin, Tennessee, and "the islands." In evaluating the factors related to equitable distribution, alimony, and objective evidence in the record, we affirm the family court's decision.

V. Fees Awarded to Wife

Husband argues the family court erred when it awarded attorney's fees to Wife. We disagree.

"Section 20-3-130(H) of the South Carolina Code (2014) authorizes the family court to order payment of litigation expenses such as attorney's fees, expert fees, and investigation fees to either party in a divorce action." *Thornton v. Thornton*, 428 S.C. 460, 477, 836 S.E.2d 351, 360 (Ct. App. 2019). There are four factors a family court should consider in determining whether attorney's fees should be awarded to a party: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) [the] effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining a reasonable attorney's fee, there are six factors a family court should

consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). "In awarding attorney's fees, the family court must make specific findings of fact on the record for each of the required factors." *Thornton*, 428 S.C. at 477, 836 S.E.2d at 360.

Here, the court considered both the *E.D.M.* and *Glasscock* factors when it determined Husband was required to pay Wife's attorney's fees. The record makes clear that Wife's ability to pay her own fees is severely hampered because she has been out of the workforce for more than twenty years, and she is responsible as sole caretaker of ZZ. Husband, on the other hand, has a significant income and thus the ability to afford attorney's fees. The second *E.D.M.* factor considers the beneficial results obtained. Here, Wife's attorney was successful in obtaining permanent periodic alimony from Husband. Much of the trial preparation was dedicated to Wife's demand for alimony and Husband's steadfast position against the alimony award. Additionally, Wife's attorney was successful in getting a 50-50 split of the marital assets. Husband's attorney was successful in convincing the court that the vast majority of his Stifel accounts were nonmarital in nature. The third *E.D.M.* factor is the parties' respective financial conditions. We have previously addressed this issue and established that Husband is substantially more financially stable than Wife. The final *E.D.M.* factor is the effect of the attorney's fees on each party's standard of living. Again, should Wife be responsible to pay her attorney's fees, she would certainly face financial strain, while Husband is in a better position to afford the fees.

After our own review, we agree with the family court's order that Wife has met her burden of proof by a preponderance of the evidence that she is entitled to a contribution toward her attorney's fees and costs from Husband.

AFFIRMED IN PART, REVERSED IN PART.

MCDONALD and VERDIN, JJ., concur.