The Supreme Court of South Carolina

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N O T I C E

In the Matter of Scott Christen Allmon

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

The Committee on Character and Fitness has now scheduled a hearing in this regard on June 30, 2016, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

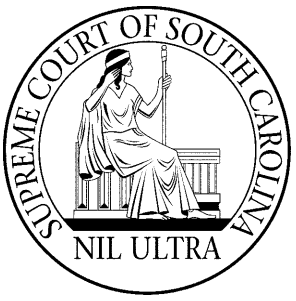
Any individual may appear before the Committee in support of, or in opposition to, the petition.

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

Columbia, South Carolina

May 31, 2016

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 8, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Francis P. Maybank and Jane H.P. Maybank, as trustee for the Francis P. Maybank Family Insurance Trust, Plaintiffs,

Of whom Francis P. Maybank is the Respondent/Appellant,

v.

BB&T Corporation, Branch Banking and Trust Company, Successor in merger to Branch Banking and Trust Company of SC, and Sterling Capital Management, LLC, Successor in merger to BB&T Asset Management, LLC, Appellants/Respondents.

Appellate Case No. 2014-002638

Appeal from Greenville County
The Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 27640
Heard November 3, 2015 – Filed June 3, 2016

AFFIRMED IN PART AND REVERSED IN PART

C. Mitchell Brown, D. Larry Kristinik, Brian P. Crotty, Michael J. Anzelmo, all of Columbia, and William S. Brown, of Greenville, all of Nelson Mullins Riley and Scarborough, LLP, for Appellants/Respondents.

Mitchell Willoughby, John M.S. Hoefer, Tracey C. Green, Chad N. Johnston, all of Willoughby and Hoefer, P.A., of Columbia, and Bruce W. Bannister, of Bannister,

Wyatt and Stalvey, LLC, of Greenville, for Respondent/Appellant.

ACTING CHIEF JUSTICE HEARN: This appeal arises from a total verdict of $17,199,306 rendered in favor of Francis P. Maybank for claims sounding in contract, tort, and the South Carolina Unfair Trade Practices Act (UTPA). Maybank brought this action alleging he received faulty investment advice from Branch Banking and Trust (BB&T) Company (the Bank) through BB&T Wealth Management (Wealth Management) and BB&T Asset Management (Asset Management), all operating under the corporate umbrella of BB&T Corporation (collectively, Appellants). Appellants appeal on numerous grounds, and Maybank appeals the trial court's denial of prejudgment interest. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

I. BACKGROUND

Because of the numerous BB&T entities involved and their intertwined relationships, we begin by briefly highlighting the role of each Appellant. The Bank is a subsidiary of BB&T Corporation and is its largest asset—comprising ninety-eight percent of the corporation's holdings. The Bank offers traditional banking services along with insurance, trust, and wealth management services. Wealth Management oversees financial portfolios, keeping abreast of clients' financial situations, needs, and risks. Asset Management, an independent corporate entity, through investment advisors or brokers, makes recommendations about investment strategies and products as well as assists clients in entering investments with third parties.

In 1999, the Bank offered well-established commercial middle-market lending, investment counseling, insurance, and trust services. As part of an effort to offer increasingly sophisticated and diversified financial products, it acquired Scott & Stringfellow brokerage firm, which specialized in corporate finance, equity underwriting and distribution, and advisory services.

The Bank continued to follow an expansion strategy, and in 2001, it became interested in acquiring Southeastern Trust Company (Southeastern), an independent investment firm with offices in Greenville, Columbia, Charleston, and Anderson, which had been founded by Maybank. Southeastern served as the

trustee or personal representative for clients' wills and trusts in addition to acting as investment manager and advisor to individuals, companies, and profit-sharing trusts.

Raised in South Carolina, Maybank graduated from Harvard University and moved to New York City in 1957 to work for Fiduciary Trust Company. He later operated his own trust firm on Wall Street for many years, returning to South Carolina in 1989 to found Southeastern. In November 2001, Maybank sold his interest in Southeastern to the Bank, receiving 246,000 shares of BB&T Corporation stock in exchange. As a result of the acquisition, all of Southeastern's employees began working for the Bank, including Maybank, who became a senior vice president in the Trust Department with a five-year employment contract and an annual salary of $100,000. His duties included promoting the Bank's services to Southeastern's existing customers and overseeing client transition to the Bank. This was a shift from his previous work experience as a trust officer. In order to avoid substantial capital gains taxes due to the high value of the BB&T Corporation stock, Maybank placed his newly acquired stock in his brokerage account with Scott & Stringfellow. This allowed him to defer the tax liability and to enjoy annual dividends of approximately $400,000.

In 2004, the Bank created Wealth Management, which included the Trust Department in which Maybank worked. The former Southeastern clients who transferred to the Bank's Trust Department became Wealth Management clients. Around the same time, the Bank, through Asset Management, began to market "alternative investment strategies" to clients with substantial net worth and highly concentrated stock positions.

In order to effectuate these alternative investment strategies, clients executed a wealth management agreement (WMA), establishing a contractual relationship between the Bank and Asset Management. Under the WMA, the Bank served as the advisor for the designated assets and thereby had the ability to advise and provide professional guidance on available BB&T products. Wealth Management portfolio advisors served as liaisons between clients and Asset Management. Specifically, Wealth Management oversaw the portfolio account, serving as its custodian. By signing the WMA, a client hired Asset Management to handle the discretionary account and serve as the account's investment advisor. Under its terms, the Bank had total discretion to invest in securities from the Wealth Management portfolio.[1]

[1] Although Wealth Management portfolio advisors were neither trained nor

One of the new strategies touted by the Bank and Asset Management included a variable prepaid forward contract (Prepaid) that was directed at customers with concentrated stock positions. A Prepaid is an investment contract by which a stock is sold to an investment bank for an upfront payment of approximately seventy-five to ninety percent of its value. Significantly, title to the stock is not transferred for two to three years, thereby deferring capital gains taxes and allowing the customer to receive dividends and the benefit of appreciation. A Prepaid provides four meaningful benefits for its holder: (1) protection against a collapse of the stock, (2) immediate liquidity, (3) an opportunity to partially participate in future gains, and (4) an opportunity to receive dividends.[2]

In mid-2006, Maybank attended a meeting between a long-time client of his and representatives from Wealth Management and Asset Management. The purpose of the meeting was to discuss the client's concentrated position in a particular stock and the advisability of Prepaids. Kristopher Kapoor attended the meeting as a portfolio manager for Asset Management to address proceeds in the event the client decided to purchase a Prepaid. Anthony Mahfood, a Wealth Management advisor, was also present. Although Maybank had previous knowledge about Prepaids through written presentations circulated within BB&T, it was this meeting that piqued Maybank's personal interest in this alternative investment product.

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licensed to make any trades or investments, they were experienced in BB&T's platform investment strategies and products. According to David Fisher, head of Wealth Management, a portfolio manager's job was to be an "issue spotter" so as to identify opportunities and inform clients of potential BB&T products that could best serve clients' needs. In Fisher's words, portfolio managers possessed a general knowledge that was "a mile wide and an inch deep." Asset Management's role was to connect the client to a given product. Essentially, Asset Management served as an investment advisor, for which it received compensation, but it neither made the trade nor sold a security. Asset Management served as a middle-man between the client and groups like Scott & Stringfellow, which executed the security transaction.

[2] In addition to fees connected with a Prepaid and any subsequent rollovers, it is undisputed a Prepaid is a risky strategy and a hedge. It has no diversification and may not effectively minimize a client's risk—primarily because future dividends could be reduced or eliminated by the company.

In light of his concentrated position in BB&T Corporation stock, Maybank spoke with Kapoor following the meeting about his interest in entering into a Prepaid, along with his investment objectives and risk tolerance.[3] As of 2006, the 246,000 shares of BB&T stock he had received in 2001 remained in his brokerage account with Scott & Stringfellow. At Kapoor's recommendation, Maybank communicated with Mahfood, who then asked Shawn Gibson, a member of Asset Management's alternative investment team, to prepare illustrations of the anticipated Prepaid's terms.

In July 2006, Maybank was given a Concentrated Stock Risk Management Addendum (Addendum), which outlined a general description of the strategies of various single-stock products, including a Prepaid. Also included within the Addendum was the fee schedule to use the services of "BB&T professionals," which explained a "one-time-upfront advisory fee from your Account, based upon the principal value of the investments." The Addendum stated it was an addition to the WMA between the Bank, the advisor, and Maybank, even though Maybank had not yet executed a WMA with the Bank and Asset Management.

On August 11, 2006, Wealth Management presented Maybank with a letter (Approval Letter), which approved Maybank entering into a Prepaid with BB&T.[4] The Approval Letter was written by Mahfood to Patricia Oliver, the Executive Vice President, Secretary, and General Counsel for BB&T Corporation, but signed by both Mahfood and Oliver. Express authorization by BB&T Corporation was necessary because the BB&T Code of Ethics prohibited BB&T employees from using BB&T Corporation stock in any transaction deemed to be speculative, including Prepaids. The letter stated "a [Prepaid] may allow Mr. Maybank to reduce the risk of his concentrated position in BB&T, while raising cash to create a diversified portfolio." It further stated "implementation of this [Prepaid] will protect Mr. Maybank from an extraordinary reduction in the overall value of his investment portfolio and resulting net worth. It will also help him achieve important diversification goals we have discussed throughout the financial planning process." Oliver signed the Approval Letter as Executive Vice President, Secretary, and General Counsel for BB&T Corporation. A handwritten note under

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[3] Maybank had significant life expenses at this time, including paying for graduate school and private school for his children and grandchildren, as well as expenses connected with owning two farms, a home in Charleston, and a horse-raising business.

[4] Although the Approval Letter uses Maybank's name throughout, as discussed *infra*, it is actually a form letter.

Oliver's signature stated: "This approval by General Counsel is conditioned on Mr. Maybank not purchasing additional shares of BB&T Corporation under proceeds from the [Prepaid]."

After being presented with the Approval Letter, Maybank executed a Prepaid with Bear Stearns—a three-year contract in which Maybank pledged 220,000 shares of BB&T Corporation stock with a value of $9,318,364 in exchange for upfront proceeds of $7,120,000. The Bank charged Maybank $32,614 for the advice and recommendation to enter into the first Prepaid. Of the $7,120,000 in upfront proceeds derived from the Prepaid, $2,470,000 was applied by BB&T to Maybank's margin debts from Southeastern. The remaining $4,650,000 was placed into a Wealth Management portfolio account, notwithstanding the fact that at this point in time the account was still not subject to any WMA.

Subsequently, on August 23, 2006, Maybank entered into a WMA with the Bank and Asset Management. The WMA served as the umbrella for the various services BB&T was offering to Maybank through Wealth Management and Asset Management. The WMA established the Bank would (1) gather information about the client's investment objectives, risk, financial situation, and needs; (2) make a recommendation to the client; and (3) coordinate and supervise the account. The WMA stated the Bank will do what is in the "best interest" of the client. Further, the WMA also governed the portfolio account with the $4,650,000 in proceeds from the Prepaid after Maybank's margin debt had been paid.

By the end of 2008, the value of BB&T Corporation stock had dropped precipitously as a result of the national financial crisis. Due to his concentrated stock position, Maybank suffered a considerable loss. Accordingly, Maybank was concerned about his income stream, which had been supplied by the rather substantial dividends paid by BB&T Corporation stock and tied to the Prepaid. This concern was further fueled by the fact that the initial Prepaid would expire in August 2009. Maybank therefore discussed the expiration of the first Prepaid with Mahfood and Gibson, primarily focusing on whether he should roll the first Prepaid into a second one.

In January 2009, Appellants assisted Maybank in the execution of a second Prepaid with Deutsche Bank, a global investment bank and securities trading and brokerage firm. When the transaction was completed, Maybank discovered he had incurred costs and fees of nearly $1,300,000 from the roll-over. Thereafter, during the second quarter of 2009, BB&T Corporation decreased its dividend

significantly. As a result, Maybank received an annual dividend of $230,000, in contrast to the approximately $400,000 annual dividend he had been receiving previously.

In August 2010, Maybank requested a meeting with personnel of the Bank to discuss the significant losses he sustained, which he believed were the result of mismanagement and a failed investment strategy. He met with Fisher, the head of Wealth Management, and Ross Walters of the Greenville division. At that time, he believed he had been damaged by Appellants' mismanagement in the amount of $3,500,000. Dissatisfied with Appellants' response, Maybank decided to pursue legal action.

II. LITIGATION

In December 2011, Maybank filed this lawsuit against Appellants, alleging numerous causes of action arising from Appellants' financial investment advice, including breach of fiduciary duty, breach of contract, negligence, breach of contract accompanied by a fraudulent act, constructive fraud, violations of the South Carolina Uniform Securities Act of 2005 (Securities Act), and violations of the UTPA. Maybank asserted that in preparation for his retirement, he engaged Appellants to develop an investment plan that reflected his goals of diversification, steady income, tax sheltering, and the ability to protect his wealth for his grandchildren through the Francis P. Maybank Family Life Insurance Trust (the Trust), established in 1993. He contended Appellants' investment plans were aggressive, risky, and involved a complex system of derivative trading with BB&T Corporation stock—which he characterized as an uncommon investment approach for someone seeking financial advice for retirement. Maybank alleged he lost substantial sums of money because of this faulty investment advice.

Following the removal of this action to federal district court by Appellants and the subsequent remand, the parties jointly moved for the case to be assigned to the Greenville Business Court (then) Pilot Program. Maybank filed an amended complaint, which added the Trust as a plaintiff.[5]

In November 2012, Maybank received a letter from Wealth Management stating he was being refunded for the one-time advisory fee that was charged in connection with the services Asset Management had provided for the Prepaids.

[5] The jury did not return a verdict on any claims for the Trust, and the Trust did not appeal.

The letter (Refund Letter) stated, "Recently, as part of a review of client accounts we discovered that a fee was charged to your account that we wish to refund to you. While we are not required to rebate these fees, we choose to do so as a reflection of our corporate values." It also explained, "This fee would not have been charged under our current billing practices." Maybank was returned fees in the total amount of $79,682.19.[6]

The Refund Letter did not disclose that the refund of fees was actually motivated by an inquiry by the Securities and Exchange Commission (the SEC) into Asset Management's fee practices. At the time of the refund, the SEC expressed concerns over the upfront charges and associated fees for selling alternative investments. This investigation was qualified both as "out of the bounds" of the SEC and in a "gray area" of regulation. According to Fisher, the investigation was prompted because the fees charged were "broker-esque." Maybank's refund was part of approximately $1,000,000 in fees refunded by Wealth Management.

Essentially, Maybank's theory of the case was that Appellants' recommendation of alternative investment strategies and products like Prepaids, which generated fees and profit for the Bank and BB&T Corporation, caused grave financial damage to clients like Maybank. He contended he relied on Appellants to advise him in their capacity as fiduciaries. Maybank alleged Appellants willfully and wantonly deceived him. He specifically claimed he relied on two key documents in trusting Appellants: the Approval Letter and the WMA.

Conversely, Appellants characterized the case as one involving a sophisticated businessman with fifty years in the investment advisory industry who fully appreciated the risks involved in his investments. They claimed it was Maybank who ultimately decided a Prepaid was an ideal solution to his retirement needs. Appellants pointed to the fact that Maybank went on to unwind and roll over his Prepaid three more times himself—without any involvement by BB&T. Moreover, according to Appellants, Maybank received $1,500,000 in dividends during the six years the Prepaids were in effect, monies he would never have received had he sold his BB&T Corporation stock in 2006.

[6] Because Maybank had two Prepaids, he was returned two separate fees.

III. EVIDENCE PRESENTED

At trial, Maybank testified that based on his employment with the Bank, he believed Appellants were responsible and knowledgeable on both financial matters and fiduciary interests, and consequently, he sought their advice and services. He testified he expressly told Appellants about his financial concerns and he wanted to secure his assets. Maybank contended Appellants represented they had special expertise in alternative investment strategies, and they recommended he enter into a Prepaid as a way to avoid risk, protect his dividends from his BB&T Corporation stock, address his debt issues, defer his tax liability, and generate cash proceeds. Maybank testified he had no prior experience with or real knowledge of Prepaids. He further testified he relied on the advice of Appellants as his fiduciaries because his prior experience had been in the limited capacity of managing trusts and investments like stocks and bonds, not in the areas of options or other derivative products.

Maybank also presented the video deposition testimony of Walters, head of Greenville's Wealth Management division, who stated that while he held a Series 7 broker license and Series 24 broker license, and although he had general knowledge as an investment broker, he did not have the training or expertise to provide advice or make recommendations about any particular investment strategy. Walters further agreed he did not know how to advise a client with a concentrated stock position. Moreover, he admitted he did not have the knowledge or experience to inform a client how to assemble a well-managed and balanced portfolio.

Maybank introduced the Approval Letter to demonstrate the selling points used by BB&T for the strategies and representations made to him. Maybank testified he relied on the Approval Letter in deciding to enter into the first Prepaid in 2006. He further stated he believed Appellants had thoroughly researched the financial products and determined a Prepaid was best for his specific situation, as outlined in the Approval Letter. Maybank testified that based on the language of the Approval Letter, he assumed it was specifically tailored to him and his needs; however, he later learned it was merely a form letter. Maybank submitted into evidence the form letter that was used for all customers in Maybank's situation, which stated analysis and review had been done for the customer whose name was then filled into a blank.

Maybank also submitted the WMA as evidence of the expansion of the Bank's fiduciary role with Maybank through Wealth Management and Asset Management. Maybank put forth evidence Wealth Management never intended to fulfill—and could not fulfill—the duties and obligations outlined in the WMA. For example, Walters's deposition testimony revealed that Wealth Management did not gather the information required under the WMA. Further, he testified Wealth Management did not advise; rather, that service was provided by Asset Management based on the Bank's policies and procedures. Walters also testified he believed someone within the Bank or Asset Management would have addressed the duties and obligations outlined in the WMA.

Maybank also established, through the deposition testimony of Walters, that the Bank knew at the time Maybank entered into the WMA that the contract contained errors, misstatements, and deliberate misrepresentations. Walters testified he knew wealth advisors were using the inaccurate WMA, but he did not review the WMA signed by Maybank and therefore did not question it. Walters testified because Maybank was a wealth advisor, he would have known Asset Management handled that portion of the advising and the transaction. He stated it was Maybank's job to know such information and if he did not, he was "incompetent." Walters testified he believed the contract was fulfilled in principle. He claimed the errors in the WMA were the result of an "oversight on our attorneys' part."

Maybank entered the Refund Letter into evidence to further his theory Appellants engaged in unfair and deceptive business practices. Appellants' representatives testified repeatedly the Refund Letter was indicative of their corporate values, and it chose to refund the fees because they were inconsistent with the 2012 billing practices.

Three expert witnesses also testified for Maybank: Professor John Freeman, Dr. Craig McCann, and Dr. Oliver Wood. Their testimony covered the topics of fiduciary relationships, securities, and damages.

In their defense, Appellants painted a markedly different picture. They concentrated on Maybank's professional experience, the fact he was informed and aware of the contracts he was entering, and their theory that Prepaids were the only option for Maybank based on his financial circumstances. Appellants also focused extensively on the role Wealth Management and Asset Management employees played in the execution of the services rendered.

Testimony by the Bank's employees suggested Maybank was not open to advice and was set in his ways. For example, Kapoor explained that during his meeting to discuss Maybank's goals and overall financial situation, he realized Maybank was a "100 percent equity guy" who preferred stocks. Kapoor acknowledged that a more diversified portfolio would have been a better option for Maybank, and they discussed the importance of diversification multiple times. A personal trust specialist for Wealth Management and a former employee of Southeastern testified that Maybank's financial philosophy over the years was "all equities." Gibson testified he generally remembered Maybank being involved in conversations about how to guide the transaction and how it would be structured. He also stated Maybank never indicated he was giving complete discretion to Appellants to determine how best to handle his concentrated stock position.

Appellants additionally put forth evidence and testimony Maybank was fully informed about the contracts he entered. They submitted into evidence extensive documentation provided to Maybank in his capacity as a client and in his role as a wealth management advisor. For example, Appellants entered into evidence sales presentations and materials on alternative investments and Prepaids given to Wealth Management and Asset Management employees. This evidence was used by Appellants to support their argument of Maybank's knowledge, but on cross-examination, Maybank's counsel used the evidence to support Maybank's contention the advisors possessed inadequate information on Prepaids. The jury also heard from multiple employees who testified they were not allowed to provide investment advice. Additionally, Appellants presented testimony that Gibson insisted Maybank seek advice from a tax lawyer before entering into the first Prepaid, and that Maybank proceeded to unwind and roll over his Prepaid three additional times without any assistance from BB&T.

To refute Maybank's reliance on the Approval Letter, Mahfood testified he believed the letter was a necessary part of the paperwork required to execute the recommended strategy because Maybank was an employee of the Bank and held concentrated stock in BB&T Corporation. Mahfood acknowledged he did not conduct any analysis to confirm any of the promises or representations made in the letter even though he signed it. This was supported by Kapoor's testimony that wealth advisors were not authorized to make any recommendations to Maybank. Mahfood explained he would have spoken up if something appeared "out of whack." Subsequently, Mahfood testified he did not analyze or formally review Maybank's file. Similarly, Walters explained at trial he could not provide investment advice.

In addressing the obligations of the WMA, Walters testified at trial that the Bank had the responsibility of gathering information about a client's investment objective and risk tolerance, making a recommendation to the client regarding an investment program, and supervising the services of the investment advisor. He stated that each obligation of the WMA was fulfilled by either the Bank or Kapoor of Asset Management. On cross-examination, however, Walters conceded the WMA stated "the [B]ank shall" perform the three responsibilities outlined in the WMA, not Asset Management. Further, he agreed the responsibilities were not completed by the Bank nor could they be completed by the Bank.

Appellants suggested Maybank's only viable option was to enter into a Prepaid because he was living beyond his means. They emphasized that rather than cutting expenses, Maybank chose to borrow on the margin. By July 2006, Maybank had a margin debt of $2,700,000 secured by his BB&T Corporation stock, which was invested at Scott & Stringfellow.[7] Because Gibson admitted he did not have an independent recollection of his discussion with Maybank, he testified he assumed he would have believed a Prepaid was a good strategy for Maybank.

Appellants' financial expert, Robert Thorne, testified that as of July 2006, Maybank would have been in a "predicament" if he sold his stock because it was trading extremely low and he would have faced significant capital gains taxes. Thorne further stated that if Maybank sold the stock, he would lose the dividend, which was providing an annual income of $400,000. Therefore, it was Thorne's opinion that taking a "hedge" on a Prepaid was Maybank's best option.

Because of the securities violation claim, Appellants devoted considerable effort in discovery and at trial to establish their employees did not advise Maybank or sell securities. Paul Merolla, an employee of Asset Management, testified that Asset Management and its employees did not buy and sell securities for its clients or for its own accounts. He further testified Asset Management was "simply advising Maybank as to managing his asset pool." The actual sale was done by a myriad of separate companies. In Maybank's particular circumstance, the Prepaids were contracted with Bear Stearns and Deutsche Bank. Thus, to avoid liability on the securities claim, Appellants were adamant that no BB&T entity sold securities.

[7] Evidence was introduced that this debt was related to outstanding business debt from Southeastern.

Appellants moved for a directed verdict at the close of Maybank's case and again at the close of all evidence. Notably, Appellants argued, in an effort to defeat the securities claim, that: "[Maybank and the Trust] have not presented any evidence that BB&T Corporation offered or sold any securities. They have also not presented any evidence that any securities were offered or sold to the Trust by any [Appellants]." Conversely, to defeat the UTPA claim, Appellants' counsel argued that because a Prepaid was a security, the securities exemption in the UTPA controlled. Maybank and the Trust voluntarily dismissed the claims for negligence and fraud. The trial court denied Appellants' motions.

IV. VERDICT

The jury returned a verdict in favor of Maybank and against all Appellants on five claims: (1) breach of contract, (2) breach of fiduciary duty, (3) violation of the UTPA, (4) constructive fraud, and (5) negligent misrepresentation.[8] The jury returned a verdict in favor of Appellants on all other claims, including the securities claim. The jury awarded Maybank $3,100,000 in actual damages and $5,000,000 in punitive damages against all Appellants.

Appellants then moved for judgment notwithstanding the verdict (JNOV) on forty grounds and for a new trial absolute or, in the alternative, for a new trial *nisi remittitur*. Appellants also filed a motion to compel an election of remedies. Maybank filed motions for attorneys' fees and costs and to treble damages under the UTPA. Appellants opposed the motions and filed three motions directed to Maybank's requests for additional UTPA remedies.

The trial court denied all of Appellants' motions. The trial court found the jury's punitive damages award of $5,000,000 was appropriate. Further, the trial court found the evidence supported the jury's conclusion a violation of the UTPA had occurred. The trial court found Appellants' conduct to be both willful and knowing and therefore granted Maybank's motion to treble the award of actual damages from $3,100,000 to $9,300,000. Further, the trial court granted Maybank's motion for attorneys' fees and costs under the lodestar analysis,[9]

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[8] Significantly, the trial court used the verdict form created by Appellants with minimal modifications.

[9] The lodestar analysis "is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." *S.C. Dep't of Transp. v. Revels*, 411 S.C. 1,

reducing the request by twenty percent and awarding attorneys' fees of $2,654,295 and costs of $245,011. Appellants' motion for an election of remedies was denied because the trial court found the evidence supporting the UTPA verdict was distinct from the conduct supporting the common law causes of action for which punitive damages were awarded. Thus, the trial court entered a judgment for $17,199,306 against all Appellants. Finally, the trial court denied Maybank's motion for prejudgment interest.

Appellants filed a motion to alter or amend judgment, which the trial court denied, and Appellants and Maybank appealed. This Court certified the appeal pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED[10]

I. Whether the trial court erred in finding personal jurisdiction over BB&T Corporation.

II. Whether the trial court erred in denying Appellants' motion for a new trial based upon Freeman's lack of qualification to testify as to the Prepaids.

III. Whether the trial court erred in denying Appellants' motions for JNOV as to the UTPA, breach of fiduciary duty, breach of contract, negligent misrepresentation and constructive fraud, speculative damages, the statute of limitations, and punitive damages.

IV. Whether the trial court erred in trebling the actual damages under the UTPA.

V. Whether the trial court abused its discretion in awarding attorneys' fees and costs to Maybank under the UTPA.

VI. Whether the trial court erred in denying Maybank's motion for prejudgment interest.

5, 766 S.E.2d 700, 702 (2014) (quoting *Layman v. State*, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008)).

[10] Appellants raised ten issues on appeal with numerous subparts which we have condensed to these six issues.

LAW/ANALYSIS

I. PERSONAL JURISDICTION

Appellants argue the trial court lacked personal jurisdiction over BB&T Corporation and therefore the claims against it should be dismissed. Specifically, they contend BB&T Corporation is a North Carolina corporation with no offices, employees, or operations in South Carolina, and at no time did BB&T Corporation provide any services to Maybank or other South Carolina customers. As such, they assert finding personal jurisdiction was improper, as South Carolina courts have no authority to enforce a decision over an out-of-state business with no significant ties to the State. Because we find BB&T Corporation waived its right to contest personal jurisdiction by actively participating in litigation, we decline to reach the merits of Appellants' arguments.

Personal jurisdiction is a court's authority to rule and enforce a decision over the parties of a lawsuit. *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). Personal jurisdiction over a nonresident is resolved upon the facts of each case. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008).

Maybank argued BB&T Corporation waived its right to assert a personal jurisdiction defense because it failed to timely contest personal jurisdiction in a motion to dismiss and actively participated in litigation for more than one year. The trial court agreed, finding BB&T Corporation waived personal jurisdiction in failing to argue their motion until a month before trial. Alternatively, the trial court found there was sufficient evidence to invoke personal jurisdiction over BB&T Corporation.

Rule 12(h)(1), SCRCP, provides a defense is waived if "it is neither made by motion under this rule or included in a responsive pleading or an amendment." No South Carolina case has squarely addressed whether personal jurisdiction is waived if a party continues to participate in litigation after challenging personal jurisdiction in their initial responsive pleading to a court. However, the language of Rule 12(h)(1) is substantially similar to the Federal Rules of Civil Procedure. In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

A number of federal courts have determined "a delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even where the defense was asserted in a timely answer.'" *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60 (2d Cir. 1999) (citation omitted) (internal quotation and alteration marks omitted); *see also Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998) ("Rule 12(h)(1)[, FRCP,] specifies the minimum steps that a party must take in order to preserve a defense."); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296–97 (7th Cir. 1993) (finding waiver of personal jurisdiction defense by defendant's conduct, though acknowledging the waiver specifically provided for by Rule 12(h), FRCP, did not occur); *Yeldell v. Tutt*, 913 F.2d 533, 538 (8th Cir. 1990) (finding Rule 12(h), FRCP, "'sets only the outer limits of waiver; it does not preclude waiver by implication.'" (quoting *Marquest Med. Prods. v. EMDE Corp.*, 496 F. Supp. 1242, 1245 n.1 (D. Col. 1980))).

Considerable pretrial activity occurred in this case. BB&T Corporation timely answered and addressed personal jurisdiction by stating it "reserve[d] its objection based on the Court's lack of in *personam* jurisdiction." Following this reservation, BB&T Corporation did not wait for the trial court to rule whether it could properly exercise personal jurisdiction over BB&T Corporation. Rather, BB&T Corporation, along with the other Appellants, removed the case to federal court. During this time, BB&T Corporation further engaged in the litigation by filing an amended answer to Maybank's amended complaint, filing a corporate disclosure, opposing remand, and opposing a motion for attorneys' fees.

Moreover, following the federal court's remand to state court, BB&T Corporation continued to participate in litigation and discovery, which spanned more than one year, and in fact BB&T Corporation submitted its own responses to discovery requests separate from the other Appellants. After its active participation in the extensive discovery leading up to trial, BB&T Corporation reasserted this defense a mere one month prior to the start of trial.

In our opinion, BB&T Corporation gambled that it could argue personal jurisdiction on the eve of trial after actively participating in litigation over the course of two and a half years. After considering the circumstances of this case, we find BB&T Corporation waived any possible personal jurisdiction defense, and it was well within the trial court's discretion to find BB&T Corporation waived its personal jurisdiction defense.

II. EXPERT QUALIFICATION

Appellants argue the trial court erred in permitting Freeman to testify as an expert witness with respect to Prepaids because he had no prior experience with Prepaids and only possessed a general knowledge of securities. We disagree.

The qualification of a witness as an expert is within the trial court's discretion, and this Court will not reverse that decision absent an abuse of discretion. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25–26, 609 S.E.2d 506, 509 (2005). To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error in the ruling and resulting prejudice. *Id*.

Under Rule 702, SCRE, a witness can be qualified as an expert if the witness has "specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather should make a broad inquiry. *J. Haynes Waters Builders, Inc.*, 376 S.C. at 556, 658 S.E.2d at 86. "The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004).

Maybank offered Freeman as an expert in the field of finance to testify as to the proper conduct for financial advisors, planning professionals, and trustees. Prior to Appellants' objection, Freeman testified he had served as an investment advisor, a securities arbitrator, and a law school professor teaching on securities regulation, corporations, agency, and white collar crime. On direct examination during voir dire, Freeman stated that in preparing to give his opinions about investment products, he had conducted his own research by reading articles on Prepaids, reviewing sales literature, and speaking to Maybank and McCann.

On cross-examination during voir dire, Freeman conceded his actual experience with Prepaids was limited in that he had never advised a client with respect to a Prepaid, nor had he taught any courses, designed a training program to educate investment advisors, written any training materials, or published any

articles or other materials on Prepaids. However, Freeman stated his lack of experience was consistent with his opinion that Prepaids were not viable long-term investments.

Given our deferential standard of review, we find there is evidence to support the trial court's decision to qualify Freeman as an expert witness. Freeman had experience with securities and alternative investments strategies, of which Prepaids are a type. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 448, 699 S.E.2d 169, 176 (2010) (finding an expert unqualified when he admitted he had no knowledge, skill, experience, training, or education specifically related to cruise control systems). Accordingly, we affirm the trial court in qualifying Freeman as an expert.[11]

III. JNOV MOTIONS[12]

When reviewing the trial court's ruling on a motion for a directed verdict or JNOV, this Court applies the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no

[11] Moreover, we find Freeman's testimony did not prejudice Appellants. Appellants extensively cross-examined Freeman on his experience and qualifications. Additionally, Freeman's testimony was cumulative to that of McCann, who testified extensively concerning the unsuitability of Prepaids without objection from Appellants. Therefore, even if we were to hold that Freeman's testimony was admitted in error, reversal would not be warranted. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 41, 691 S.E.2d 135, 145 (2010) (finding that even if the trial court erred in qualifying the expert witness, there was no prejudice because witness's testimony was cumulative to other testimony).

[12] In addition to the challenges discussed in detail below, Appellants argue the trial court erred in failing to grant their motion for JNOV on the claims for breach of fiduciary duty, breach of contract, negligent misrepresentation, constructive fraud, speculative damages, and the statute of limitations. Because we find ample evidence in the record supporting the jury's verdict on each of those claims, we affirm them pursuant to Rule 220, SCACR.

reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (2000).

A. UTPA

Appellants argue the trial court erred in failing to grant JNOV because Prepaids are exempt from the UTPA as a matter of law, and therefore, the trial court erred in submitting the question to the jury and in upholding the jury's finding of a UTPA violation. We disagree.

The UTPA declares "unfair or deceptive acts or practices in the conduct of any trade or commerce . . . unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 337, 732 S.E.2d 166, 174 (2012).

However, the UTPA provides an industry exemption for certain practices and transactions if the activity or transaction in question is subject to other regulation. *See* S.C. Code Ann. § 39-5-40 (1985) (explaining the UTPA expressly exempts certain practices and transactions by providing that it is inapplicable to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States"). The burden of proving an exemption is on the party claiming the exemption. *Id.*

Appellants moved for a directed verdict and JNOV, asserting that Prepaids fell under the UTPA's industry exemption. The trial court denied the motions, finding Appellants failed to carry their burden of proving the exemption applied. Specifically, the trial court noted it was undisputed that Appellants were not registered to sell securities as broker-dealers, thus explaining the SEC investigation into Appellants' fees that appeared to be "broker-esque." Moreover, the trial court found Appellants presented no evidence that Prepaids were a registered security or initial public offering that was regulated by another administrative body.

Appellants now assert the trial court erred in submitting the issue of whether Prepaids were subject to the UTPA to the jury because it is a question of law. We recognize section 35-1-102(29) of the South Carolina Code (Supp. 2014) provides that the definition of a security includes an "investment contract," and that courts in other jurisdictions have held as a matter of law that a Prepaid is a security.[13] Nevertheless, we find the trial court correctly submitted the issue to the jury based on the alternative theories of relief posited by Maybank and based on Appellants' position at trial that they were not subject to the Securities Act, and that they did not effectuate transactions and sell securities.

Appellants' own expert, Thorne, testified a Prepaid was not a security. He stated no sale occurred on the date the Prepaid was entered, and he believed the Prepaid was a contract. Furthermore, Fisher's testimony was that a Prepaid and the practice of advising on alternative investments created a gray area in the view of the SEC. Thus, through the testimony of their own witnesses, Appellants put forth evidence that was susceptible to more than one reasonable inference regarding the applicability of the exemption. Therefore, we find no error in the trial court's decision to submit this question to the jury.[14]

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[13] *See, e.g.*, *Chechele v. Sperling*, 758 F.3d 463, 471 (2d Cir. 2014) (explaining a Prepaid transaction was a sale of stock and qualified as the sale of an underlying security); *Anschutz Co. v. Comm'r*, 664 F.3d 313, 326 (10th Cir. 2011) (finding the entry into a Prepaid established a security interest).

[14] Maybank additionally challenges Appellants' argument on this issue based on waiver, issue preservation, and collateral estoppel. First, Maybank argues that because Appellants suggested the jury charge and consequently did not object to it, the issue is unpreserved. Normally, a party is required to object to the opposing party's suggested charge to preserve the matter for appeal. *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 36, 491 S.E.2d 571, 577 (1997). However, we find the facts here are easily distinguishable. Following the denial of their motion for directed verdict as to the UTPA claim, Appellants offered a charge on this issue. We decline to hold that this trial strategy, which amounts to Appellants simply playing the hand they were dealt, somehow precludes Appellants from arguing this issue on appeal. We also reject Maybank's arguments this issue is unpreserved or Appellants should be estopped from arguing they were involved in securities-related conduct because Appellants consistently argued they did not participate in the sale of the Prepaid. Appellants were placed in the position of defending numerous causes of action, some of which were arguably inconsistent with others. We therefore disagree a procedural bar precludes this Court from reaching the merits of whether the motion for JNOV should have been granted as

We also find sufficient evidence in the record to support the jury's finding of a UTPA violation. In responding to Appellants' post-trial motions, the trial court cited three specific instances in which the jury could have found Appellants liable for violating the UTPA: the WMA, the Approval Letter, and the Refund Letter. We agree with the trial court the WMA constitutes evidence upon which a jury could conclude Appellants violated the UTPA. *Cf. Elam*, 361 S.C. at 27–28, 602 S.E.2d at 782 (stating that in reviewing a trial court's ruling denying a motion for JNOV, appellate courts must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party, and may only reverse the trial court if there is no evidence to support its decision); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) ("In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight."). For example, Walters testified Appellants knew the WMA presented to Maybank contained misrepresentations, and Appellants could not fulfill the three stated promises outlined in it. While Appellants put forth evidence the obligations of the WMA were fulfilled, testimony was introduced that Appellants knew for more than three years this document was incorrect to the extent it outlined the duties that would be performed as promised by Wealth Management. *Cf. Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("When considering a JNOV, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." (citation omitted) (internal quotation and alteration marks omitted)). Further, the policies and procedures of the Bank expressly prohibited Maybank's portfolio advisors from performing the very duties the Bank promised it would provide for him. Moreover, both Fisher and Walters admitted Appellants did not notify Maybank or any customer that the promises made through the WMA would not be fulfilled. As such, we affirm the trial court's finding that the WMA constitutes evidence upon which the jury could have found a UTPA violation.

We also agree with the trial court that the Approval Letter constitutes further evidence Appellants knowingly misrepresented their efforts and the extent of their review of Maybank's financial situation, which provides additional support for the jury's finding of a UTPA violation. On its face, the letter appeared to specifically address Maybank's needs, explicit goals, and financial concerns, which Maybank testified he discussed with Kapoor, Gibson, and Mahfood. However, the testimony established that in actuality, the Approval Letter was a fill-in-the blank form letter not tailored to any single client. Moreover, the record also includes evidence the

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to the UTPA claim.

Approval Letter condoned a conflict of interest between Maybank's financial interest and Appellants. Accordingly, we affirm the trial court's finding that the Approval Letter is evidence upon which the jury could have found a UTPA violation.

Further, we find the Refund Letter is evidence of a deceptive practice that supports the jury's finding of a UTPA violation. Although the Refund Letter was sent by Appellants after the commencement of litigation, it concerned prior fees charged to Maybank and other clients that were subsequently questioned by the SEC. A reasonable jury could have found the Refund Letter supported Maybank's assertion of deception rather than being a reflection of ostensible corporate values.

As to the impact on the public interest,[15] we find the fact the Approval Letter as well as the Refund Letter were utilized by BB&T Corporation for multiple customers would allow a jury to conclude that these deceptive practices affected the public. We thus agree with the trial court that under the evidence adduced at trial, the question of whether Maybank's claim under the UTPA fell under the UTPA's industry exemption was for the jury. Moreover, we find sufficient evidence exists to uphold the jury verdict as to this cause of action. Accordingly, we find the trial court did not err in refusing to grant Appellants' motion for JNOV on this issue.

B. Punitive Damages

Appellants contend the trial court erred in denying their motion for JNOV on Maybank's claim for punitive damages because such damages are barred by the WMA's limitation on liability clause. We agree.

Paragraph F.1 of the WMA states, in pertinent part:

> F. Limitation of Liability and Indemnification. Client agrees:

[15] *See Daisy Outdoor Advert. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) ("Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest.").

> 1. Bank and Investment Advisor shall not be liable with respect to their services under this Agreement except for any loss attributable to their negligence or willful misconduct. *In no event shall Bank or Investment Advisor be liable for any incidental, indirect, special, consequential or punitive damages*.

(Emphasis added).

Over Appellants' objection, the question of the enforceability of this clause was submitted to the jury, which awarded $5,000,000 in punitive damages to Maybank. In denying Appellants' motion for JNOV, the trial court held the clause was contrary to public policy and that its enforcement would be unconscionable. Further, the trial court held the clause unenforceable as to the common law causes of action of constructive fraud, breach of fiduciary duty, and negligent misrepresentation because these claims were not included within the scope of the services provided by the WMA. Specifically, the trial court found the parties did not contract for Appellants to make misrepresentations, and the jury found Appellants' actions were "intentional, reckless, and fraudulent."

When a contract is entered into freely and voluntarily, contractual limitations are normally enforced. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). This Court has generally upheld limitations of liability and exculpatory clauses, finding they are commercially reasonable. *See, e.g.*, *Gladden v. Boykin*, 402 S.C. 140, 144–45, 739 S.E.2d 882, 884 (2013) (upholding a limitation of liability provision in a home inspection agreement which confined the liability of the inspection company to "a sum equal to the amount of the fee paid by the client for this inspection," and finding the clause neither unconscionable nor violative of public policy); *Huckaby v. Confederate Motor Speedway, Inc*., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by a waiver and release voluntarily signed by plaintiff prior to entering the racetrack); *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (upholding a release which explicitly and unambiguously limited paintball range's liability for negligence); *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 192, 322 S.E.2d 453, 459 (Ct. App. 1984) (enforcing the language of an exculpatory clause in a contract for the sale of a boiler).

However, notwithstanding our general acceptance of limitation of liability provisions and exculpatory clauses, the law disfavors such provisions, and courts must strictly construe the language of the provision against the drafter. *Pride v. S. Bell Tel. & Tel. Co.*, 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964); *McCune*, 364 S.C. at 248, 612 S.E.2d at 465. Moreover, should a court find the provision violates public policy or is unconscionable, the court may declare the provision unenforceable. *Pride*, 244 S.C. at 621, 138 S.E.2d at 157. Nevertheless, a court's ultimate duty is confined to interpreting the contractual provisions agreed to by the parties—regardless of their wisdom or folly, apparent unreasonableness, or any failure of the parties to guard their interests carefully. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999).

In determining the public policy of this State, our courts must rely on legislative enactments whenever possible. *Gladden*, 402 S.C. at 143, 739 S.E.2d at 883. The trial court's sole basis for finding Paragraph F.1 violative of public policy was that the parties were not in an equal bargaining position. Maybank offers no additional legal basis upon which this Court could find the limitation on liability contrary to our public policy. We acknowledge our jurisprudence has stated a party should not be permitted to contractually insulate himself from liability where the parties are not on roughly equal bargaining terms. *Pride*, 244 S.C. at 619–20, 138 S.E.2d at 157. While recognizing the breadth of this pronouncement, we find it unpersuasive in this instance. It is true that a contract for services between an individual and a large corporation will frequently involve some disparity of bargaining power. However, this is not a case where an ordinary investor seeks financial services from a more knowledgeable company. Rather, Maybank has an extensive history as a trust advisor. Therefore, we cannot agree that the policy in this state is to decline enforcement of such a contract on this basis alone.

Somewhat similarly, a challenged contractual provision is examined to determine whether it is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). The absence of meaningful choice on the part of one party is generally indicative of a fundamental unfairness of the bargaining process in the contract. *Id.* In analyzing the absence of meaningful choice, courts should consider, *inter alia*, the nature of the injuries, any disparity in the parties' bargaining power, the level of sophistication of the parties, whether there is an element of surprise in the challenged clause, and the conspicuousness of the clause. *Id.*

However, only in rare circumstances has an appellate court invalidated a contract on the basis of unconscionability. For example, our courts have found that numerous one-sided provisions cumulatively impact the oppressive nature of an adhesion contract. *See Simpson*, 373 S.C. at 36, 644 S.E.2d at 674. Additionally, courts may consider whether the party asserting unconscionability spoke English, had the ability to consult an attorney, or faced other circumstances that made signing the contract in a particular instance grossly inequitable. *See Holler*, 364 S.C. 256, 269–70, 612 S.E.2d 469, 476–77 (Ct. App. 2005) (declaring a prenuptial agreement unconscionable when a Ukrainian woman averred she was forced to sign the agreement because at the time, she was pregnant, did not speak English, and faced immediate deportation unless she married, but she lacked the funds or time to consult an attorney or translator).

Turning to Paragraph F.1, we find the clause is neither violative of public policy nor unconscionable. Under its terms, it does not deprive Maybank of all damages arising under the contract but merely limits the type of damages he is entitled to recover. Specifically, Maybank is precluded from seeking consequential damages, indirect damages, special damages, or punitive damages in claims arising from his relationships with Appellants; he is still entitled to actual damages. While clauses limiting liability are to be strictly construed, we find no reason to ignore the plain language of the clause based on either public policy or unconscionability grounds.

Turning next to the scope of the exculpatory clause, the trial court held the clause only applied to "services under the [WMA]," and the common law causes of action did not arise in connection with the services set forth in the WMA. Moreover, the trial court found the jury verdicts of constructive fraud, breach of fiduciary duty, and negligent misrepresentation preclude the enforcement of the clause because these claims arose from Appellants' "intentional, reckless, and fraudulent" conduct.

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). When the contract's language is clear and unambiguous, the language alone determines its force and effect. *Id*. A contract must be read as a whole document such that litigants may not create an ambiguity by pointing to a single sentence or clause. *Id*.

We find the WMA governs all aspects of the investment relationship between Maybank and Appellants, and the common law causes of action are subject to the limitations contained in Paragraph F.1. The trial court erred in relying solely on the services listed in the WMA and ignoring the language of the Addendum and Prepaids. Under general contract rules and plain language, these documents must be read as a whole because they all concerned one course of conduct: Appellants' investment advice. *See Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (explaining where multiple documents form the terms of a contract the documents will be interpreted so as to give effect to all of their provisions, if practical). Reading them thusly, we find the claims of constructive fraud, breach of fiduciary duty, and negligent misrepresentation are not outside the scope of the limitation of liability clause.

We also disagree with the trial court's finding that the jury verdicts of constructive fraud, breach of fiduciary duty, and negligent misrepresentation preclude the enforcement of the clause because these claims arose from Appellants' "intentional, reckless, and fraudulent" conduct. It is true that contracts may be avoided based on fraud. *Metro. Life Ins. Co. v. Stuckey*, 194 S.C. 469, 470, 10 S.E.2d 3, 5 (1940). We further recognize other jurisdictions have refused to enforce limitations on liability where actual fraud is involved.[16] Here, however, Maybank proceeded only on constructive fraud and dismissed his claim for actual fraud prior to trial. Constructive fraud is distinguishable from actual fraud in that constructive fraud does not require the element of intent to deceive. *See Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 270 (Ct. App. 1993) (noting that constructive fraud removes the element of intent found in actual fraud).

In general, we refuse to enforce contracts based on fraudulent conduct because a party should not retain the benefits of an agreement that he knowingly and *intentionally* entered into though deceptive means. *Regions Bank v.*

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[16] *See*, *e.g.*, *Roopchan v. ADT Sec. Sys., Inc.*, 781 F. Supp. 2d 636, 660 (E.D. Tenn. 2011) ("Courts will enforce exculpatory clauses unless there is 'fraud, misrepresentation or violations of the Tennessee Consumer Protection Act.'" (citation omitted)); *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 545 (Del. Super. Ct. 1977) ("Even if a contract purports to give a general exoneration from 'damages,' it will not protect a party from a claim involving its own fraud or bad faith."); *Houghland v. Sec. Alarms & Servs., Inc.*, 755 S.W.2d 769, 773 (Tenn. 1988) (holding exculpatory "clauses do not ordinarily protect against liability for fraud or intentional misrepresentation").

Schmauch, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003). Moreover, beyond the patent unfairness inherent in enforcing a contract induced through intentional fraud, giving legal effect to such a contract violates a fundamental principle of contract law: there must be a meeting of the minds. By its very nature, there can be no union of purpose where one party is intentionally deceiving the other through fraud. However, the jury's finding of constructive fraud is not equal to a finding of actual fraud and is thus not sufficient to thwart enforcement of the exculpatory clause.[17]

Accordingly, we find the trial court erred in failing to grant JNOV to Appellants on the award of punitive damages based on the limitation of liability clause found in the WMA. Thus, because Appellants are not subject to punitive damages, we need not address the Appellants' argument that Maybank must elect between the allegedly inconsistent portions of the jury's award. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when decision regarding a prior issue is dispositive).

IV. TREBLING

Appellants contend the trial court erred in trebling damages because the WMA limits Maybank's recovery of statutory treble damages under the UTPA, and their alleged conduct did not constitute "willful or knowing" violations of the UTPA. Appellants further argue there is no evidence they knew or should have known their conduct violated the UTPA. We disagree.

The UTPA provides for treble damages upon a finding of a willful violation of the Act. *See* S.C. Code Ann. § 39-5-140(a) (Supp. 2014). A willful violation is defined by statute as occurring "when the party committing the violation knew or should have known that his conduct was a violation of [the UTPA]." S.C. Code Ann. § 39-5-140(d). Thus, if a person of ordinary prudence who was engaged in trade or commerce could have ascertained that his conduct violated the UTPA, such conduct is willful within the meaning of the statute. *Wright v. Craft*, 372 S.C. 1, 23–24, 640 S.E.2d 486, 498 (Ct. App. 2006).

[17] Similarly, we decline to hold that the clause is unenforceable based on of the jury's verdict for breach of fiduciary duty and negligent misrepresentation. As with constructive fraud, no specific intent to deceive is necessary to support either verdict.

We again note limitation of liability provisions and exculpatory clause are disfavored and will be strictly construed against the drafter. *Pride*, 244 S.C. at 619, 138 S.E.2d at 157. Here, the exculpatory clause prohibits "incidental, indirect, special, consequential or punitive damages," but does not specifically prohibit statutory or multiple damages. Appellants failed to explicitly limit statutory or multiple damages when they drafted the WMA, and we decline to extend its terms to prohibit the statutory treble damages awarded to Maybank under the UTPA. *Cf. Simpson*, 373 S.C. at 29–30, 644 S.E.2d at 671 (finding an arbitration agreement unconscionable when it purported to restrict a consumer from receiving the statutorily-mandated treble damages to which she might otherwise have been entitled in her underlying UPTA claim, because courts "will not enforce a contract which is violative of public policy, *statutory law*, or provisions of the Constitution" (emphasis added) (citation omitted)).

We find the evidence in the record supports the trial court's decision to treble damages. As previously discussed, the trial court found Appellants violated the UTPA based on the WMA, the Approval Letter, and the Refund Letter. We find this conclusion is clearly supported by the record. For example, numerous witnesses testified Appellants knew they could not fulfill the terms of the WMA. Further, the Refund Letter was portrayed to the jury as being disingenuous in its stated laudatory purpose, and the Approval Letter, though seemingly tailored specifically to Maybank, was a mere fill-in-the-blank form letter. Therefore, we find evidence exists to uphold the trial court's decision to treble the damages under the UTPA.

V. ATTORNEYS' FEES AND COSTS

Appellants argue the trial court erred in concluding eighty percent of the attorneys' fees and costs were attributable to the UTPA claim. Appellants challenge the award of fees and costs on multiple bases, including the sufficiency of documentation, reasonableness, the validity of the enhancement of the award through the lodestar multiplier, and the use of witness fees and deposition expenses. We disagree.

The decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion. *S.C. Dep't of Transp. v. Revels*, 411 S.C. 1, 8, 766 S.E.2d 700, 703 (2014). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citation omitted).

Generally, attorneys' fees and costs are not recoverable unless authorized by contract or statute. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). The UTPA permits a successful plaintiff to recover reasonable attorneys' fees and costs. S.C. Code Ann. § 39-5-140(a) ("Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.").

Appellants argue the affidavit of attorneys' fees and costs submitted by Maybank's counsel was inadequate and lacked the necessary detail that would enable Appellants to respond. They suggest Maybank failed to provide detailed billing statements to identify how the billed hours correlated to the claims alleged, especially since Maybank prevailed on only five of his eleven claims, and the Trust lost on all its claims. Moreover, Appellants suggest the insufficiency in the billing statements make it difficult to ascertain and delineate the work completed in furtherance of the UTPA claim—which is the only claim upon which attorneys' fees and costs may be awarded.

We find all of Maybank's claims shared the same common facts and required combined efforts throughout the litigation process. The trial court's reduction of fees by twenty percent accounts for a distinction in the claims and the time allotted to defend claims unrelated to the UTPA. We find this to be a reasonable estimation. *Cf. Haley Nursery Co. v. Forrest*, 298 S.C. 520, 524, 381 S.E.2d 906, 909 (1989) (finding a reduction in fees and costs reflected that the fees and costs sought were not solely from the UTPA action).

We turn next to the calculation of determining reasonable attorneys' fees under the UTPA and the trial court's application of the lodestar multiplier. "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." *Layman v. State*, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008). Moreover, in some cases of exceptional success an enhanced award may be justified by using a lodestar multiplier. *Id.* In determining the reasonable time and hourly rate for attorneys' fees, the Court looks to the factors set forth in *Jackson v. Speed*, which include the nature, extent, and difficulty of the case; the time necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the beneficial results obtained; and the customary legal fees for similar services. 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Here, the trial court's order awarding $2,654,295 in attorneys' fees based on the lodestar multiplier is detailed and contains a thorough discussion of the *Jackson* factors used to determine reasonable attorneys' fees. This matter was heavily litigated for several years, involved thirty-two depositions, and produced more than 60,000 pages of documentation. Moreover, there were numerous motions filed by Appellants, including ten separate motions for summary judgment and seven motions *in limine*. This case took a tremendous amount of time and effort by experienced counsel, which garnered beneficial results for Maybank on five causes of action. We find the trial court's finding of the base attorney fee award of $1,769,530 was proper, along with applying the 1.5 multiplier to reach $2,654,295. Moreover, we agree with the trial court that Maybank achieved a successful result in this very complex case. Finally, the excellent business court judge who tried this case was involved in this matter from the time the federal court remanded the case through the post-trial motions, a period of twenty-one months. Thus, we find the judge acted within his discretion in awarding attorneys' fees and applying the lodestar multiplier.

The trial court also awarded $245,011 in costs to Maybank. Appellants claim error in allowing Maybank to be awarded costs not specifically statutorily authorized, such as expert witness fees and unnecessary deposition expenses. Appellants contend a party "must be able to point to some statute which allows him [to recover specific costs]," which Maybank is unable to do. *See Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992). There, the plaintiff sought recovery of costs pursuant to section 15-37-40 of the South Carolina Code (2005), a general statute relating to the clerk of court entering judgment. *Id.* at 319, 422 S.E.2d at 132. The statute at issue expressly provided for a limited list of recoverable fees, but not costs. *Id.*

However, this case is distinguishable from *Oliver* because the UTPA expressly allows for "reasonable costs" arising from litigation. S.C. Code Ann. § 39-5-140. The term "reasonable costs" is undefined. Nonetheless, this Court has previously upheld the award of costs for expert witness fees based on reasonableness. *See Lewis v. Lewis*, 392 S.C. 381, 394, 709 S.E.2d 650, 656–57 (2011) (upholding the family court's award of expert witness fees in the amount of $23,066.25); *Peirson v. Calhoun*, 308 S.C. 246, 255, 417 S.E.2d 604, 609 (Ct. App. 1992) (finding the trial court had authority under Rule 26(b)(4)(C) to order the deposing party to pay a reasonable expert witness fee). We therefore believe costs arising from UTPA litigation should be treated in the same manner, and may include expert witness fees. *See Hale v. Basin Motor Co.*, 795 P.2d 1006, 1013 (N.M. 1990) (holding costs in unfair trade practice litigation should not be treated

any differently from other litigation); *see also Trimper v. City of Norfolk*, 58 F.3d 68, 75 (4th Cir. 1995) (explaining litigation costs include litigation expenses such as secretarial costs, copying, telephone costs, and necessary travel). Based on the standard of review and the evidence in the record, it was well within the trial court's discretion to grant Maybank costs. Accordingly, we affirm the trial court's award of attorneys' fees and costs.

VI. PREJUDGMENT INTEREST

Turning now to the cross-appeal, Maybank contends the trial court erred in failing to award him statutory prejudgment interest on the jury's actual damages. We disagree and affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 34-31-20(A) (Supp. 2014) ("In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."); *Historic Charleston Holdings, L.L.C. v. Mallon*, 381 S.C. 417, 435–36, 673 S.E.2d 448, 457–58 (2009) ("The trial court's decision whether to award prejudgment interest will not be disturbed on appeal absent an abuse of discretion."); *Butler Contracting, Inc. v. Court St., L.L.C.*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006) ("The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.").

CONCLUSION

As set forth above, we reverse the award of punitive damages based on the limitation of liability clause. As a result, we decline to address the election of remedies issue, and affirm on all other grounds.

Acting Justices James E. Lockemy, Jasper M. Cureton, Clifton Newman and William H. Seals, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth Simmons, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-000387

ON WRIT OF CERTIORARI

Appeal from Dorchester County
Doyet A. Early, III, Post-Conviction Relief Judge

Opinion No. 27641
Heard March 2, 2016 – Filed June 8, 2016

VACATED IN PART AND REMANDED

Emily C. Paavola, of Justice 360, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General Melody J. Brown, all of Columbia, for Respondent.

Joseph M. McCulloch, Jr., of Columbia, Lori R. Mason, of Cooley LLP, of Palo Alto, California, Adam S.

Gerhenson, of Cooley LLP, of Boston, Massachusetts and Jennifer Pavane Kenter, of Cooley LLP, of New York, New York, for Amicus Curiae The Innocence Network. Daniel J. Westbook, of Nelson Mullins Riley & Scarborough, of Columbia, Vilia B. Hayes, Charles W. Cohen and Casey S. Duffy, all of Hughes Hubbard & Reed, LLP, of New York, New York, for Amici Curiae ARC of South Carolina, Able SC, SCAAIDD, Protection and Advocacy for People With Disabilities, Inc. and Family Connection of South Carolina.

JUSTICE KITTREDGE: Petitioner Kenneth Simmons was convicted and sentenced for the 1996 murder and criminal sexual assault of an 89-year-old Summerville woman. Petitioner sought post-conviction relief (PCR), which was granted in part. Because Petitioner is intellectually disabled, the PCR court vacated Petitioner's death sentence and imposed a sentence of life without parole, a matter which is not before us. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of mentally retarded individuals (citation omitted)). Petitioner additionally sought a new trial on newly discovered evidence and due process grounds, which the PCR court denied without discussion. The essence of Petitioner's new-trial claims centers on the allegation that the State misrepresented at trial the strength of the DNA[1] evidence linking Petitioner to the crimes. The State urges this Court to not reach the merits of Petitioner's certiorari petition on issue-preservation grounds. Alternatively, the State recommends the case be remanded to the PCR court for the issuance of a proper order setting forth findings of fact and conclusions of law. We conclude the compelling nature of the dispute and the interests of justice warrant the "extraordinary action" of remanding the case to the PCR court for issuance of a

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[1] DNA is the commonly used abbreviation for deoxyribonucleic acid, "the long, double-strand molecule found in the chromosomes carried in cell nuclei" that "contains the genetic blueprint for all living organisms." *State v. Dinkins*, 319 S.C. 415, 417, 462 S.E.2d 59, 60 (1995).

proper order. *See Pruitt v. State*, 310 S.C. 254, 255 & n.2, 423 S.E.2d 127, 128 & n.2 (1992) (citations omitted). We commend the State for its alternative suggestion.

I.

This was a brutal and horrific murder, a fact that does not escape us. From the beginning, the State relied heavily on the supposed match between Simmons's DNA and DNA found in semen at the crime scene. As the Solicitor told the jury during opening statements, the State's evidence against Simmons consisted solely of statements Simmons made to police and DNA analysis. Regarding the DNA evidence, the Solicitor told the jury the State would present the testimony of forensic analysts "that nine out of nine of the locations on DNA molecules that they compared with the semen in that vaginal swab [taken from the victim] matched the DNA from Kenneth Simmons'[s] blood."

As the South Carolina Law Enforcement Division (SLED) lacked the ability at the time to perform the necessary forensic analysis, the State sent the DNA samples to Lifecodes Corporation (Lifecodes), a private laboratory in Stamford, Connecticut. There, forensic analysis was performed by Lauren Crane and Dr. Michael Baird.[2]

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[2] We note that Lifecodes and its findings, including Dr. Baird's statistical analysis based on those findings, have been the subject of considerable litigation in numerous jurisdictions. *See, e.g.*, *Harvey v. State*, No. A-7963, 2004 WL 60771, at *8–11 (Alaska Ct. App. Jan. 14, 2004) (discussing experts who were critical of Dr. Baird's testimony regarding the statistical significance of DNA test results and noting that Dr. Baird and Lifecodes "were connected to controversial DNA testimony that prompted a National Research Council study of DNA evidence—a study that was critical of certain DNA testing, and that cautioned prosecutors and defense attorneys against 'over-sell[ing] DNA evidence' or arguing 'that DNA-typing is infallible'" (alteration in original)); *Caldwell v. State*, 393 S.E.2d 436, 443–44 (Ga. 1990) (crediting the uncontroverted testimony of a defense expert that "seriously call[ed] into question Lifecodes'[s] claimed power of identity . . . for the defendant's DNA identification" because Lifecodes's calculations relied upon unfounded assumptions); *People v. Keene*, 591 N.Y.S.2d 733, 741 (Sup. Ct. 1992) (ruling results from tests performed by Lifecodes to be inadmissible because "Lifecodes did not substantially perform scientifically accepted tests and techniques and did not achieve scientifically reliable results"); *People v. Castro*,

To aid their testimony, the Solicitor displayed a chart he prepared based on his review of the documentation submitted by Lifecodes, which purported to compare the victim's and Simmons's DNA with the crime-scene samples at the nine locations, or loci, that Lifecodes tested.[3]

When directly asked if Simmons's DNA matched the perpetrator's DNA at all nine loci tested, Crane responded, "What we found was a mixture of DNA which we could not eliminate Kenneth Simmons'[s] blood as being a contributor to."[4] While a correct statement, this failed to inform the jury that she was basing that opinion on only six of the loci tested. At her PCR deposition, Crane admitted the CTT test results, which looked at the other three loci, were inconclusive and had no evidentiary value for identifying Simmons. Nonetheless, Baird used the CTT test results at trial to create a "combined frequency of occurrence" for the genetic profile developed from the crime scene samples. Dr. Baird thus told the jury that based on the "nine different genetic tests done in this case," Simmons's genetic profile, which was found in the samples taken from the victim, occurred in about 1 in 1,280,249,916 white individuals and 1 in approximately 8,000,000 black individuals.

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545 N.Y.S.2d 985, 996–99 & n.15 (Sup. Ct. 1989) (finding the results of DNA testing performed by Lifecodes to be inadmissible because Lifecodes "failed in its responsibility to perform the accepted scientific techniques and experiments in several major respects" and noting that "the population frequencies reported by Lifecodes in this case are not generally accepted by the scientific community").

[3] The first six loci (LDLR, GYPA, HBGG, D7S8, GC, and HLADOA1) were analyzed using what is known as a DQ Alpha/Polymarker (DQA/PM) test. The final three loci (CSF1PO, TPOX, and THO1) were analyzed using what is called a CTT test.

[4] Crane's trial testimony referenced the chart, even though at the time Crane said she had "not recently" seen it. During her deposition for these PCR proceedings, Crane said she had *never* seen the chart before the trial and admitted testifying off of it based on the assumption it was correct. It is now conceded that the chart contained false information.

Then, during its closing argument, the State essentially told the jury it was impossible for the DNA to have come from anyone other than Simmons: the State emphasized the supposed nine-for-nine match between Simmons's DNA and the samples recovered from the victim and noted the frequency of occurrence of Simmons's genetic profile in the black community was 1 in 8,029,316.

The jury found Simmons guilty on all charges. This Court affirmed Simmons's murder conviction and death sentence on direct appeal. *State v. Simmons*, 360 S.C. 33, 36–37, 46, 599 S.E.2d 448, 449, 454 (2004).

II.

Simmons filed an application for PCR on multiple grounds, including an ineffective assistance of counsel claim related to his trial counsel's failure to adequately challenge the State's DNA evidence and a claim he was ineligible for the death penalty because he is "mentally retarded."[5] Simmons later amended his application for PCR, expanding on his ineffective assistance of counsel claim and adding a newly discovered evidence claim,[6] as well as a claim that the State violated his due process rights by presenting false evidence to the jury and failing to disclose exculpatory evidence.

The PCR court held multiple hearings. During the course of the PCR proceedings, it became apparent that the DNA evidence against Simmons was far weaker than the State had claimed at trial. Simmons presented numerous witnesses to testify to problems in the State's presentation of the DNA evidence and provided the PCR court with reports and affidavits from other experts. These experts were consistent

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[5] In *Atkins*, the United State Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded individuals. In *Franklin v. Maynard*, we held that prisoners sentenced to death pre-*Atkins* could seek to have their sentences vacated in PCR proceedings. 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). The General Assembly has since replaced the terms "mental retardation" and "mentally retarded" with "intellectual disability" and "person with intellectual disability." *See* Act No. 47, 2011 S.C. Acts 172 (codified as amended in scattered sections of titles 43–44 of the South Carolina Code).

[6] *See* S.C. Code Ann. § 17-27-20(A)(4) (2014).

in their identification of numerous problems with the way the State presented the DNA evidence at Simmons's trial. For example, the affidavit of two of those experts, Dr. Charlotte Word and Dr. Robin Cotton, identified four "critical problems": (1) "The chart used to assist with both Dr. Baird's and Ms. Crane's trial testimony contains data that are completely unsupported by the laboratory notes and results provided."[7] (2) "No credible forensic scientist would report the results from DNA testing" the way Dr. Baird did.[8] (3) Lifecodes failed to utilize "a critical and required control" for DNA tests.[9] (4) "[T]he results generated were inconsistent across the various tests."[10]

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[7] For one of the samples, even though no CTT test was performed, the chart indicated the test resulted in a match to Simmons's DNA. For another sample, the chart indicated the test resulted in a match to Simmons's DNA when the test actually resulted in a match to only the victim's DNA.

[8] In addition to including the CTT test results in his statistical calculations, which was inappropriate since those tests did not implicate Simmons, Dr. Baird's testimony as to the statistical frequency of Simmons's genetic profile was misleading because it ignored the fact that *other* genetic profiles were equally consistent with the crime scene samples. Baird used what are known as single-source statistics to calculate how rare *Simmons's* genetic profile is, when according to the record, he should have used what is known as random match probability to calculate the frequency of the *evidence's* profile.

[9] Lifecodes failed to use a reagent blank control, which is used to ensure DNA samples are not contaminated. Now required, reagent blank controls were strongly recommended at the time Lifecodes tested the samples in this case. According to Dr. Word, the reagent blank control has "been essentially a mandatory control in all forensic testing from day one" and "without it we don't know whether results are reliable or not."

[10] The DQA/PM tests indicated the presence of DNA from at least two individuals, while the CTT tests indicated the presence of DNA from a single individual (the victim). Moreover, gender-typing tests performed on some of the samples indicated *only* the presence of *female* DNA. Despite requesting "[a]ll notes, memoranda[,] or recordings pertaining to the preparation, execution, results[,] and outcome of any scientific/DNA experiments conducted by SLED or consulting laboratories, such as Lifecodes," Simmons never became aware of many of these

The PCR court vacated Simmons's death sentence pursuant to *Atkins* and summarily denied the remaining claims, including Simmons's challenge to the DNA evidence, "as without merit."[11] Yet Simmons failed to file a Rule 59, SCRCP motion, as our issue-preservation rules require.

III.

The State first argues that Simmons's claims are procedurally barred because they were not raised to the PCR court in a motion to reconsider. We note that although the State is technically correct, we also believe dismissing the writ of certiorari would be fundamentally contrary to the interests of justice. As discussed below, our jurisprudence permits a remand under such extraordinary circumstances.

A.

The State, to its credit, does not deny the obvious—that is, the strength of the State's DNA evidence against Simmons was misrepresented to the jury. We hasten to add that our careful review of the voluminous record reveals no evidence of conscious wrongdoing in the prosecution of this case. We are persuaded that the misleading chart, and the demonstrative use of it by the State, was the result of faulty information provided by Lifecodes concerning a complex matter.

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted); *see also Riddle v. Ozmint*, 369 S.C. 39, 47–48,

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errors at trial because, as Dr. Word and Dr. Cotton concluded after reviewing the documents provided by Lifecodes, "either there are pages of documentation that were not provided or significant portions of the testing procedures were not documented in the notes."

[11] The State filed a motion to alter or amend the PCR court's *Atkins* ruling pursuant to Rule 59(e), SCRCP, which the PCR court denied. This Court denied the State's petition for a writ of certiorari on this issue.

631 S.E.2d 70, 75 (2006) ("The failure to correct false evidence is as reprehensible as its presentation." (citing *Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 834–35 (1996))). In addition, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Alternatively, a prisoner may be entitled to relief when "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4) (2014).

B.

In ruling on an application for PCR, "[t]he [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80 (2014). The PCR court's general denial of all claims not specifically addressed in the PCR court's order "does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law." *Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007). To preserve issues for appellate review, "after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP[] motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by [section] 17-27-80 [of the South Carolina Code] and Rule 52(a), SCRCP." *Pruitt*, 310 S.C. at 256, 423 S.E.2d at 128.

As noted, we believe the State is technically correct regarding issue preservation. However, as the State acknowledges, this Court has previously remanded cases such as this to the PCR court for findings of fact. *See, e.g.*, *McCullough v. State*, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) ("Although the error was not raised to and ruled on by the PCR judge, we find it necessary to vacate the order and remand this matter to the circuit court to issue an order addressing its decision to dismiss [the PCR applicant's] second application as successive."). Our jurisprudence has referred to a remand under these circumstances as an "extraordinary action."[12] *Pruitt*, 310 S.C. at 255 n.2, 423 S.E.2d at 128 n.2. A

[12] The Court in *Pruitt* said it was taking the extraordinary action of remanding the case to the PCR court "because [the Court's] opinion in *McCray*[*v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991)] is not being followed." *Pruitt*, 310 S.C. at 255 n.2, 423 S.E.2d at 128 n.2. In *McCray*, this Court reminded PCR courts that section

remand under these circumstances must, of course, be granted sparingly and be reserved for the rarest of cases. We believe this is such a case.

Petitioner requests that we proceed and grant relief today in the form of a new trial, an invitation we decline. We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting. *See, e.g.*, *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 131–34, 568 S.E.2d 338, 342–44 (2002) (vacating and remanding a trial court's ruling because that court's order did not contain factual findings "sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below," and refusing to engage in the speculation that would be required to uphold the trial court's decision (citations omitted)). Moreover, a preemptive ruling on the merits would be unfair to the State, which would be deprived of the opportunity to have this matter fully resolved by a proper order from the PCR court. In this regard, the State correctly asserts it should not be foreclosed from the panoply of arguments available to it, especially related to the prejudice prong in the PCR analysis and the strength of Petitioner's confession to the crimes. In striking this difficult balance, we believe a remand is in the best interests of justice. And finally, because of the growing knowledge of science as it relates to DNA, we grant the PCR court discretion to permit additional evidence.[13]

IV.

We therefore remand this matter to the PCR court for proceedings consistent with this opinion.

17-27-80 "requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray*, 305 S.C. at 330, 408 S.E.2d at 241 (quoting S.C. Code Ann. § 17-27-80).

[13] We grant this discretion to permit additional evidence with some reservation, for we, like all involved, are aware of the years of litigation in this case. Thus, this matter should be expedited, regardless of whether the PCR court allows additional evidence.

VACATED IN PART AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of Ann M. Stirling, Respondent.

Appellate Case No. 2016-001157

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on incapacity inactive status pursuant to Rule 28 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent consents to being transferred to incapacity inactive status.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

Within fifteen (15) days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, respondent may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Costa M. Pleicones C.J.

June 2, 2016

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Martina R. Putnam, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212396

ON WRIT OF CERTIORARI

Appeal From Sumter County
George C. James, Trial Judge
W. Jeffrey Young, Post-Conviction Relief Judge

Opinion No. 5408
Heard October 13, 2015 – Filed June 8, 2016

AFFIRMED

Appellate Defender Benjamin John Tripp, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Daniel Francis Gourley, II, both of Columbia, for Respondent.

LOCKEMY, J.: In this post-conviction relief (PCR) action, Martina R. Putnam contends the PCR court erred in dismissing her application for PCR and finding trial counsel was not ineffective for failing to adequately prepare her case and call witnesses to testify in her defense. We affirm.

FACTS/PROCEDURAL HISTORY

Putnam was charged with homicide by child abuse in the death of her thirteen-month-old son (the Victim). At trial, the State sought to prove Putnam willfully and unlawfully killed the Victim by abuse or neglect. Putnam attempted to shift suspicion to her husband, Patrick, and her older children—Sibling One, age nine, and Sibling Two, age six (collectively, the Children)—who were also in the house when the Victim's fatal injuries occurred.

When Putnam awoke on the morning of the Victim's death, Patrick and the Children were already awake; Patrick was in the kitchen preparing food, and the Children were playing outside. Putnam testified she fed the Victim breakfast, took him to the bathroom for his bath, and laid him on the bathroom floor. Putnam stated she went to the bedroom to get a towel and when she returned to the bathroom, the Victim was not moving and felt like a "rag doll" in her hands. Officer Gwen Herod of the Sumter County Sheriff's Office, who interviewed Putnam, testified that Putnam claimed she did not know how the Victim's injury happened and admitted she was the only person with the Victim during that time.

Officer Herod conducted a videotaped forensic interview with the Children. Her understanding was Sibling One had interacted with the Victim before Putnam did on the morning of the Victim's death. Officer Herod testified Sibling One said he picked the Victim up from his crib that morning before going outside to play, hugged him, and then put him back in the crib. Additionally, Officer Herod stated Sibling One described picking the Victim up and holding him upside down by his feet two days before the Victim died. The trial court allowed this testimony after the parties stipulated to its admissibility. Outside the presence of the jury, trial counsel asked Officer Herod whether Sibling One reported seeing Patrick pick the Victim up in a similar manner. Without reviewing the videotaped interview, Officer Herod could not recall whether Sibling One said someone else also picked the Victim up by his feet. Trial counsel noted that in the videotaped interview, Sibling One described holding the Victim by his feet and went "into this whole process about how [Patrick] used to do this and how they would hold his head and

everything else." The trial court ruled Sibling One's comments concerning Patrick's alleged conduct were inadmissible hearsay under section 17-23-175 of the South Carolina Code (2014) because Sibling One did not testify at trial and were beyond the scope of the stipulation.[1]

Outside the presence of the jury, trial counsel proffered Officer Herod's testimony that on the day the Victim died, Patrick allegedly threatened to kill her and another officer. Trial counsel argued Patrick's threat was relevant because it demonstrated Patrick, who had access to the Victim before Putnam awoke on the day he died, had a tendency to express violence. The trial court excluded the proffered testimony because the threat was not relevant.

To demonstrate Sibling One's propensity for violence, Putnam proffered testimony that while in foster care following Putnam's arrest, Sibling One kicked Sibling Two so hard that the kick left a shoe print on Sibling Two's chest. The trial court refused to admit the testimony under Rule 404(b), SCRE, and determined the testimony did not survive the analysis set forth in *State v. Gregory*[2] because it merely cast a bare suspicion of guilt on Sibling One.

The State presented testimony from three doctors who explained the Victim's medical history and injuries. Dr. Joel Sexton, the pathologist who conducted the Victim's autopsy, concluded the cause of death was a subdural hematoma resulting from an abusive head trauma like a shaking or impact injury and ruled the death a homicide. Dr. Sexton opined the Victim could have experienced a lucid period after his impact injury but before he lost consciousness; however, the other two doctors disagreed with Dr. Sexton's opinion. Dr. Sexton testified the Victim was

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[1] *See* § 17-23-175 (allowing the admission of an out-of-court statement of a child under twelve years of age when the statement was given in response to questioning conducted during an investigative interview of the child, the statement was recorded, the child is present to testify and is subject to cross-examination, and the trial court finds the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness).

[2] 198 S.C. 98, 104-05, 16 S.E.2d 532, 534-35 (1941) (providing evidence demonstrating a third party's guilt "must be limited to such facts as are inconsistent with [the accused's] own guilt" and prohibiting "evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another").

born premature and suffered from delayed development. In addition, Putnam testified the Victim suffered from severe apnea, reflux, digestive problems, breathing problems, and retinopathy.

The jury found Putnam guilty, and the trial court sentenced her to twenty-five years' imprisonment. Putnam filed a direct appeal, and this court affirmed her conviction and sentence. *State v. Putnam*, Op. No. 2011-UP-526 (S.C. Ct. App. filed Dec. 2, 2011).

Putnam filed a PCR application. At the PCR hearing, Putnam asserted trial counsel provided ineffective assistance by failing to call Patrick and the Children to testify about the events occurring in their home on the day the Victim died. She contended if the Children had attended trial and the trial court had admitted the videotape of the Children's interviews, the interviews could have helped her case. At the PCR hearing, neither Patrick nor the Children testified, Putnam did not introduce evidence showing what Patrick and the Children would have testified at trial, and Putnam did not introduce the videotape or transcript of the Children's recorded interviews. Putnam also asserted trial counsel was ineffective for failing to call an expert to testify about the Victim's medical issues and the ways a premature infant can die from a hematoma without suffering child abuse. Putnam did not introduce any expert testimony at the PCR hearing.

The PCR court found trial counsel's investigation fell within reasonable professional norms and Putnam failed to demonstrate prejudice from trial counsel's failure to present additional witnesses. Accordingly, the PCR court denied Putnam's PCR application. This court granted certiorari.

STANDARD OF REVIEW

"In reviewing the PCR court's decision, [an appellate court] is concerned only with whether there is any evidence of probative value to support that decision." *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This court "will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011). This court gives great deference to the PCR court's findings of fact. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). "In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief." *Lorenzen v. State*, 376 S.C. 521, 528, 657 S.E.2d 771, 776

(2008). This court gives great deference to the PCR court's findings on matters of credibility. *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014).

LAW/ANALYSIS

Trial counsel must provide "reasonably effective assistance" under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Under the two-prong test established in *Strickland*, to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance was deficient and (2) the deficient performance prejudiced the applicant's case. *Leon v. State*, 379 S.C. 448, 450, 666 S.E.2d 260, 261 (Ct. App. 2008). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

Under the first prong of the *Strickland* test, "the burden of proof is upon [the] petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms." *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis omitted). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Id*. (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)).

Concerning the second prong of the *Strickland* test, "[t]o establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, [the p]etitioner must demonstrate that his attorney's errors had an effect on the judgment against him." *Edwards*, 392 S.C. at 458-59, 710 S.E.2d at 65. "A PCR applicant 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. at 459, 710 S.E.2d at 66 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of

the trial." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." *Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995).

A. Failure to Present Expert Testimony

Putnam argues the PCR court erred in dismissing her PCR application because trial counsel was ineffective for failing to call an expert witness to undermine the testimony of the State's experts that the Victim died from either violent shaking or a severe blunt trauma to the head. We disagree.

We find evidence in the appendix supports the PCR court's determination that trial counsel conducted a reasonable investigation concerning experts who might give testimony favorable to Putnam. Trial counsel testified at the PCR hearing that he spoke with Dr. Sexton several times before trial, and both Putnam and Dr. Sexton testified at trial about the Victim's developmental problems. Further, trial counsel explained one reason he did not retain an expert witness was that Dr. Sexton "made it very clear that he had seen it many times, and felt it was true in this case—not just possible, but probable"—that the Victim experienced a period of lucidity between the time of the injury and the time he lost consciousness. Trial counsel also explained one of the State's other expert witnesses, Dr. Richard Cartie, testified there was no period of lucidity, so the jury heard the doctors take different positions. Therefore, trial counsel determined he did not need to call another expert to provide the same testimony Dr. Sexton provided. Because trial counsel interviewed Dr. Sexton before trial and strategically chose not to call an expert witness to give the same testimony Dr. Sexton provided concerning a possible period of lucidity and the Victim's developmental problems, we find evidence shows trial counsel's performance was objectively reasonable.

In addition, we find evidence in the appendix supports the PCR court's finding that Putnam failed to demonstrate prejudice from trial counsel's decision not to call additional expert witnesses. Putnam did not present any expert testimony at the PCR hearing; therefore, her assertion that additional expert testimony might have changed the result of her case is merely speculative and insufficient to demonstrate

prejudice. Accordingly, we find probative evidence in the appendix supports the PCR court's finding that Putnam failed to meet her burden of demonstrating trial counsel was ineffective and failed to show prejudice.

B. Failure to Secure the Attendance of Patrick and the Children

Putnam also argues trial counsel was ineffective for failing to secure the attendance of Patrick and the Children at trial, given that all three had clear opportunities to injure the Victim and trial counsel's sole theory of the case was the State could not prove beyond a reasonable doubt that Putnam—rather than another resident of the home—injured the Victim. We disagree because, although we find trial counsel's performance was deficient, Putnam failed to demonstrate how trial counsel's performance prejudiced her trial.

Trial counsel's failure to subpoena witnesses can constitute ineffective assistance of counsel under certain circumstances. For example, in *Martinez v. State*, our supreme court found trial counsel ineffective for failing to subpoena a witness who would have testified he saw the petitioner at a location other than the crime scene fifteen minutes before the conclusion of the crime. 304 S.C. 39, 40-41, 403 S.E.2d 113, 113-14 (1991). In *Martinez*, trial counsel testified at the PCR hearing that he would have called the witness if the witness had been present at trial, the witness's testimony might have been important, and one more piece of evidence might have made a difference in the verdict. *Id*. at 41, 403 S.E.2d at 113-14.

Both South Carolina and Tennessee have enacted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (the Uniform Act). *See* S.C. Code Ann. § 19-9-10 (2014); Tenn. Code Ann. § 40-17-201 (2012). The Uniform Act provides procedures for securing the testimony of material witnesses through the courts of states that have adopted it, and South Carolina's version of the Uniform Act specifically provides the court requesting the witness may recommend "the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State." *See* S.C. Code Ann. § 19-9-70 (2014). Tennessee's version of the Uniform Act provides that in lieu of issuing a subpoena or summons, the Tennessee court may "order that the witness be taken into custody immediately and delivered to an officer of the requesting state." Tenn. Code Ann. § 40-17-205 (2012). The Uniform Act also prescribes penalties to ensure witnesses attend trials. S.C. Code Ann. § 19-9-100 (2014); Tenn. Code Ann. § 40-17-206 (2012).

We find trial counsel rendered deficient performance by failing to secure the Children's attendance at trial and no probative evidence supports the PCR court's contrary finding. Because the Children were not present at trial, the rule against hearsay prohibited Putnam from introducing their videotaped depositions, which included testimony that Sibling One saw Patrick hold the Victim upside down by his feet. The Children's absence also prevented Putnam from questioning them about the events occurring before Putnam awoke on the day of the incident. Both Children awoke before Putnam that morning, and Officer Herod testified Sibling One admitted entering the Victim's room that morning before going outside to play.

Trial counsel testified he subpoenaed the Children through Putnam's ex-husband, who had custody of the Children and lived in Tennessee, but the ex-husband refused to bring the Children to court. Trial counsel should have secured the Children's attendance using the Uniform Act, which was in effect in both Tennessee and South Carolina at the time of trial. If trial counsel had utilized the Uniform Act to secure the Children's presence at trial, a Tennessee court could have ordered the Children to be taken into custody immediately and delivered to an officer in South Carolina. Further, a Tennessee court could have imposed penalties to ensure the Children attended Putnam's trial in South Carolina. Because trial counsel failed to secure the Children's presence at trial, his performance was unreasonable under prevailing professional norms and therefore deficient.

However, evidence supports the PCR court's finding that Putnam did not establish prejudice from trial counsel's failure to secure the Children's attendance at trial. Although Putnam asserted the Children's testimony "may have shown some sort of information that may have helped in some way" and may have provided the jury with a better understanding of "what was actually going on in the house at the time," that testimony was speculative and therefore insufficient to establish prejudice. The jury heard Officer Herod testify about two statements Sibling One made in his videotaped interview: first, that he picked the Victim up from his crib and hugged him on the morning of the incident before going outside to play; and second, that he picked the Victim up and held him upside down by his feet two days before he died. However, at the PCR hearing, Putnam did not introduce the Children's videotaped deposition, and the Children did not testify. Therefore, any other testimony of the Children—including Sibling One's alleged statement he saw Patrick hold the Victim by his feet—was merely speculative. Putnam also failed to establish the result of the trial would have been different if the Children had

testified at trial. Therefore, we hold Putnam failed to show she was prejudiced by trial counsel's failure to secure the Children's presence at trial.

Furthermore, we find probative evidence does not support the PCR court's determination that trial counsel's performance was not deficient based on his failure to subpoena Patrick to testify at trial. Trial counsel should have subpoenaed Patrick to ensure his attendance instead of relying on him to attend trial voluntarily. Trial counsel was in contact with Patrick before trial, and Patrick attended Putnam's bond hearing. Therefore, trial counsel could have served Patrick with a subpoena before trial. Because Putnam's defense was that Patrick and the Children were in the home and could have interacted with the Victim before she did on the day the Victim died, trial counsel should have subpoenaed Patrick to question him about his interaction with the Victim that morning. The fact Patrick changed his mind about attending trial "in the last few days" before trial, got in a truck, and "took off" out-of-state does not excuse trial counsel's failure to subpoena him before that time. Accordingly, trial counsel's failure to subpoena Patrick was unreasonable under prevailing professional norms and constituted deficient performance.

However, evidence supports the PCR court's conclusion that Putnam did not demonstrate prejudice from trial counsel's failure to subpoena Patrick. First, although trial counsel hoped to introduce testimony regarding Patrick's alleged threats against law enforcement to demonstrate his violent nature, the trial court ruled such testimony was irrelevant to Putnam's guilt and was inappropriate under a third-party guilt approach. Putnam failed to demonstrate the trial court's decision would have been different had Patrick testified at trial. Second, because Patrick did not testify at the PCR hearing, any other testimony by Patrick was merely speculative and therefore insufficient to establish prejudice. Therefore, we hold Putnam failed to show she was prejudiced by trial counsel's failure to subpoena Patrick to testify at trial.

CONCLUSION

Putnam received inadequate representation in her prior trial proceedings.[3] However, we are constrained by our standard of review to affirm the PCR court's

[3] In that regard, we are concerned that PCR counsel—who knew of trial counsel's failure to secure Patrick's and the Children's presence at trial—failed to secure their presence at the PCR hearing or provide evidence of what their testimony would

order dismissing Putnam's PCR application because Putnam failed to demonstrate trial counsel's deficient performance prejudiced her trial. Based on the foregoing, the PCR court's order of dismissal is

AFFIRMED.

KONDUROS, J., and FEW, A.J., concur.

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have been at trial. At the PCR hearing, for example, PCR counsel failed to present any depositions or the Children's videotaped interviews in an effort to establish trial counsel's deficient performance prejudiced Putnam's case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wilkins Lee Byrd, Kay R. Larson, John Norwood Klettner, Laura K. Bynum, Ann B. Crump, Robert Larsen, Joan Rutledge Gary, John Robert Stanton, Charles E. Stanton, Byrd L. Thomson, and John Doe and Richard Roe as Representatives of all persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the appeal herein, including but not limited to any unknown owners, unknown heirs, unknown devisees of S.W. Byrd, Mary Moore Byrd, Etta B. Klettner, S. J. Klettner, Sr., Susan Wilkins Byrd, Mary M. Byrd, Joseph D. Rutledge, John R. Larsen, Charles E. Byrd, Jewel Butler Byrd, Wilkins Norwood Byrd, Ruth Byrd, Marian Moore Byrd, Mary K. Stanton, S. J. Klettner, Jr., Mary R. Larsen, John Rutledge Gary, Jewel Elizabeth Byrd, or any person, any unknown infants of persons under disability or persons in the military service designated in a class as Richard Roe, as to the property described in the petition herein and designated as Tax Map No. 076-00-02-004, Appellants,

v.

E. Butler McDonald, Respondent.

Appellate Case No. 2014-000589

Appeal From Darlington County
Marvin I. Lawson, Acting Probate Court Judge
J. Michael Baxley, Circuit Court Judge

Opinion No. 5409
Heard January 7, 2016 – Filed June 8, 2016

AFFIRMED IN PART, VACATED IN PART

Brown W. Johnson, of Clarke Johnson Peterson & McLean, PA, of Florence, for Appellants.

Gena Phillips Ervin, of Orr Elmore & Ervin, LLC, of Florence, for Respondent.

LOCKEMY, J.: In this action for partition and the determination of heirs, Wilkins Byrd (Wilkins), Kay Larsen, John Klettner, Laura Bynum, Ann Crump, Robert Larsen, Joan Gary, John Stanton, Charles Stanton, Byrd Thompson, and unknown persons claiming an interest in the subject real property (collectively, Appellants) appeal the circuit court's affirmance of the probate court's decision to order the public sale of real property owned jointly by Appellants and E. Butler McDonald (McDonald). On appeal, Appellants argue the probate court (1) erred in treating the percentages of ownership as personal property rather than as realty, (2) lacked subject matter jurisdiction to hear the partition action, (3) erred in applying section 15-61-25(A) of the South Carolina Code (2006) rather than section 62-3-911 of the South Carolina Code (Supp. 2012), (4) erred in finding Appellants failed to comply with the probate court's order, (5) erred in holding partition by allotment was not practical and in ordering a public sale, and (6) erred in awarding reasonable attorney's fees and costs to McDonald pursuant to section 15-61-110 of the South Carolina Code (2005). We affirm in part and vacate in part.

FACTS

S.W. Byrd owned real property in Darlington County (the S.W. Byrd Farm), ownership of which passed to his heirs upon his death in 1923. The estates of several of S.W. Byrd's heirs were not probated. In April 2012, McDonald filed with the Darlington County Probate Court a petition to determine the heirs of S.W. Byrd and physically partition the S.W. Byrd Farm. At that time, more than ten

years had passed since the deaths of S.W. Byrd's original heirs, so their unprobated estates could not be probated.[1]

At trial, McDonald referred to a chart he believed correctly listed the owners of the S.W. Byrd Farm and their percentages of ownership of the property (the heir chart). Wilkins believed the heir chart correctly identified the heirs but incorrectly listed some of the percentages of ownership. Specifically, Wilkins believed the interest of one deceased relative, Betty Byrd, was treated as personal property passing under Georgia law rather than as real property passing under South Carolina law. Consequently, Wilkins believed the heir chart did not accurately reflect the percentages of ownership by Betty Byrd's heirs.

In its order, the probate court listed the names of S.W. Byrd's heirs and their percentages of ownership of the S.W. Byrd Farm. The probate court found no interested party had timely notified McDonald's counsel of a desire to purchase the S.W Byrd Farm. The probate court also found physical partition of the property was impractical and ordered the property to be sold at auction. Finally, the probate court found, pursuant to section 15-61-110, McDonald was entitled to reimbursement of his attorney's fees and costs incurred in bringing the action. On appeal, the circuit court affirmed the probate court's order. This appeal followed.

STANDARD OF REVIEW

"A proceeding in probate court may either be an action at law or in equity." *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). "Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." *Id*. "When a probate court proceeding is an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005). "Questions of law, however, may be decided with no particular deference to the lower court." *Id*. at 350, 618 S.E.2d at 886. "The question of subject matter

[1] *See* S.C. Code Ann. § 62-3-108 (2009 & Supp. 2015) (establishing, subject to certain exceptions, a time limitation of ten years after a decedent's death for commencement of any proceeding to determine whether a decedent died testate or for commencing administration of the decedent's estate).

jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007).

LAW/ANALYSIS

A. Percentages of Ownership

Appellants argue the probate court erred in treating Betty Byrd's percentage of ownership as personal property rather than as realty. According to Appellants, the percentages listed in the heir chart—and adopted by the probate court—improperly treated Betty Byrd's interest in the S.W. Byrd Farm as if it passed as personal property under Georgia law.

We agree with Appellants that South Carolina law governed the descent of Betty Byrd's interest in the S.W. Byrd Farm. *See Stent v. McLeod's Ex'rs*, 7 S.C. Eq. 354, 355 (S.C. App. L. & Eq. 1827) (stating real estate descends according to the law of the state in which the land lies). However, no evidence was presented that the probate court treated Betty Byrd's interest in the S.W. Byrd Farm as personal property passing under Georgia law. At trial, the parties referenced the heir chart that set forth their percentages of ownership in the S.W. Byrd Farm. We cannot assess Appellants' assertion that the percentages listed in the heir chart were incorrect because the heir chart was not admitted as an exhibit at trial and was not included in the Record on Appeal. *See* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal"); *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 214, 723 S.E.2d 597, 608 (Ct. App. 2012) (stating "the appellant has the burden of providing an adequate record on appeal"). Accordingly, because the Record on Appeal does not support Appellants' argument, we affirm the probate court's determination of the heirs and their percentages of ownership.

B. Subject Matter Jurisdiction

Appellants argue the probate court lacked subject matter jurisdiction over the partition action. We agree.

"[T]he extent of the probate court's jurisdiction is defined by our legislature." *Judy v. Judy*, 393 S.C. 160, 169, 712 S.E.2d 408, 412 (2011). The version of section 62-

1-302(a)(1) of the South Carolina Code in effect at the time of trial described the probate court's jurisdiction as follows:

> To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to . . . *estates of decedents*, *including the . . . determination of heirs and successors of decedents* . . . .

S.C. Code Ann. § 62-1-302(a)(1) (2009) (emphases added) (amended by 2013 Act. No. 100, § 1, effective Jan. 1, 2014).

Concerning partition actions filed in probate court, "[w]hen two or more heirs or devisees are entitled to distribution of undivided interests in any . . . real property of the estate, . . . one or more of the heirs or devisees may petition the court *prior to the closing of the estate*, to make partition." S.C. Code Ann. § 62-3-911 (Supp. 2012) (emphasis added) (amended by 2013 Act No. 100, § 1, effective Jan. 1, 2014).

Regarding the circuit court's jurisdiction over partition actions, section 15-61-50 of the South Carolina Code (2005) provides as follows:

> The court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties.

We find the probate court lacked subject matter jurisdiction over the partition action.[2] Section 62-1-302 did not provide the probate court with subject matter

[2] We address this issue even though Appellants did not raise it to the circuit court because lack of subject matter jurisdiction can be raised at any time. *See Ex parte*

jurisdiction because this case involved a partition action and section 62-1-302 does not give the probate court jurisdiction over partition actions; rather, section 62-1-302 merely gives the probate court subject matter jurisdiction over the estates of decedents.

In addition, section 62-3-911 did not provide the probate court with subject matter jurisdiction over the partition action because the estate of S.W. Byrd was closed in 1948 and section 62-3-911 authorizes subject matter jurisdiction over partition actions only while the estate remains open. Appellants presented to the probate court uncontested evidence that S.W. Byrd's estate was closed in 1948. Specifically, Appellants presented an order stating, "[T]he Petitioner is from henceforth and forever discharged and dismissed from all liability as Administrator of the foresaid . . .[sic]." The probate court looked at the document and said, "It didn't get copied, but that's that. All right."[3] By this statement, the probate court indicated the order was, as Appellants asserted, an order closing S.W. Byrd's estate. Further, at oral argument before this court, Appellants' attorney stated S.W. Byrd's estate was closed in 1948, and McDonald's attorney did not contest that assertion. Accordingly, we find the probate court lacked subject matter jurisdiction over this partition action.

The circuit court has subject matter jurisdiction over the trial of this partition action, and any further action in this matter should be brought in the circuit court.

C. Remaining Issues Raised on Appeal

Because we find the probate court lacked subject matter jurisdiction over this partition action, we need not address the remaining issues Appellants raise on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

Cannon, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) ("Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court.").

[3] This order was not included in the Record on Appeal.

CONCLUSION

For the foregoing reasons, we affirm the probate court's determination of S.W. Byrd's heirs and their percentages of ownership of the S.W. Byrd Farm. However, because the probate court lacked subject matter jurisdiction over the partition action, the probate court's order is vacated as to the remaining issues.

AFFIRMED IN PART, VACATED IN PART.

KONDUROS, J., and FEW, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Protection and Advocacy for People with Disabilities, Inc., Appellant,

v.

Beverly A. H. Buscemi, Ph.D., in her official capacity as State Director, South Carolina Department of Disabilities and Special Needs and The South Carolina Department of Disabilities and Special Needs, and Kelly Hanson Floyd, Nancy Banov, W. Robert Harrell, Rick Huntress, Deborah McPherson and Dr. Otis Speight in their Official Capacities as Members of the Department of Disabilities and Special Needs Commission, Respondents.

Appellate Case No. 2015-000109

Appeal From Richland County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5410
Heard April 19, 2016 – Filed June 8, 2016

AFFIRMED

Anna Maria Darwin, of Protection & Advocacy for People with Disabilities, Inc., of Greenville; Thornwell Simons, of Protection & Advocacy for People with Disabilities, Inc., of Columbia; Reid T. Sherard and David Curry Dill, both of Nelson Mullins Riley &

Scarborough, LLP, of Greenville; and Phillips Lancaster McWilliams, of Nelson Mullins Riley & Scarborough, LLP, of Columbia; for Appellant.

William H. Davidson, II and Kenneth P. Woodington, both of Davidson & Lindemann, PA, of Columbia, for Respondents.

HUFF, A.C.J.: Protection and Advocacy for People with Disabilities, Inc. (P&A) brought this declaratory judgment action against the Department of Disabilities and Special Needs, as well as the Department's Director, Beverly A. Buscemi, Ph.D., and members of the Department's Commission (collectively, DDSN) seeking an order requiring DDSN to allow P&A access to medical information and records, including Medication Administration Records (MARs), of residents of Community Training Home (CTH) facilities housing developmentally disabled persons. From an order of the trial court dismissing the action, P&A appeals, asserting the trial court erred in (1) not giving effect to the statutorily authorized review of "plans of care" during Team Advocacy inspections, (2) interpreting S.C. Code Ann. § 43-33-350 to prevent P&A from conducting proper inspections as required by statute, (3) refusing to afford deference to P&A's interpretation of the term "plans of care," and (4) ignoring South Carolina public policy in preventing P&A from inspecting documents to protect the State's most vulnerable citizens. Upon examination of the relevant statutes, we find it is the clear intent of the General Assembly not to permit P&A to review individual medical records in the course of unannounced inspections of the living conditions of the residential facilities and, therefore, affirm the trial court.

FACTUAL/PROCEDURAL BACKGROUND

P&A is a private, nonprofit corporation designated as South Carolina's protection and advocacy system for people with disabilities. As such, the General Assembly has provided P&A with certain powers and duties. S.C. Code Ann. § 43-33-310 to-400. At issue in this matter is P&A's authority to review personal medical records—particularly MARs—of CTH residents during P&A's statutorily authorized inspections of CTHs. In particular, the question presented is whether P&A's review of "plans of care" during an inspection, as provided in section 43-

33-350(4) of the South Carolina Code, includes the personal medical records of CTH residents.

As part of its function, P&A conducts team advocacy inspections of facilities housing individuals with disabilities. Initially, P&A focused its efforts on Community Residential Care Facilities (CRCFs), which are licensed by the South Carolina Department of Health and Environmental Control (SCDHEC). However, it decided it needed to expand its team advocacy inspections into CTHs, which are licensed and operated by DDSN. P&A sent DDSN notice of such in November 2007.

In 2009, P&A was ready to start inspecting CTHs and sent DDSN a letter on June 11, 2009, stating its intention to begin unannounced visits to CTH IIs.[1] In its unannounced inspections of CRCFs, P&A had not been prevented from reviewing medical records.[2] In an August 12, 2009 letter to P&A, DDSN stated it supported the efforts of P&A to review living conditions; however, it further stated it did not agree team advocacy inspections of living conditions could involve the review of medical records. P&A sought to look at documents in CTHs concerning medical care in general, as well as MARS,[3] in part to ensure the residents were properly provided services involving food and medicine and were protected from neglectful

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[1] There are two types of community training homes. In CTH Is, caregivers are trained private citizens who provide care in their own homes to, generally, no more than two individuals. CTH IIs have trained staff who provide 24-hour supervision, personal care, and training in a homelike environment for no more than four people.

[2] CRCFs are under a different licensing scheme than CTHs, and unlike CTHs, P&A is under contract with the Department of Mental Health (DMH) to inspect CRCFs. DDSN, on the other hand, contracts with an organization designated by Medicare and Medicaid to perform quality assurance reviews, and each year every provider serving individuals with disabilities has an annual review.

[3] Neither P&A nor DDSN submitted any examples of MARs at trial. However, a P&A employee testified a MAR was a document that showed the names of the medications, when the medication was supposed to be administered, how it was to be taken, and boxes for staff at the home to initial when the medication was given based on the day of the week and the time of the day.

situations. DDSN and P&A disagreed over the interpretation of the term "plans of care" as set forth in section 43-33-350(4) of the South Carolina Code, and DDSN informed its contracted providers of its position that CTH II staff were to release only the residential treatment/support plan of a resident—which it considered the same as the plan of care—to the Team Advocacy coordinator. Thereafter, team advocates inspecting CTHs were informed they could not view medical records. P&A brought this action, seeking an order requiring DDSN to allow it access to CTH residents' medical records during inspections, including but not limited to MARs. P&A maintained it had the authority to view medical records of CTH residents during inspections, whether or not the residents or their legal guardians consented to such. It argued, under the statutory provision allowing it to review living conditions of these homes, including "plans of care," it had the right during its inspections to review the residents' medical records, in particular MARs. DDSN, on the other hand, contended the statutes do not allow P&A to view medical records of the residents during inspections, asserting that MARs and other medical records are records and not plans, the General Assembly has excluded the review of residents' private medical records during inspections, and the inability to review medical records has not stripped P&A of its ability to inspect living conditions.

The trial court, sitting without a jury, concluded P&A does not have authority to review the medical records of CTH residents during its statutorily authorized inspections of living conditions in the homes and dismissed P&A's action with prejudice. This appeal followed.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, and the standard of review for such action is determined by the nature of the underlying issue. *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). "Interpretation of a legislative enactment is a question of law." *Edwards v. State Law Enf't Div.*, 395 S.C. 571, 575, 720 S.E.2d 462, 464 (2011). "In a case raising a novel question of law, [the appellate court] is free to decide the question with no particular deference to the lower court." *Id.*; *see also Sloan v. Greenville Hosp. Sys.*, 388 S.C. 152, 157, 694 S.E.2d 532, 534-35 (2010) (providing statutory interpretation is a question of law for the court, which the appellate court may decide without deference to the trial court).

LAW/ANALYSIS

Pursuant to section 43-33-310, P&A was permanently established as an eleemosynary corporation to exercise protection and advocacy functions for the developmentally disabled and all other handicapped citizens of South Carolina. S.C. Code Ann § 43-33-310 (2015). An overview of sections 43-33-310 to-400 reveals the powers and duties of P&A as authorized by the General Assembly, including the circumstances under and manner in which P&A is allowed to carry out those duties. In particular, section 43-33-350 sets forth the powers and duties of P&A, which include in pertinent part as follows:

> (1) It shall protect and advocate for the rights of all developmentally disabled persons . . . and for the rights of other handicapped persons by pursuing legal, administrative, and other appropriate remedies to insure the protection of the rights of these persons.
>
> (2) It may investigate complaints by or on behalf of any developmentally disabled or handicapped person.
>
> (3) It may establish a priority for the delivery of protection and advocacy services according to the type, severity, and number of handicapping conditions of the person making a complaint or on whose behalf a complaint has been made.
>
> (4) It may conduct team advocacy inspections of a facility providing residence to a developmentally disabled or handicapped person. Inspections must be completed by the system's staff and trained volunteers. *Team advocacy inspections are unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals* in a residential care facility and a community mental health center day program. Only the coordinator of the team advocacy project or the coordinator's designee is authorized to perform reviews of plans of care.

S.C. Code Ann. § 43-33-350 (2015) (emphasis added).

In cases involving written requests to investigate a complaint signed by a resident, his parent, his legal guardian or a state agency, or complaints of abuse or threat of abuse involving circumstances in which the resident is not capable of giving informed consent and does not have a parent or legal guardian to sign a request on his behalf, P&A may take actions including, but not limited to, as follows:

> (1) Interview any member of the staff of the program or facility which is providing or did provide treatment, services or habilitation to the person making the complaint or on whose behalf the complaint is made.
>
> (2) Inspect and copy any documents, records, files, books, charts or other writings which are maintained in the regular course of business by the program or facility and which bear upon the subject matter of the individual complaint, *except for the individual medical, treatment or other personal records of other persons* in the program or facility.

S.C. Code Ann. § 43-33-370 (2015) (emphasis added).

Finally, our statutes require that certain representatives of the state cooperate with P&A in carrying out its duties, including allowing the inspection and copying of any documents provided for in section 43-33-370(2), stating as follows:

> All departments, officers, agencies and institutions of the State shall cooperate with [P&A] in carrying out its duties. Notwithstanding any other provision of law, all departments, officers, agencies and institutions of the State may, on the behalf of a developmentally disabled or handicapped person, request [P&A] to provide protection and advocacy services. Notwithstanding any other provision of law, any program or facility shall permit [P&A] to inspect and copy *any record or documents provided for in 43-33-370(2)*.

S.C. Code Ann. § 43-33-400 (2015) (emphasis added).

The trial court found P&A is not authorized, pursuant to section 43-33-350(4), to review the medical records—including MARs—of CTH residents during its unannounced inspections. We agree. Specifically, we hold a review of the entire protection and advocacy statutory scheme makes it clear the General Assembly intended not to authorize P&A to review individual medical records in the course of inspecting the living conditions of the residential facilities.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Perry v. Bullock*, 409 S.C. 137, 140,761 S.E.2d 251, 253 (2014) (quoting *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000)). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *S.C. Prop. & Cas. Ins. Co. Guar. Ass'n v. Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) (quoting *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). "The plain language of a statute is considered the best evidence of the legislature's intent." *Perry*, 409 S.C. at 140, 761 S.E.2d at 253. "When interpreting an undefined statutory term, the Court must look to its usual and customary meaning." *Id.* at 140-41, 761 S.E.2d at 253.

> In interpreting a statute, [w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and *sections which are a part of the same general statutory law must be construed together and each one given effect*. Accordingly, we read the statute as a whole and should not concentrate on isolated phrases within the statute.

Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (alteration in original) (emphasis added) (citations omitted). "Statutes which are part of the same legislative scheme should be read together." *Great Games, Inc. v. SC Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000). *See also Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("[S]tatutes are to be construed with reference to the whole system of law of

which they form a part."). "When interpreting a statute, courts must presume the legislature did not intend to do a futile act." *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous. . . ." *Id.* (quoting *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999). Further, "[i]n construing a statute, this Court is constrained to avoid an absurd result." *Roche*, 332 S.C. at 81, 504 S.E.2d at 314.

Viewing P&A's enabling statutes under these statutory rules of construction, we find it is the clear intent of the General Assembly to exclude medical records—including MARs—from Team Advocacy inspections authorized by section 43-33-350(4). "Plans of care" is an undefined term in the statute. Thus, we must interpret the term in accordance with its usual and customary meaning. *Perry*, 409 S.C. at 140-41, 761 S.E.2d at 253. Additionally, we must construe this statute in reference to other statutes that are part of the same legislative scheme. *Great Games Inc.*, 339 S.C. at 84, 529 S.E.2d at 8; *Roche*, 332 S.C. at 81, 504 S.E.2d at 314. We must read the statute as a whole, and "sections which are a part of the same general statutory law must be construed together and each one given effect." *Centex Int'l, Inc.*, 406 S.C. at 139, 750 S.E.2d at 69. Finally, we must eschew a statutory construction that would have the effect of reading a provision out of a statute, and must also avoid an absurd result in construction of the statute. *Steinke*, 336 S.C. at 396, 520 S.E.2d at 154; *Roche*, 332 S.C. at 81, 504 S.E.2d at 314.

We recognize, as P&A stresses, that the purpose behind enactment of the statutory scheme is the protection and advocacy of persons with developmental disabilities and other handicaps. *See Brock*, 410 S.C. at 367, 764 S.E.2d at 922 (2014) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quoting *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002))). Nonetheless, the means with which P&A has been empowered to achieve that end are not unfettered. Rather, the General Assembly placed limitations on P&A's authority in that regard. Section 43-33-370 explicitly limits the inspection of "individual medical, treatment or other personal records" by P&A to those of a resident upon whose behalf a proper complaint requesting

investigation has been received. S.C. Code Ann. § 43-33-370(2) (2015). We are unpersuaded by P&A's assertion that its authority under the Team Advocacy inspection provision is distinct from its authority to investigate complaints such that limitations on its authority to inspect medical records under section 43-33-370(2) should not apply to its authority to review plans of care under section 44-33-350(4). To accept this proposition would render the limitation of inspection of such records in section 44-33-370(2) meaningless and would lead to an absurd result, as P&A could simply announce during an investigation of a complaint pursuant to section 44-33-370 that it was making an unannounced inspection pursuant to section 44-33-350(4), thereby entitling it to review the individual medical records of non-complaining residents—which is explicitly prohibited by section 43-33-370. Thus, we hold section 44-33-350(4), read in conjunction with section 43-33-370(2), evinces a clear intent on the part of the General Assembly to exclude the right to review the personal medical records of developmentally disabled and handicapped persons from P&A's authority to view documents setting forth the plans of care of these persons during its unannounced inspections of facilities housing them.[4]

While we appreciate the concerns expressed by P&A regarding its ability to protect the State's most vulnerable citizens, we find the legislative intent clear that medical records—including MARs— are to be excluded from review during unannounced team advocacy inspections. As stated by the trial court, while no one would disagree with the worthiness of the broad goals expressed by P&A, these residents—like other citizens—are entitled to a level of privacy in regard to their medical records, and the General Assembly has not deemed it appropriate to make the medical records of the residents in question available for review to P&A during its Team Advocacy inspections. *See Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015) (holding the primary source of the declaration of public policy in this state is the General Assembly, and our courts assume this prerogative only in the absence of legislative declaration); *Nationwide Mut. Ins.*

[4] We further agree with the trial court that the General Assembly apparently provided for such limited review of medical records under these statutes in recognition of the need for privacy as to medical records on the part of disabled individuals. Additionally, as noted by the trial court, though section 43-33-400 allows the inspection of medical records by P&A, this section specifically limits it to instances in which review is allowed pursuant to section 43-33-370(2).

Co. v. Rhoden, 398 S.C. 393, 401 n.4, 728 S.E.2d 477, 481 n.4 (2012) ("If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by this Court must give way because '[t]he primary source of the declaration of the public policy of the state is the General Assembly[, and] the courts assume this prerogative only in the absence of legislative declaration.'" (alteration in original) (quoting *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925))). Accordingly, P&A's policy arguments are more properly addressed to the General Assembly.[5]

For the foregoing reasons, the order of the trial court is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

[5] Because we find, based upon analysis of the relevant statutes, it is the clear intent of the General Assembly to exclude from P&A's review individual medical records in the course of inspecting the living conditions of the residential facilities, we need not address the other issues raised on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, Appellant,

v.

City of Duncan, Respondent.

Appellate Case No. 2012-213499

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5411
Heard January 14, 2016 – Filed June 8, 2016

AFFIRMED

Gregg E. Meyers, of Jeff Anderson & Assoc. P.A., of Saint Paul, Minnesota, for Appellant.

William Harrell Foster, III, of Nelson Mullins Riley & Scarborough, LLP, of Greenville; Allen Mattison Bogan and Miles Edward Coleman, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Charles Franklin Turner, Jr., of Willson Jones Carter & Baxley, P.A., of Greenville; for Respondent.

LOCKEMY, J.: John Doe appeals the circuit court's decision to dismiss his action pursuant to Rules 3, 12(b)(1), and 12(b)(2), SCRCP. Doe argues the circuit court failed to apply the Servicemembers Civil Relief Act (the Act).[1] We affirm.

FACTS

On January 28, 2008, Doe filed a complaint against the City of Duncan (the City), asserting a cause of action for negligent supervision. In his complaint, Doe alleged he was sexually abused while participating in activities sponsored by the City's fire department. Doe acknowledged he failed to serve the City with the summons or complaint.

Over four years later on February 21, 2012, Doe filed an amended complaint in which he alleged the same cause of action as in the original complaint and added that the action was brought pursuant to the Act.[2] An affidavit of service, dated February 27, 2012, indicated the amended complaint was delivered to "Bridget Musteata[,] Town Clerk for Duncan Town." The City subsequently filed a motion to dismiss, arguing Doe failed to file and serve a summons with his original and amended complaints.

At the circuit court hearing on the motion to dismiss, the City acknowledged Doe served it with the amended complaint but stated Doe did not serve it with a summons. Conversely, Doe stated the amended summons was served on the City. The City also argued the merits of the case and stated Doe was taking inconsistent positions. Namely, the City asserted Doe argued the chief of the City's fire department was acting both in his individual capacity and in the course and scope of his employment. The circuit court dismissed the action, ruling (1) Doe filed a complaint in 2008 but failed to serve the City with the complaint within 120 days of its filing; (2) Doe failed to serve the City with the 2012 summons; (3) Doe failed to seek leave from the trial court to amend his complaint; (4) Doe failed to timely commence the action pursuant to Rule 3, SCRCP; and (5) the court lacked personal and subject matter jurisdiction over the City pursuant to Rules 3, 12(b)(1), and 12(b)(2), SCRCP. The circuit court's order did not mention the Act by name.

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[1] Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043 (previously 50 U.S.C. app. §§ 501-597(b) (2012 & Supp. II 2014)).

[2] During his military career (February 2003 and August 10, 2011), Doe served in the United States Army, the United States Army Reserve, and the United States Army National Guard.

On May 22, 2012, Doe filed an amended summons. An affidavit of service dated June 6, 2012, showed Doe served the summons to "Melody Millwood, Clerk of Court."

Doe subsequently filed a notice of appeal with this court. This court affirmed the circuit court in an unpublished opinion finding Doe's argument the circuit court erred in dismissing his action without applying the Act was not preserved for appellate review. *Doe v. City of Duncan*, Op. No. 2014-UP-400 (S.C. Ct. App. filed Nov. 12, 2014).

Thereafter, the supreme court granted Doe's petition for a writ of certiorari and held Doe's argument was preserved for appellate review. *Doe v. City of Duncan*, Op. No. 2015-MO-019 (S.C. Sup. Ct. filed Apr. 15, 2015). The court found "[a]lthough the circuit court judge did not specifically state he did not believe the Act applied in this case, he implicitly rejected [Doe]'s argument by finding the service was not timely." *Id.* The supreme court remanded to this court to rule on the merits of Doe's appeal. *Id.*

LAW/ANALYSIS

Doe argues the circuit court erred in dismissing his action without applying the Act. Specifically, Doe contends the Act preempts any state law time limits to file an action. We disagree.

Pursuant to Rule 3(a), SCRCP,

> [a] civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

The Act is "to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Murdock v. Murdock*, 338 S.C. 322, 330, 526 S.E.2d 241, 246 (Ct. App. 1999) (quoting *Boone v. Lightner*, 319 U.S. 561, 575 (1943)). The applicable section of the Act, entitled "Tolling of statutes of limitation during military service" states:

> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 U.S.C. § 3936(a).[3]

Doe contends the circuit court erred in dismissing his action without applying the Act. Although the circuit court did not specifically state it did not believe the Act applied in this case, it implicitly rejected Doe's argument by finding service was not timely. *See Doe*, Op. No. 2015-MO-019. Accordingly, this issue is preserved.

We find the language of section 3936(a) applies only to toll statutes of limitation for *bringing* a suit, not serving or amending a suit. Doe argues "the action by the [the Act] to suspend state law time limits necessarily includes the time provisions under SCRCP 3." Doe, however, does not cite any case law to support this argument. Other courts considering this issue have held the opposite, namely that once a suit is filed, section 3936(a) does not toll or extend any subsequent calculations of time such as the time in which to serve the defendant or the duty to prosecute a case. *See, e.g.*, *Zitomer v. Holdsworth*, 449 F.2d 724, 726 (3d Cir. 1971) (affirming the trial court's dismissal of a suit for failure to prosecute and noting the Act's tolling provision "simply tolls the statute of limitations during the period of military service and has no applicability to an action duly filed and served within the applicable statute of limitations"); *Zarlinsky v. Laudenslager*, 167 A.2d 317, 320 (Penn. 1961) (noting the Act's tolling provision "expressly applies to the limitation of time for *bringing* an action, not to a limitation of time for the continuing of process in an action already brought and avails the plaintiffs nothing"); *Thornley v. Superior Court in & for City & Cty. of San Francisco*, 201 P.2d 567, 568 (Cal. Ct. App. 1949) ("There is nothing in section 525 of the federal act which purports to suspend this mandatory requirement of service. Respondent argues that the word 'proceeding' in section 525 of the federal act should be construed as applying to the service of summons or any other procedural step taken

[3] 50 U.S.C. § 3936(a) was previously cited as 50 U.S.C. app. § 526(a).

in the prosecution of the action. This is not sound."); *Puchek v. Elledge*, 160 F. Supp. 286, 287 (N.D. Ind. 1958) (noting the Act has no relation to service of process); *see also* 36 A.L.R. Fed. 420, § 12 (1978) ("The tolling provision of the [the Act] (50 App. U.S.C.A. § 525) is not applicable to, and cannot prevent the running of, time limitations governing the service of process in, or the prosecution of, actions already brought.").

In sum, we hold the Act's tolling provision applies only to toll statutes of limitations for *bringing* a suit. It does not apply to subsequent procedural timelines such as service of process. When, as here, a servicemember chooses to file suit during his time of military service, he cannot later rely solely on the Act to excuse his four-year delay in serving the defendant and prosecuting the action.

We further find the circuit court properly dismissed Doe's action because he did not serve the City or amend the complaint within the applicable statutory time period. We disagree with Doe's assertion the applicable statute of limitations is the time period set forth in section 15-3-555 of the South Carolina Code.[4] Rather, because Doe's suit is against the City and his sole cause of action alleges negligence by the fire chief and other fire department officials, the suit is pursuant to the South Carolina Tort Claims Act (SCTCA). *See* S.C. Code Ann. § 15-78-70(a) (2005) (stating the SCTCA is "the exclusive remedy for any tort committed by an employee of a governmental entity"); S.C. Code Ann. § 15-78-200 (stating the SCTCA "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty"); *Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 70-71, 651 S.E.2d 305, 309 (2007) (noting a negligent supervision claim against the school district involving sexual abuse committed by a third party was brought pursuant to the SCTCA).

The SCTCA imposes a two-year statute of limitations on any action brought against the State or a subdivision thereof. *See* S.C. Code Ann. § 15-78-110 (2005). Because Doe's cause of action for negligent supervision allegedly occurred while he was a minor, the SCTCA's statute of limitations did not begin to run until his

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[4] Pursuant to section 15-3-555(A), "[a]n action to recover damages for injury to a person arising out of an act of sexual abuse or incest must be commenced within six years after the person becomes twenty-one years of age or within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse or incest, whichever occurs later." S.C. Code Ann. § 15-3-555(A) (2005).

eighteenth birthday. *See* S.C. Code Ann. §§ 15-78-110 and 15-3-40 (2005). Accordingly, the statute began to run in February 2004.[5]

Doe enlisted in the military prior to the time the statute of limitations began to run for bringing a suit, and as noted above, the Act's tolling provision tolls the statute of limitations during a plaintiff's military service. The Act, however, tolls the running of the statute only during periods of *active* duty. *See* 50 U.S.C. § 3911(2), (defining "military service" as "active duty"); *Boone v. United States*, 78 Fed. Appx. 108, 110-11 (Fed. Cir. 2003) (noting the Act's tolling provision applies only to time in active duty); *Lazarski v. Archdiocese of Phila.*, 926 A.2d 459, 469 (Pa. Super. Ct. 2007) (noting that a plaintiff servicemember's non-active duty time in the military did not toll the state statute of limitations on his sexual abuse claim because "the [Act] expressly points to 'active duty' as the touchstone activating its tolling provisions . . . . There are gaps in appellant's active duty status . . . . As a result, because appellant has undisputed periods of inactive duty, the tolling provision of the [Act] would not apply to those dates").

During his military career (February 2003 to August 10, 2011), Doe served in the Army, the Army Reserve, and the Army National Guard. During that time, he was on active duty for a total of five years, eleven months, and fourteen days.[6] The statute began to run on Doe's eighteenth birthday, which occurred on an unknown day in February of 2004. Assuming it began to run on February 29, five months and twenty-one days had expired by the time Doe reached active duty status on August 19, 2004. The clock began to run again during Doe's first hiatus from

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[5] Doe was born in February 1986. His actual birth date is not in evidence.

[6] Normally, proof of military service, including periods of active duty service, are listed on Defense Department Form 214 (DD 214). Here, a DD 214 is not in the record. Instead, the record contains National Archives and Records Administration (NA) Form 13164, which extracts certain information from the DD 214. The NA 13164 indicates Doe's total term of service in the United States Army, Army Reserve, and Army National Guard was approximately eight years and seven months (we note although Doe's exit from service is listed as August 10, 2011, his entry date is listed only as February 2003). Service in the Army Reserve and National Guard do not necessarily require active duty service. The NA 13164 reflects Doe's tours of active duty. It also indicates his duty assignments, military education, and awards received as well as his discharge rank of Private. Although Doe's name on the form is redacted, neither party disputes it accurately represents Doe's military service.

active duty (October 8, 2004, to February 10, 2005), which allowed another four months and two days to expire. The clock resumed during Doe's second period of inactive duty (May 23, 2006, to January 29, 2007), during which another eight months and six days expired. The clock began to run again when Doe left military service on August 10, 2011.

The SCTCA's two-year statute of limitations on Doe's cause of action expired on February 11, 2012, at which point the window of time closed to serve the summons and complaint. Because neither document had been served on the City by that date, Doe failed to commence a civil action and dismissal was warranted. *See* S.C. Code Ann. § 15-3-20(B) (2005) ("A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing."); *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848 850-51 (1996) (affirming dismissal when plaintiff failed to serve the summons and complaint); *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming dismissal when defendant was not served with a summons); *see also Louden v. Moragne*, 327 S.C. 465, 468-69, 486 S.E.2d 525, 526-27 (Ct. App. 1997) (affirming trial court's grant of summary judgment when plaintiff failed to serve the summons within the statute of limitations).

Additionally, as a result of Doe's failure to commence a civil action, no suit existed in which an amended complaint could be filed. Rule 15(a), SCRCP, provides:

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

The plain language of Rule 15(a) allows an amendment only of a pleading that has been served. Doe failed to serve the 2008 summons and complaint. Accordingly, we find, pursuant to Rule 15, SCRCP, Doe's service of the February 2012 amended complaint was a nullity.

CONCLUSION

The circuit court's dismissal of Doe's action is

AFFIRMED.

KONDUROS, J., and FEW, A.J., concur.