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**2024 SC BAR CONVENTION**

**Trial & Appellate Advocacy Section**

**Friday, January 19**

Civil Law Update

*Scott Bauries*

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

The Kitchen Planners, LLC, Petitioner,

v.

Samuel E. Friedman and Jane Breyer Friedman and  
Branch Banking and Trust, Respondents.

Appellate Case No. 2020-001669

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Richland County  
Robert E. Hood, Circuit Court Judge

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Opinion No. 28173  
Submitted April 17, 2023 – Filed August 23, 2023

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**AFFIRMED AS MODIFIED**

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Christopher P. Kenney, of Columbia, Petitioner.<sup>1</sup>

Charles A. Krawczyk, of Finkel Law Firm LLC, of  
Columbia for Respondents.

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<sup>1</sup> Petitioner's brief was prepared and filed by the late Jean Perrin Derrick of Lexington prior to her unfortunate death in January, just as this Court was initially preparing to consider this case.

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**JUSTICE FEW:** The Kitchen Planners, LLC, filed a petition for a writ of certiorari asking this Court to review the court of appeals' decision in *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020). In that decision, the court of appeals affirmed the circuit court's order granting summary judgment to the Friedmans and dissolving Kitchen Planners' mechanic's lien. We granted Kitchen Planners' petition in part and now affirm as modified. As we will explain, the court of appeals incorrectly applied the wrong standard of decision for a motion for summary judgment when the motion is based on insufficiency of the evidence. Reviewing the circuit court's order using the correct standard of decision, however, we nevertheless find the court of appeals reached the correct result in affirming the summary judgment.<sup>2</sup>

The court of appeals' opinion contains an exhaustive recitation of the facts. 432 S.C. at 271-74, 851 S.E.2d at 726-28. Of importance, the Friedmans contracted with Kitchen Planners to procure cabinets manufactured by Crystal Cabinets and install the cabinets in the Friedmans' home. When Kitchen Planners delivered the cabinets, the Friedmans refused to accept them and refused to pay the final one-third of the contract price. Kitchen Planners attempted to perfect its mechanic's lien<sup>3</sup> by serving on the Friedmans "a statement of a just and true account of the amount due" as required by section 29-5-90 of the South Carolina Code (2007). Kitchen Planners then filed this action to enforce the lien.

The Friedmans filed a motion for summary judgment contending Kitchen Planners failed to perfect its lien because it did not serve the section 29-5-90 "statement"

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<sup>2</sup> We find "oral argument would not aid the court in resolving the issues" before us and thus consider this case without oral argument pursuant to Rule 215, SCACR.

<sup>3</sup> A mechanic's lien arises automatically from the performance of work or the provision of materials. *See* S.C. Code Ann. § 29-5-10(a) (2007) ("A person to whom a debt is due for labor performed or furnished or for materials furnished . . . in the erection, alteration, or repair of a building or structure upon real estate . . . shall have a lien upon the building or structure . . . to secure the payment of the debt due to him."); S.C. Code Ann. § 29-5-20(A) (2007) ("Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon . . . to the value of the labor or material so furnished . . .").

within ninety days as required by the section. *See id.* ("Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner . . . a statement of a just and true account of the amount due . . ."). The circuit court agreed and granted the motion for summary judgment.<sup>4</sup>

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment "if the [evidence before the court] show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To survive the Friedmans' motion, Kitchen Planners was required by Rule 56(c) to present evidence that it perfected its lien by serving the section 29-5-90 statement on the Friedmans "within ninety days after [Kitchen Planners] cease[d] to labor on or furnish labor or materials for such building or structure." § 29-5-90. Sufficient evidence that Kitchen Planners timely served the statement would have established a "genuine issue [of] material fact" as to whether it perfected the lien. Whether Kitchen Planners presented sufficient evidence to create a genuine issue of material fact that it met the ninety-day deadline for serving the section 29-5-90 statement is the sole issue before the Court.

The following dates are important. The cabinets were delivered to the Friedmans' home on May 20, 2015. Kitchen Planners' sole member—Patricia Comose—accompanied an installer to the Friedmans' home on May 21 for the purpose of installing the cabinets. The cabinets were not installed. On June 18, a Crystal Cabinets representative informed Comose the Friedmans did not want Comose involved any further. According to Comose, "In mid-June 2015 I was taken off the job." On August 18, the Crystal Cabinets representative emailed Comose telling her Crystal Cabinets had also been removed from the job. "We've been fired," the email stated, "Everything is done." On September 29, Comose wrote a check for \$550.61 to pay for parts of the cabinets she ordered on an unknown previous date. Kitchen Planners served the section 29-5-90 statement on the Friedmans on November 17, 2015. Ninety days before November 17 is August 19.

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<sup>4</sup> The court of appeals addressed issues other than timeliness. However, none of those issues were necessary for the court of appeals to address to affirm the order granting summary judgment. In light of our holding the circuit court properly granted the Friedmans' motion for summary judgment on the ground Kitchen Planners did not serve the section 29-5-90 statement within ninety days, and thus did not perfect its lien, we also need not address any other issues.

In the section of its opinion entitled "Standard of Review," the court of appeals stated, "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." 432 S.C. at 275, 851 S.E.2d at 729 (alteration in original) (quoting *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). As we explain below, Comose's statement she wrote a check on September 29 to pay for parts of the Friedmans' cabinets is a scintilla of evidence the November 17 service of the section 29-5-90 statement was "within ninety days after [Kitchen Planners] cease[d] to labor on or furnish labor or materials." Applying the so-called "mere scintilla" standard, therefore, the court of appeals should have reversed the order granting summary judgment. As we now clarify, however, the "mere scintilla" standard is not the correct standard for decision under Rule 56(c).

Rule 56(c) became effective in 1985. Rule 86(a), SCRCP.<sup>5</sup> In most cases applying Rule 56(c), this Court and our court of appeals have applied the "genuine issue of material fact" standard set forth in the Rule, requiring the party opposing the motion show a "reasonable inference" to be drawn from the evidence, and we have rejected the "mere scintilla" standard. *See, e.g., Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006) (reversing an award of summary judgment and stating "the evidence is susceptible to more than one reasonable inference, and therefore should be submitted to the jury"); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219 n.4, 578 S.E.2d 329, 334 n.4 (2003) ("The standard for summary judgment 'mirrors the standard for a directed verdict under Rule 50(a)' [SCRCP]."<sup>6</sup> (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991))); *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545 (holding a party opposing summary judgment "must . . . 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89

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<sup>5</sup> *See also* Rule 44, *Rules of Practice for the Circuit Courts of South Carolina*, 1962 S.C. Code Ann., Vol. 15 (Supp. 1975) (adopted 1969; repealed 1985) (stating the "genuine issue [of] material fact" standard for summary judgment motions based on insufficiency of the evidence).

<sup>6</sup> The standard for directed verdict under Rule 50(a) requires the evidence support a "reasonable inference" in favor of the non-moving party. *Mullinax v. J.M. Brown Amusement Co.*, 333 S.C. 89, 92, 508 S.E.2d 848, 849 (1998).

L. Ed. 2d 538, 552 (1986));<sup>7</sup> *Shelton v. LS & K, Inc.*, 374 S.C. 294, 297, 648 S.E.2d 307, 308 (Ct. App. 2007) ("The existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." (citing *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994))); *Dickert v. Metro. Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1991), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993) (stating "the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment" (citing *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214)).<sup>8</sup> *But see Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 408 (Ct. App. 1992) ("At the summary judgment stage of the proceeding, it was only necessary for the Defendant to submit a scintilla of evidence warranting a determination by the jury." (citing nothing)).

In 2009 in *Hancock*, however, this Court made the statement quoted by the court of appeals in this case, "that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." 381 S.C. at 330, 673 S.E.2d at 803. In other cases even after *Hancock*, we continued to impose the "genuine issue of material fact" and "reasonable inference" standard that appears inconsistent

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<sup>7</sup> The *Baughman* Court also cited *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986). 306 S.C. at 115, 410 S.E.2d at 545. In *Anderson* and *Matsushita*, the Supreme Court of the United States rejected the "mere scintilla" standard for Rule 56, Fed. R. Civ. P., *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, and held "the issue of fact must be 'genuine,'" meaning "the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*,'" *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (quoting Rule 56, Fed. R. Civ. P.).

<sup>8</sup> In *Dickert*, the court of appeals found "the circuit court correctly decided this issue" and "direct[ed] the circuit court's order to be printed, with minor deletions, as the opinion of this Court." 306 S.C. at 313, 411 S.E.2d at 673. We find it significant that the circuit judge whose order became the opinion of the court of appeals was retired Chief Justice C. Bruce Littlejohn, sitting by designation as a special circuit judge. Chief Justice Littlejohn served as Chief Justice of this Court in January 1985 when the Court submitted the new Rules of Civil Procedure—including Rule 56(c)—to the General Assembly. Bruce Littlejohn, *LITTLEJOHN'S HALF CENTURY AT THE BENCH AND BAR* (1936-1986) 168 (1987).



with the "mere scintilla" standard *Hancock* purported to set. See *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (stating as to the summary judgment standard "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine"); see also *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022) (stating as to a motion for summary judgment, "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." (quoting *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002))); *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) (same); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (reciting the "mere scintilla" standard from *Hancock*, but stating, "Nevertheless, 'when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted.'" (quoting *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997))).

We acknowledge there may be disagreement as to whether the "mere scintilla" standard is inconsistent with the Rule 56(c) "genuine issue [of] material fact" standard. See *Taylor v. Atl. Coast Line R. Co.*, 78 S.C. 552, 556, 59 S.E. 641, 643 (1907) ("A *scintilla* of evidence is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror."). The position that the two standards are the same would explain this Court's recitation of both at various times since 1985. In the minds of many, however, the standards are inconsistent. See *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214 (rejecting the mere scintilla standard for Rule 56, Fed. R. Civ. P., and stating, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff"); see also *Bethea v. Floyd*, 177 S.C. 521, 529, 181 S.E. 721, 724 (1935) ("Saying that there 'may be a *scintilla* of evidence' to go to the jury . . . is certainly a very weak contention. 'Scintilla' means. . . 'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.'" (quoting 56 Corpus Juris 863-64 (1932))); *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 95, 588 S.E.2d 87, 92 (2003) (Burnett, J., dissenting) ("A scintilla is defined as 'a trace' of evidence." (quoting *Scintilla*, BLACK'S LAW DICTIONARY (7th ed. 1999))).

We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact

that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166. To the extent what we said in *Hancock* is inconsistent with our decision today, *Hancock* is overruled.

Turning back to the evidence Kitchen Planners presented in this case, and analyzing that evidence using the proper standard for decision, we find Kitchen Planners failed to show the existence of a genuine issue of material fact. Kitchen Planners served the section 29-5-90 statement on November 17. The only event within ninety days before November 17 is the September 29 check Comose wrote to pay for cabinet parts she previously ordered. Ordering parts for the cabinets may very well qualify as "to labor on or furnish labor or materials for" under section 29-5-90, and if that event occurred within ninety days of serving the section 29-5-90 statement, the statement would have been timely and the lien perfected. Writing a check to pay for parts previously ordered, however, does not qualify as "to labor on or furnish labor or materials for." While the writing of the check on September 29 is some evidence—a scintilla—of when she ordered the parts, it does not provide a meaningful factual basis on which a factfinder could determine if the parts were ordered within or before the ninety-day time frame. Comose specifically testified she did not remember why she wrote the check on September 29, and she did not know the date the parts were ordered. The writing of the check on September 29 does not create a reasonable inference that she ordered the parts within ninety days of the service of the section 29-5-90 statement. Thus, the factfinder would be required to speculate to determine whether Kitchen Planners perfected its lien in a timely manner. Under this circumstance, Kitchen Planners failed to establish a genuine issue of material fact, and the Friedmans were entitled to summary judgment as a matter of law.

**AFFIRMED AS MODIFIED.**

**BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.**

**THE STATE OF SOUTH CAROLINA**  
**In The Supreme Court**

Planned Parenthood South Atlantic, on behalf of itself, its patients, and its physicians and staff; Katherine Farris, M.D., on behalf of herself and her patients; Greenville Women's Clinic, on behalf of itself, its patients, and its physicians and staff; and Terry L. Buffkin, M.D., on behalf of himself and his patients, Respondents,

v.

State of South Carolina; Alan Wilson, in his official capacity as Attorney General of South Carolina; Edward Simmer, in his official capacity as Director of the South Carolina Department of Health and Environmental Control; Anne G. Cook, in her official capacity as President of the South Carolina Board of Medical Examiners; Stephen I. Schabel, in his official capacity as Vice President of the South Carolina Board of Medical Examiners; Ronald Januchowski, in his official capacity as Secretary of the South Carolina Board of Medical Examiners; George S. Dilts, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Dion Franga, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Richard Howell, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Robert Kosciusko, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Theresa Mills-Floyd, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Jennifer R. Root, in her official capacity as a Member of the South Carolina Board of Medical Examiners; Christopher C. Wright, in his official capacity as a Member of the South Carolina Board of Medical Examiners; Samuel H. McNutt, in his official capacity as Chairperson of the South Carolina Board of Nursing; Sallie Beth Todd, in her official capacity as Vice

Chairperson of the South Carolina Board of Nursing; Tamara Day, in her official capacity as Secretary of the South Carolina Board of Nursing; Jonella Davis, in her official capacity as a Member of the South Carolina Board of Nursing; Kelli Garber, in her official capacity as a Member of the South Carolina Board of Nursing; Lindsey K. Mitcham, in her official capacity as a Member of the South Carolina Board of Nursing; Rebecca Morrison, in her official capacity as a Member of the South Carolina Board of Nursing; Kay Swisher, in her official capacity as a Member of the South Carolina Board of Nursing; Robert J. Wolff, in his official capacity as a Member of the South Carolina Board of Nursing; Scarlett A. Wilson, in her official capacity as Solicitor for South Carolina's 9th Judicial Circuit; Byron E. Gipson, in his official capacity as Solicitor for South Carolina's 5th Judicial Circuit; and William Walter Wilkins III, in his official capacity as Solicitor for South Carolina's 13th Judicial Circuit, Defendants,

and

Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; G. Murrell Smith Jr., in his official capacity as Speaker of the South Carolina House of Representatives; and Henry McMaster, in his official capacity as Governor of the State of South Carolina, Intervenors-Defendants,

of whom Henry McMaster, in his official capacity as Governor of the State of South Carolina; G. Murrell Smith Jr., in his official capacity as Speaker of the South Carolina House of Representatives; Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; State of South Carolina; and Alan Wilson, in his official capacity as Attorney General of South Carolina, are Petitioners.

Appellate Case No. 2023-000896

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**IN THE COURT'S ORIGINAL JURISDICTION**

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Opinion No. 28174  
Heard June 27, 2023 – Filed August 23, 2023

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**INJUNCTION VACATED AND ACT DECLARED  
CONSTITUTIONAL**

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Chief Legal Counsel Thomas A. Limehouse Jr., Senior Litigation Counsel William Grayson Lambert, and Deputy Legal Counsel Erica Wells Shedd, all of Columbia, for Petitioner Governor Henry McMaster; Patrick Graham Dennis, of Columbia, for Petitioner G. Murrell Smith Jr.; Kenneth M. Moffitt, John Potter Hazzard V, and Jessica J Godwin, all of Columbia, for Petitioner Thomas C. Alexander; and Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J. Emory Smith Jr., Assistant Deputy Solicitor General Thomas Tyler Hydrick, and Assistant Deputy Solicitor General Joseph David Spate, all of Columbia, for Petitioners State of South Carolina; Attorney General Alan Wilson and Solicitor William Walter Wilkins, III.

M. Malissa Burnette, Kathleen McColl McDaniel, and Grant Burnette LeFever, all of Burnette Shutt & McDaniel, PA, of Columbia, for Respondents Planned Parenthood South Atlantic, Katherine Farris, M.D., Greenville Women's Clinic, and Terry Buffkin, M.D.; Catherine Peyton Humphreville and Kyla Eastling, both of New York, New York of Planned Parenthood Federation of America, for Respondents Planned Parenthood South Atlantic and Katherine Farris, M.D.; and Caroline Sacerdote and Jasmine Yunus, both of New York, New York of the Center for Reproductive Rights, for

Respondents Greenville Women's Clinic and Terry L. Buffkin, M.D.

Randall Scott Hiller of Randall S. Hiller, P.A., of Greenville; Kimberly A. Parker of Wilmer Cutler Pickering Hale and Dorr LLP, of Washington, D.C.; and Hannah E. Gelbort, of Wilmer Cutler Pickering Hale and Dorr LLP, of Boston, Massachusetts, for American College of Obstetricians and Gynecologists, American Medical Association, and Society for Maternal-Fetal Medicine Amici Curiae.

Christopher Ernest Mills, of Spero Law LLC, of Charleston for American College of Pediatricians; South Carolina Association of Pregnancy Care Centers and Daybreak Lifecare Center Amici Curiae.

Harmon L. Cooper, of Crowell & Moring LLP, of Chicago, Illinois for Women's Rights and Empowerment Network, (WREN), Able SC, Dr. Deborah Billings, Dr. Cara Delay, Dr. Bambi W. Gaddist, The Hive Community Circle, Palmetto State Abortion Fund, Jill Perry, and SisterSong Amici Curiae.

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**JUSTICE KITTREDGE:** Earlier this year, a majority of this Court found unconstitutional the 2021 version of the Fetal Heartbeat and Protection from Abortion Act (the 2021 Act).<sup>1</sup> In response to our decision, the South Carolina General Assembly (the legislature) revised the 2021 Act, especially in terms of its legislative findings and purposes, and passed a new version of the Fetal Heartbeat and Protection from Abortion Act (the 2023 Act).<sup>2</sup> Immediately after the Governor signed the 2023 Act into law, Planned Parenthood South Atlantic and three other medical providers (collectively, Planned Parenthood) filed an action in the circuit court seeking a declaration that the new law is unconstitutional. Upon Planned

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<sup>1</sup> See *Planned Parenthood S. Atl. v. State (Planned Parenthood I)*, 438 S.C. 188, 882 S.E.2d 770 (2023); Act No. 1, 2021 S.C. Acts 2.

<sup>2</sup> Act No. 70, 2023 S.C. Acts ---, *codified at* S.C. Code Ann. §§ 44-41-610 to -740 (West 2023).

Parenthood's motion, the circuit court enjoined enforcement of the 2023 Act pending resolution of the constitutional challenge. Numerous state officials<sup>3</sup> (collectively, the State) promptly filed with this Court an emergency petition for supersedeas or, alternatively, a request that we accept the matter in our original jurisdiction and expedite briefing. We denied the petition for supersedeas but granted the alternative request to accept the matter in our original jurisdiction and expedite resolution of the case. For the reasons we explain below, we vacate the preliminary injunction issued by the circuit court and declare the 2023 Act constitutional.

## I.

We first acknowledge and confront the obvious: the subject of abortion is a highly contentious and divisive issue in our society. As United States Supreme Court Justice Brett Kavanaugh observed:

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

*Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2304 (2022) (Kavanaugh, J., concurring). In fact, it was acknowledged decades ago that "[m]en and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992), *overruled by Dobbs*, 142 S. Ct. at 2242, 2284.

We recognize the tendency of many to view the divisive issue of abortion through a lens shaped by their own politics or personal preferences. To be clear, our decision today is in no way intended to denigrate or exalt any of the valid concerns on either side of the abortion debate, whether those concerns are based in privacy, morality, medicine, religion, bodily autonomy, or something else. Rather, respectful of separation of powers principles and the limited (non-policy) role of the Court, we approach our solemn duty in this case with a single commitment: to honor the rule

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<sup>3</sup> The State officials include, among others, the Governor of South Carolina, the President of the South Carolina Senate, the Speaker of the South Carolina House of Representatives, and the South Carolina Attorney General.

of law. In our constitutional framework, the rule of law does not bend to satisfy personal preferences.

## II.

The case before us is unique due to our recent decision in *Planned Parenthood I*. In that case, by a three-to-two vote (and in five separate writings), the 2021 Act was declared unconstitutional. While the three Justices in the majority reached the same conclusion, their reasoning varied significantly. Much of their relevant analysis centered on the scope of the search and seizure clause of the South Carolina Constitution, which contains a privacy provision. *See* S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated . . . ." (emphasis added)). Chief Justice Beatty and now-retired Justice Hearn were firmly in the camp of an expansive reading of the privacy provision in article I, section 10. *See Planned Parenthood I*, 438 S.C. at 199–210, 882 S.E.2d at 776–82 (Hearn, J.); *id.* at 229–39, 882 S.E.2d at 792–98 (Beatty, C.J., concurring). That expansive interpretation inured to the benefit of Planned Parenthood's position. *Id.* at 199–210, 882 S.E.2d at 776–82 (Hearn, J.); *id.* at 229–39, 882 S.E.2d at 792–98 (Beatty, C.J., concurring).

On the other hand, while Justice Few agreed with the ultimate result reached by Justices Beatty and Hearn, his reasoning was different. Justice Few pointed to what he believed were flaws in "the General Assembly's failure to consider the necessary factual question as a predicate to its policy judgment." *Id.* at 285, 882 S.E.2d at 822 (Few, J., concurring). After detailing his particular concerns, with a focus on the legislative findings and purposes of the 2021 Act, Justice Few determined the 2021 Act was unconstitutional as it violated article I, section 10 of the state constitution. *Id.* at 287–88, 290, 882 S.E.2d at 824, 825 (Few, J., concurring). However, importantly, Justice Few agreed with the two dissenting Justices that the South Carolina Constitution—whether in article I, section 10 or elsewhere—does not expressly provide a right to have an abortion. *Id.* at 287, 882 S.E.2d at 823 (Few, J., concurring).

On the heels of our decision in *Planned Parenthood I*, the General Assembly went back to the drawing board and drafted new legislation. It is unmistakable that the legislature focused on the alleged defects in the 2021 Act. The result was the passage of the 2023 Act.



The 2023 Act generally prohibits an abortion after the detection of a fetal heartbeat, not at a specified period of weeks into the pregnancy. *See* S.C. Code Ann. § 44-41-610(6) (defining the term "fetal heartbeat" as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac");<sup>4</sup> *id.* § 44-41-630(B) ("[N]o person shall perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting an abortion if the unborn child's fetal heartbeat has been detected . . ."). The law provides limited exceptions allowing for an abortion in the event of a risk to the health of the mother, fatal fetal anomalies, rape, and incest. *Id.* § 44-41-640 to -660.

It is apparent the South Carolina General Assembly carefully crafted the 2023 Act in an effort to demonstrate that its policy decision was not arbitrary. In particular, the legislature made a number of findings in support of its policy judgment. For example, the legislature explained the 2023 Act "took into consideration the interests of the pregnant woman and balanced them against the legitimate interest of the State to protect the life of the unborn," the latter interest of which the legislature characterized as "compelling." Citing its reliance on a number of experts in the field for a "scientific understanding of the development of the unborn early in pregnancy," the legislature concluded that "there is nothing arbitrary about banning abortions after a fetal heartbeat is detected with certain limited exceptions." Specifically, the legislature explained it had placed weight on the fact that a woman could learn of her pregnancy within seven to fourteen days of conception and would have several weeks after that to make her decision and have an abortion if she so chose. Thus, the legislature stated it had determined the "proper balance should be struck at the point of a fetal heartbeat," given the "ample" period of weeks a woman would have "to make a decision about whether to terminate her pregnancy." S. 474, S. Journal, 125th Leg. Sess., at --- (S.C. Feb. 9, 2023).

### III.

As an initial matter, we recognize that legislative findings are entitled to deference and may be rejected only if determined to be arbitrary as a matter of law. *See Richards v. City of Columbia*, 227 S.C. 538, 560, 88 S.E.2d 683, 694 (1955) ("Legislative findings of fact, while not binding upon the court, will not be

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<sup>4</sup> We leave for another day (in an as-applied constitutional challenge) the meaning of "fetal heartbeat" and whether the statutory definition—"cardiac activity, *or* the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac"—refers to one period of time during a pregnancy or two separate periods of time. (Emphasis added.)

overturned except by convincing evidence to the contrary."). This deference is not diminished simply because there is medical support for "both sides" of an issue. See *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (upholding the federal partial-birth abortion ban even where "[b]oth sides ha[d] medical support for their position"). In addition, a court should not turn its back on legislative deference merely because the issue is abortion, for "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164.

Moreover, three fundamental principles of law inform our analysis and provide the lens through which we examine Planned Parenthood's constitutional challenge to the 2023 Act. First, the General Assembly's authority to legislate is plenary: the South Carolina Constitution grants power to the legislature to "enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this state, or the Constitution of the United States." *Heslep v. State Highway Dep't*, 171 S.C. 186, 193, 171 S.E. 913, 915 (1933); see also *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) ("[T]he General Assembly has plenary power over all legislative matters unless limited by some constitutional provision."); *Fripp v. Coburn*, 101 S.C. 312, 317, 85 S.E. 774, 775 (1915) ("[T]he Legislature may enact any law not prohibited by the Constitution.").<sup>5</sup>

Second, statutes are presumed constitutional. That presumption is a weighty one and can be overcome only by a showing of unconstitutionality beyond a reasonable doubt. See *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) ("A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution."); *In re Care & Treatment of Griffin*, 434 S.C. 338, 341, 863 S.E.2d 346, 348 (Ct. App. 2021) (recognizing "beyond a reasonable doubt" as the highest possible burden of proof to satisfy).

Third, when issuing constitutional rulings, a court should endeavor to ground its decision on the narrowest possible basis. *Wash. State Grange v. Wash. State Repub.*

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<sup>5</sup> The plenary authority of the South Carolina General Assembly is more fully understood and appreciated when contrasted with the legislative authority of the United States Congress vis-à-vis the United States Constitution. While the South Carolina Constitution allows our legislature to enact any law unless such law is expressly *prohibited* by the state or federal constitutions, the opposite holds true with respect to Congress—that is, Congress may act only if such authority is specifically *granted* by the United States Constitution.

*Party*, 552 U.S. 442, 450 (2008) ("Facial challenges . . . run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (cleaned up)). This rule gains force when the constitutional challenge is to a statute on its face, rather than as applied. *Id.* at 449–50 ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases. . . . Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." (cleaned up)); *cf. Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 220 (1912) ("How the state court may apply [a statute] to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail[] are matters upon which we need not speculate now."). Here, Planned Parenthood alleges the 2023 Act is facially unconstitutional. With a facial challenge, Planned Parenthood must demonstrate the 2023 Act is unconstitutional "in all its applications." *Richardson ex rel. 15th Cir. Drug Enft Unit v. \$20,771.00 in U.S. Currency*, 437 S.C. 290, 297, 878 S.E.2d 868, 871 (2022); *State v. Legg*, 416 S.C. 9, 13–14, 785 S.E.2d 369, 371 (2016) ("A facial challenge is 'the most difficult to mount successfully,' as it requires the challenger show the legislation at issue is unconstitutional in all its applications." (alteration marks omitted) (quoting *City of L.A. v. Patel*, 576 U.S. 409, 415 (2015))). We therefore go no further than necessary in exploring the constitutionality of the 2023 Act and issuing our decision.

#### IV.

A threshold argument of Planned Parenthood is that the decision in *Planned Parenthood I* controls our decision here. *See Kimble v. Marvel Ent., L.L.C.*, 576 U.S. 446, 455 (2015) (explaining generally the notion of stare decisis, or "the idea that today's Court should stand by yesterday's decisions"). While we acknowledge the importance of stare decisis when confronting a challenge to a prior decision, it has no application here, for the 2023 Act is materially different from the 2021 Act the majority declared unconstitutional in *Planned Parenthood I*. Specifically, the 2023 Act contains different findings and purposes from the 2021 Act. For example, in the 2023 Act, the legislature expressed its compelling interest to protect the lives of unborn children and, critically, deleted its prior reference to the hallmark feature of the 2021 Act: informed maternal choice. *See Planned Parenthood I*, 438 S.C. at 285, 285 n.63, 882 S.E.2d at 822, 822 n.63 (Few, J., concurring) (opining that "the

denial of meaningful choice to women [as codified in the 2021 version of the Fetal Heartbeat Act] arising from the [legislature's] arbitrary failure to even consider the extent to which that choice is denied is unreasonable," and, "[f]or this reason, [finding] the Fetal Heartbeat Act imposes an unreasonable invasion of privacy on pregnant women"). This new balance struck in the 2023 Act between the competing interests of the mother and unborn child was combined with the legislature's new focus on contraceptives and early pregnancy testing, as well as a repeal of the statutes that codified the *Roe v. Wade*<sup>6</sup> trimester framework.

As the legislature makes changes to a statutory scheme, reliance on stare decisis is diminished as it relates to the requirements of the prior statutory scheme. See *Kimble*, 576 U.S. at 458 (noting that when the statutory underpinnings of a court's prior decision have eroded over time, there is heightened justification for revisiting a prior decision based on the now-modified statutory scheme). Thus, the differences between the 2021 Act and the 2023 Act fully answer and compel a rejection of Planned Parenthood's reliance on stare decisis. Nevertheless, because Planned Parenthood relies almost exclusively on the doctrine of stare decisis based on the false premise that the 2021 and 2023 Acts are "identical in all material respects," we will briefly address additional reasons the doctrine does not preclude this Court from addressing the constitutionality of the 2023 Act.

We first note stare decisis "is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotation marks omitted) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). Thus, the assertion of stare decisis does not automatically foreclose a court from reviewing a precedent to ensure it was correctly decided. "This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible."<sup>7</sup> *Id.* In contrast, if a court's decision is instead tied to a statute, the legislature is free to overrule the decision through a new statutory enactment. That is why adherence to precedent—stare decisis—is at its zenith when a court decision is based on statutory construction and not the constitution. See, e.g., *Kimble*, 576 U.S. at 456 ("What is more, *stare decisis* carries enhanced force when a decision . . . interprets a statute.

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<sup>6</sup> 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. at 2242, 2284.

<sup>7</sup> *Roe* is an example. Once the United States Supreme Court discovered a right to abortion in the United States Constitution in the 1970s, neither Congress nor any state legislature had the authority to remove the "constitutional" right until the Supreme Court revisited the *Roe* decision in *Dobbs*.

Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees."). However, again, when a court's ruling is constitutionally based—as was our decision in *Planned Parenthood I*—stare decisis has reduced force. *Payne*, 501 U.S. at 828.

Second, *Planned Parenthood I* is a highly fragmented decision with five separate opinions. See *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202–03 (2012) ("[W]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated. An original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis." (cleaned up)). On the critical issue concerning the meaning of the article I, section 10 privacy provision, there is a clear rejection of the view advanced by *Planned Parenthood I*, 438 S.C. at 259, 882 S.E.2d at 808 (Few, J., concurring) ("I do not concur in Justice Hearn's or Chief Justice Beatty's analysis of the article I, section 10 question . . ."). More to the point, a majority of this Court rejected *Planned Parenthood I*'s position and held article I, section 10 does not expressly include a right to an abortion.

Third, in light of the fragmented decision in *Planned Parenthood I*, to construe *Planned Parenthood I* as forever binding precedent would impermissibly inhibit the General Assembly's plenary power to legislate. See generally *Hampton*, 403 S.C. at 403, 743 S.E.2d at 262; *Heslep*, 171 S.C. at 193, 171 S.E. at 915; *Fripp*, 101 S.C. at 317, 85 S.E. at 775. This point is closely related to our primary reason for not invoking stare decisis: the 2021 and 2023 Acts are not identical. The 2023 Act is new legislation overhauled and redrafted after the Court's rejection of the legislature's initial efforts in 2021. We must now address the constitutionality of the new legislative effort after the General Assembly implemented the guidance provided by this Court in *Planned Parenthood I*.

Accordingly, we consider the constitutionality of the 2023 Act today with respect for our prior decision in *Planned Parenthood I* but also with the knowledge that *Planned Parenthood I* does not dictate the constitutionality of the amended version of the Fetal Heartbeat and Protection from Abortion Act.

## V.

We now turn to Planned Parenthood's challenge to the constitutionality of the 2023 Act. All but one of Planned Parenthood's allegations may be summarily resolved.<sup>8</sup>

The difficult issue before us is Planned Parenthood's claim that the 2023 Act violates the article I, section 10 "unreasonable invasion of privacy" provision found in the South Carolina Constitution. The provision states, in its entirety:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and

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<sup>8</sup> As to Planned Parenthood's arguments regarding due process, equal protection, vagueness, and collateral estoppel, we summarily reject them pursuant to Rule 220, SCACR, and the following authorities: *Dobbs*, 142 S. Ct. at 2248 (considering whether the right to obtain an abortion is protected by the Fourteenth Amendment's Due Process Clause and concluding that "the clear answer is that the Fourteenth Amendment does not protect the right to an abortion"); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 764 (2000) (per curiam) ("The modern rule [in evaluating substantive due process claims] gives great deference to legislative judgment on what is reasonable to promote the public welfare when reviewing . . . social welfare legislation. Legislation is not overturned unless the law has no rational relationship to any legitimate interest of government." (cleaned up)); *Dobbs*, 142 S. Ct. at 2245–46 (holding that "a State's regulation of abortion is not a sex-based classification [in violation of the Equal Protection Clause] and is thus not subject to the 'heightened scrutiny' that applies to such classifications"); *State v. Wright*, 349 S.C. 310, 313, 563 S.E.2d 311, 312 (2002) (finding equal protection is not implicated when a law "realistically reflects the fact that the sexes are not similarly situated in certain circumstances"); *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 599 (2001) (explaining that "all the Constitution requires [in order for a statute to survive a vagueness challenge] is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices"); *Catawba Indian Nation v. State*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014) (finding collateral estoppel inapplicable when the matter resolved in the prior action was not the same as the matter asserted in the current action).

particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. art. I, § 10 (emphasis added).

While we reaffirm our finding from *Planned Parenthood I* that there is no fundamental constitutional right to abortion under article I, section 10, we likewise decline to revisit the fragmented decision regarding the proper scope of the privacy provision. Rather, in the interest of unity, we will assume only for purposes of our analysis and decision today that the privacy provision reaches beyond the search and seizure context to include bodily autonomy.<sup>9</sup> Accordingly, we go no further today than referencing *Singleton v. State*, which held that the interests protected by the privacy clause extend to bodily autonomy and integrity. 313 S.C. 75, 88–89, 437 S.E.2d 53, 60–61 (1993) (quoting article I, section 10 of the South Carolina Constitution, and concluding that "the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution").

Nonetheless, in utilizing the broader reading of article I, section 10, we cannot focus merely on the single word "privacy" contained therein but must instead consider the actual wording of the entirety of the provision: "The right of the people to be secure in their persons . . . [from] *unreasonable* invasions of privacy shall not be violated." (Emphasis added.) When viewed in its full and proper context, it is undeniable that

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<sup>9</sup> We make this assumption in favor of Planned Parenthood's position in an effort to reach the ultimate question in this case, the resolution of which all Justices in the majority agree. Specifically, the four members of this Court comprising the majority here have differing views of the threshold issues leading to the ultimate question regarding the propriety of the legislature's balancing of the interests of privacy and bodily autonomy for the pregnant woman and protecting the life developing in the womb. We elect not to address those threshold differences: for purposes of our analysis and decision today, we will cast aside a review of the history and relevance of the 1971 amendments to the state constitution that included the privacy provision, including the work of the West Committee. We have chosen this route for our analysis because, in the end, our threshold disagreements obscure the consensus among us. That is to say, regardless of our threshold disagreements, once the analysis reaches the balancing of the competing interests, all four Justices in the majority agree that while a close question is presented, the 2023 Act must be upheld.

the South Carolina Constitution does not create an absolute bar against all state action that infringes on a person's privacy.<sup>10</sup> Instead, the state constitution draws the line at unreasonable invasions of privacy. In keeping with the separation of powers, it is the legislature's prerogative to make policy decisions, and it is the Court's duty to evaluate only whether those policy decisions are indisputably repugnant to the federal or state constitutions. *See, e.g., ArrowPointe Fed. Credit Union v. Bailey*, 438 S.C. 573, 580, 884 S.E.2d 506, 509 (2023) ("Determinations of public policy 'are chiefly within the province of the legislature, whose authority on these matters we must respect.'" (quoting *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 271, 802 S.E.2d 794, 797 (2017))); *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017) ("The General Assembly in the Act struck the balance among competing policy concerns it deemed appropriate. . . . If our mission were simply to achieve equity on a case by case basis, we would not necessarily disagree with Appellants and the dissent. But wherever the balance is struck, one can easily imagine scenarios where the result may be inequitable. . . . In honoring separation of powers, we adhere to the principle that a court must not reject the legislature's policy determinations merely because the court may prefer what it believes is a more equitable result.").

The 2023 Act, with exceptions, bans abortion after the detection of a fetal heartbeat, as that term is defined by statute. Does the Act infringe on a woman's privacy interest? Are the concerns and challenges of Planned Parenthood worthy of this Court's profound respect and careful consideration? The answer to both questions is unequivocally "yes." To be sure, the 2023 Act infringes on a woman's right of privacy and bodily autonomy.<sup>11</sup>

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<sup>10</sup> Of course, virtually every law operates in some manner to limit a person's privacy. *See, e.g., Planned Parenthood I*, 438 S.C. at 297, 882 S.E.2d at 829 (Kittredge, J., dissenting) ("For example, no rational person would contend the State does not have the authority to enact laws criminalizing assault, rape, theft, child abuse, drug trafficking, and the like. In these and so many other areas, the power of the State to regulate and prohibit conduct is unquestioned. There is not the slightest prospect that a court would contravene the will of the people, as codified by their elected representatives, because the law amounts to an invasion of privacy.").

<sup>11</sup> We note the 2023 Act contains exceptions designed to protect the life and health of the mother, and in this facial challenge, we are not confronted with any plausible argument or concrete situation that suggests compliance with the Act poses significant or unconstitutional threats to a mother's life or health care, or that it will result in medical providers delaying necessary or life-saving health care to the



Even so, and despite our temporary acceptance of an expansive construction of the privacy provision in article I, section 10,<sup>12</sup> the constitutional question before us is not easily answered. The legislature has made a policy determination that, at a certain point in the pregnancy, a woman's interest in autonomy and privacy does not outweigh the interest of the unborn child to live. As a Court, unless we can say that the balance struck by the legislature was unreasonable as a matter of law, we must uphold the Act. As we acknowledged at the outset, many may strongly disagree with the balance struck by the legislature from a policy standpoint; others may strongly agree with the balance struck in the 2023 Act; and still others may believe the balance should be struck more stridently in favor of protecting the life of the unborn child. This Court, however, does not make policy determinations. The legislature makes policy decisions. This is a central feature of separation of powers. Through the legal and judicial lens under which we must operate, while mindful of the difficult and emotional issue before us, we cannot say *as a matter of law* that the 2023 Act is unreasonable and thus violates the state constitution. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 599 (2012) (Ginsburg, J., concurring) ("Whatever one thinks of the policy decision [the legislature] made, it was [the legislature's] prerogative to make it. Reviewed with appropriate deference, [that policy judgment] should survive measurement under the [Constitution]."); *Samson v. Greenville Hosp. Sys.*, 295 S.C. 359, 367, 368 S.E.2d 665, 669 (1988) (per curiam) ("[T]his Court will not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations." (cleaned up)); *Brennen v. S. Express Co.*, 106 S.C. 102, 116, 90 S.E. 402, 406 (1916) ("[S]o long as the [legislature's] exertion of power bears a reasonable relation to a legitimate purpose sought to be accomplished, the courts may not interfere. With the wisdom and policy of legislative enactments[,] they have no concern. Being forbidden by the Constitution to invade the legislative domain, they cannot substitute their judgment and discretion for that of the lawmakers."); *cf. United States v. Comstock*, 560 U.S.126, 143 (2010) (noting Congress was faced with two equally reasonable policy choices, and in selecting one of the choices over the other, Congress's decision necessarily satisfied "'review for means-end rationality,' *i.e.*, . . . satisfie[d] the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority" (citation omitted)); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("States are accorded wide latitude . . . under their police powers,

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mother or unconstitutionally infringe upon their independent medical judgment.

<sup>12</sup> Again, we accept this expansive premise for purposes of our decision today only. *See supra* note 9.

and rational distinctions may be made with substantially less than mathematical exactitude."); *Blum v. Stenson*, 465 U.S. 886, 895–96 (1984) ("The policy arguments advanced in [opposition to the law passed by the legislature] should be addressed to Congress rather than to this Court.").

We think it is important to reiterate: we are constrained by the express language in the South Carolina Constitution that prohibits only "*unreasonable* invasions of privacy." See S.C. Const. art. I, § 10 (emphasis added). A reasonableness framework is required. The concept of reasonableness necessarily embraces a range of permissible policy options, not a narrow line in the sand. Of course, people may disagree in good faith with the balance struck by the legislature, but that disagreement in no manner renders unconstitutional the legislatively determined balance. As judges, our solemn duty is to uphold the rule of law; we must maintain judicial discipline, refrain from acting as a super-legislature, and respect the plenary authority of the South Carolina General Assembly. Cf. *Hampton*, 403 S.C. at 403, 743 S.E.2d at 262 (explaining the legislature may enact any law it desires unless *expressly prohibited* by the state constitution); *Heslep*, 171 S.C. at 193, 171 S.E. at 915 (same); *Fripp*, 101 S.C. at 317, 85 S.E. at 775 (same). Because the 2023 Act is within the zone of reasonable policy decisions rationally related to the State's interest in protecting the unborn, we are constrained to defer to the legislature's policy prerogative.

## VI.

In conclusion, the legislature has found that the State has a compelling interest in protecting the lives of unborn children. That finding is indisputable and one we must respect. The legislature has further determined, after vigorous debate and compromise, that its interest in protecting the unborn becomes actionable upon the detection of a fetal heartbeat via ultrasound by qualified medical personnel. It would be a rogue imposition of will by the judiciary for us to say that the legislature's determination is unreasonable as a matter of law—particularly on the record before us and in the specific context of a claim arising under the privacy provision in article I, section 10 of our state constitution.

As a result, our judicial role in this facial challenge to the 2023 Act has come to an end. The judiciary's role is to exercise our judgment as to whether the legislative weighing of competing interests was within the range of possible, reasonable choices rationally related to promoting the legislature's legitimate interests. Having concluded that it was, we consequently defer to the legislature's gauging of the profound, competing interests at stake. Accordingly, we vacate the preliminary injunction and hold the 2023 Act is constitutional.

**PRELIMINARY INJUNCTION VACATED AND THE 2023 ACT  
DECLARED CONSTITUTIONAL.**

**FEW, JAMES and HILL, JJ., concur. FEW, J., concurring in a separate  
opinion. BEATTY, C.J., dissenting in a separate opinion.**

**JUSTICE FEW:** Seven months ago, I voted to strike down the 2021 Fetal Heartbeat and Protection from Abortion Act because the General Assembly specifically recognized in the 2021 Act a woman's interest in making "an informed choice about whether to continue a pregnancy," yet banned essentially all abortions "without the General Assembly having made any inquiry as to whether a substantial percentage of women even know they are pregnant" in time to make such a choice. *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 274, 284, 882 S.E.2d 770, 816-17, 822 (2023) (*Planned Parenthood I*) (Few, J., concurring in result). I referred to this as the "key question" as to the constitutionality of the 2021 Act. 438 S.C. at 284, 882 S.E.2d at 822 (Few, J., concurring in result). The General Assembly's failure to address this key question; its failure to balance the very right it codified—"informed choice"—against the State's interest in regulating abortion rendered the 2021 Act arbitrary, and thus violated the article I, section 10 prohibition against unreasonable invasions of privacy. *See* 438 S.C. at 285, 882 S.E.2d at 822 (Few, J., concurring in result) (explaining "under article I, section 10, the denial of meaningful choice to women arising from the arbitrary failure to even consider the extent to which that choice is denied is unreasonable").

Planned Parenthood argues the 2023 Act is no different from the 2021 Act because both ban most abortions at same point in time—"cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." Thus, Planned Parenthood argues simplistically, my vote should be the same as it was in *Planned Parenthood I*. The State argues, on the other hand, "In passing [the 2023 Act], the General Assembly expressly sought to address some of the concerns raised by members of this Court in *Planned Parenthood [I]*," Att'y General Br. 1, and, "The 2023 Act rectifies each of the three specific issues that Justice Few found with the 2021 Act," Governor's Br. 1. *See also* Att'y General Br. 8 ("In response to Justice Few's opinion in the *Planned Parenthood [I]* case, the General Assembly carefully crafted the 2023 Act to remove any reasonable doubt [the Act is constitutional] by ensuring that its provisions are not arbitrary by allowing women a meaningful opportunity to make a decision about terminating a pregnancy prior to the detection of a fetal heartbeat."). I find the 2023 Act is constitutional.

To be clear, I stand firmly by everything I wrote in *Planned Parenthood I*. While I agree wholeheartedly with Justice Kittredge's statement "the General Assembly's authority to legislate is plenary," that plenary power must be exercised according to law. When the General Assembly enacts legislation that violates the constitution, it has exceeded its "plenary" power. In *Planned Parenthood I* and in this case, the attorneys representing the State have sounded a constant drumbeat for the "separation of powers" mandated by article I, section 8 of the South Carolina

Constitution. In petitions for rehearing from our decision in *Planned Parenthood I*, as an extreme example, the attorneys literally argued the mere fact this Court overturned the 2021 Act is a violation of the separation of powers.

Respectfully, the Justices of this Court understand the separation of powers. Each Justice on the Court—then and now—embraces the constitutional requirement that we respect the General Assembly's plenary power to legislate. But the article I, section 8 separation of powers provision demands *mutual* respect. To the same extent this Court is constitutionally bound to respect plenary legislative power, the General Assembly is bound to respect the limited judicial power set forth in article V of the South Carolina Constitution. Under article V, this Court has two perfectly-consistent, solemn duties. We must uphold legislation when it is possible to find the legislation conforms to the constitution; we must strike down legislation when it clearly violates the constitution. *See Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 435, 181 S.E. 481, 484 (1935) ("A statute will, if possible, be construed so as to render it valid;" and "a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond reasonable doubt;" and "every presumption will be made in favor of the constitutionality of a legislative enactment"); *Thomas v. Macklen*, 186 S.C. 290, 305, 195 S.E. 539, 545 (1938) ("[W]e are not unmindful that it is a grave matter to overturn, by judicial construction, an enactment of the General Assembly. All presumptions are in favor of the power of that body to enact the law. All considerations involving the wisdom, the policy, or the expediency of the act are addressed exclusively to that branch of the state government. . . . But when the unconstitutionality of an act is clear to this court, beyond a reasonable doubt, then it is its plain duty to say so.").

Ultimately, the General Assembly did not attempt to simply re-enact the same legislation, as *Planned Parenthood* argues. Rather, it amended the 2021 Act in what appears to be a sincere attempt to comply with the narrowest reading of this Court's ruling in *Planned Parenthood I*. The question now before the Court, therefore, is whether the attempt was successful; do the changes the General Assembly made from the 2021 Act to the 2023 Act make it possible for this Court to find the 2023 Act constitutional under article I, section 10, despite the fact the threshold for banning most abortions did not change.

Article I, section 10, provides, "The right of the people to be secure in their persons . . . against . . . unreasonable invasions of privacy shall not be violated . . . ." There are three steps in the analysis of an unconstitutional invasion of privacy claim under article I, section 10. First, the court must identify the State's interests underlying its action. When the claim is based on legislative action, as here, the court must identify the interests the General Assembly was pursuing on behalf of the State in enacting

the legislation. Second, the court must identify the countervailing privacy interests implicated by the State's action. Third, once the competing interests have been identified, the court must address whether any invasion of privacy is "unreasonable." *See Hooper v. Rockwell*, 334 S.C. 281, 293-95, 513 S.E.2d 358, 364-66 (1999) (explaining article I, section 10 privacy interests are "not absolute" but must be balanced against the State's interests). An invasion of privacy that is reasonable in light of the State's interest is not a violation of article I, section 10. *See S.C. Dep't of Soc. Servs. v. Gamble*, 337 S.C. 428, 434-35, 523 S.E.2d 477, 480 (Ct. App. 1999) (studying the constitutionality of a statute, reciting the competing interests, and finding the statute constitutional because, "The statute at issue balances these rights"). In the case of legislative action, the Court may find the General Assembly's chosen balance of those interests—as reflected in the legislation—to be a violation of article I, section 10 only when the Court determines the invasion of privacy is unreasonable as a matter of law. In other words, if the General Assembly could fairly have determined the invasion of privacy was reasonable, this Court may not substitute its judgment on the question of reasonableness.

The 2023 Act recites the State's interest in regulating abortion differently than the 2021 Act, stating, "The State of South Carolina has a compelling interest from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child." Act No. 70, 2023 S.C. Acts § 1(3). The State argues this provision of the 2023 Act "does make explicit the General Assembly's expression of the State's interest in protecting life from conception." Governor's Br. 15. The State continues, "The 2023 Act therefore represents a new, stronger expression of the State's interest since [*Planned Parenthood I*] was decided that goes directly to this personhood question . . . ." *Id.*

As each of the Justices explained in *Planned Parenthood I*, none of us discount the strength of the State's interest in regulating abortion; the interest is a powerful one. However, I do not view this revised wording as a significant change in the State's interest, and I do not believe the newly-worded interest "goes directly to this personhood question." *See* 438 S.C. at 272-73, 882 S.E.2d at 815-16 (Few, J., concurring in result) (explaining the potential significance of a "personhood" policy determination by the General Assembly).

I do believe, however, the changes in expression of the State's interest bring more fully into focus the basis for the State's use of "the steady and repetitive rhythmic contraction of the fetal heart" as the threshold beyond which most abortions may not be performed. *See* Act No. 70, 2023 S.C. Acts § 2(6) (defining "fetal heartbeat" as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac"). In the 2021 Act, the General Assembly made extensive

findings as to the correlation between an unborn child reaching this threshold and an eventual live, healthy birth. Act No. 1, 2021 S.C. Acts 3. Those findings are essentially summarized in the 2023 Act as, "A fetal heartbeat is a key medical predictor that an unborn child will reach live birth." Act No. 70, 2023 S.C. Acts § 1(1).

The State argues the General Assembly's recognition of a "strong correlation between this [fetal heartbeat] and a live birth" supports the constitutionality of the Act. Governor's Br. 21 n.3. The State's argument is that by choosing this "biologically identifiable moment in time"—as the 2023 Act calls it—as the threshold for banning most abortions, the General Assembly chose to prohibit only those abortions most likely to terminate pregnancies that would otherwise result in a live birth. This is a sensible argument, not unlike a point the Supreme Court of the United States made in *Roe v. Wade* regarding viability. *See Roe v. Wade*, 410 U.S. 113, 163, 93 S. Ct. 705, 732, 35 L. Ed. 2d 147, 183 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022).<sup>13</sup>

The most obvious change from the 2021 Act to the 2023 Act relates to the second step in the analysis—identifying any countervailing interests. In particular, the General Assembly eliminated the statutory right to "informed choice." In the 2021 Act, the General Assembly included the following in the "legislative findings" section,

The General Assembly hereby finds, according to contemporary medical research, . . . :

. . .

(8) in order to make an informed choice about whether to

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<sup>13</sup> The State's point is not that a fetal heartbeat is a "logical and biological" indication of current "capability of meaningful life outside the mother's womb"—viability—but that the fetal heartbeat is a "logical and biological" indication that eventually this particular pregnancy is likely to result in a live birth.

continue a pregnancy, a pregnant woman has a legitimate interest in knowing the likelihood of the human fetus surviving to full-term birth based upon the presence of a fetal heartbeat.

2021 S.C. Acts at 3.

When this Court evaluated the constitutionality of the 2021 Act, we balanced the State's interest in protecting unborn life against the statutory countervailing interest of "informed choice" *and* the privacy interests arising from article I, section 10. As there is no "informed choice" provision in the 2023 Act, the State's interest in protecting unborn life is now balanced against only the constitutional privacy interests.

The most impactful change from the 2021 Act to the 2023 Act is actually a category of changes that are designed to approach the idea of choice in terms of promoting active family planning. First, the 2023 Act encourages couples to avoid unwanted pregnancies by providing insured access to contraceptives. Section 5 of the Act requires, "All individual and group health insurance and health maintenance organization policies in this State shall include coverage for contraceptives." Similarly, section 11 of the Act requires, "The Public Employee Benefit Authority and the State Health Plan shall cover prescribed contraceptives for dependents" and "shall not apply patient cost sharing provisions to covered contraceptives." In other words, the 2023 Act requires insured contraceptives to almost all couples in South Carolina.<sup>14</sup>

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<sup>14</sup> Planned Parenthood argues free contraceptives are already required under federal law. From my research, it appears Planned Parenthood is partially correct. Federal law requires insured contraceptives for all group medical insurance plans that are not "grandfathered," meaning, not in place before March 2010. This federal requirement appears to apply to approximately 85% of working-insured Americans. The 2023 Act, therefore, appears to guarantee insured contraceptives to the approximately 15% of working South Carolinians who do not already enjoy such a guarantee under federal law.



Second—as the Governor makes clear in his brief to this Court—the 2023 Act specifically permits "'emergency contraception,' such as Plan B,"<sup>15,16</sup> which is a contraceptive that can be administered after sexual intercourse. As with other forms of contraceptives, what the Governor is calling "emergency contraceptives" are guaranteed to be covered under the terms of the 2023 Act to almost all women in South Carolina who are insured under a group or individual plan.

The Attorney General addresses these two components of "family planning" in his brief:

The timeline for a meaningful opportunity to make a decision begins prior to pregnancy. Women and men who engage in sexual intercourse are aware that pregnancy can result. It is that awareness that allows a woman to engage in family planning. A woman who does not want to become pregnant, or a woman who is undecided about pregnancy, has ample opportunity to make well-informed decisions concerning her reproductive health. Prior to sexual intercourse, a woman has a meaningful opportunity to consider contraceptives such as birth control pills or intrauterine devices. After sexual intercourse, she has up to five days to consider whether she wants to take an over-the-counter emergency contraceptive to prevent pregnancy.

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<sup>15</sup> The Governor states, "All of this is in addition to the fact that women still have the option of 'emergency contraception,' such as Plan B. Plan B prevents ovulation, fertilization and implantation; it does not (like mifepristone) terminate a pregnancy if the implantation has occurred." Governor's Br. 20 n.2 (citations omitted).

<sup>16</sup> The 2023 Act permits this in two ways not present in the 2021 Act: (1) Section 2 of the Act, specifically amended subsection 44-41-640(E), provides it is not illegal to "use, sell, or administer a contraceptive measure." The term "contraceptive" is defined to include "a drug, device, or chemical that prevents ovulation." (2) The term "abortion" is defined as a "clinically diagnosable pregnancy." That term is defined as "the point in time when it is possible to determine that a woman is pregnant due to the detectable presence of human chorionic gonadotropin (hCG)." That point in time occurs after the time when a woman would use emergency contraception, such as Plan B.

Att'y General Br. 12 n.4.

The Attorney General then addresses a point this Court specifically introduced during *Planned Parenthood I*. During oral arguments and in my opinion in *Planned Parenthood I*, I questioned whether—as a predicate to understanding the percentage of women are denied choice—the more appropriate question should be "how many women *can* know they are pregnant in time to make an informed choice," rather than "how many women [*do*] know . . . ." See *Planned Parenthood I*, 438 S.C. at 281, 882 S.E.2d at 820 (Few, J., concurring in result) (describing the questions I put to counsel during oral argument as seeking information on "what the General Assembly knew when enacting the [2021 Act], what Planned Parenthood knew when it filed this lawsuit, and what medical and scientific research shows about the percentage of women who *cannot know* of their pregnancy in time to make an 'informed choice'" (emphasis added)); 438 S.C. at 278, 882 S.E.2d at 818 (Few, J., concurring in result) ("Whether a pregnant woman is given an opportunity to make a meaningful choice and whether the invasion of her privacy by restricting her opportunity for an abortion is unreasonable each depend on the answer to one particular factual question: *Can* a pregnant woman even know she is pregnant in time to engage in a meaningful decision-making process and—if her choice is to not continue the pregnancy—make the necessary arrangements to carry out an abortion?" (emphasis added)). The Attorney General argues:

Her awareness of the possibility of pregnancy further affords her the opportunity to control her reproductive health after sexual intercourse by taking a common, over-the-counter pregnancy test to determine whether she is pregnant and make a decision concerning an abortion before a fetal heartbeat can be detected.

Att'y General Br. 12 n.4.

This third component of family planning was specifically taken up by the Senate during its debate of House amendments to the original Senate bill.

The Senate's debate during consideration of S. 474 very clearly established that there is nothing arbitrary about banning abortions after a fetal heartbeat is detected with certain limited exceptions. In fact, we very clearly articulated the basis for making that determination and specifically addressed the fact that a pregnant woman can know within 10 to 14 days after conception whether she is pregnant. According to the Cleveland Clinic, as early as 10 days after conception (but within 14 days) a home pregnancy test will detect the presence of human

chorionic gonadotropin, a special hormone that developed only upon implantation. A blood test can confirm the presence of that hormone as early as 7 to 10 days after conception. According to the American Pregnancy Association the heartbeat of an unborn child can be detected between 6½ to 7 weeks of pregnancy though it is possible, though much less likely, that a heartbeat can be detected a week earlier -- about 5½ weeks. That means that a woman can find out that she is pregnant two weeks after conception and has another 4½ to 5 weeks<sup>[17]</sup> to make her decision and have an abortion. It is our reasoned judgement that a month is enough time for a pregnant woman to decide whether to have an abortion and undertake the procedure to follow through with her decision.

S. 474, S. Journal, 125th Leg. Sess., at \_\_\_\_ (S.C. Feb. 9, 2023).

While there are no specific written findings in the 2023 Act on this subject, the General Assembly clearly considered the question. This is, therefore, the type of finding we typically will imply to the General Assembly. *See Richards v. City of Columbia*, 227 S.C. 538, 561, 88 S.E.2d 683, 694 (1955) (stating it is "presumed from the mere passage of the act that there was a finding of such facts as were necessary to authorize the enactment"). This Court must presume, therefore, the General Assembly placed emphasis in enacting the 2023 Act on the responsibility of sexually-active couples to actively—rather than passively—seek out testing as to whether a pregnancy has resulted from their sexual activity.

This brings me to the balancing of the State's interests against the countervailing interest of privacy under article I, section 10. At the outset of this balancing, there are a couple of points to make clear. The first point is that abortion is different from any other context in which a person may enjoy privacy rights, because abortion ends the life of an unborn child. No matter how one may view this reality in their own political terms, the constitutional reality for evaluating whether a particular restriction on abortion is an "unreasonable" invasion of privacy is that our General Assembly has clearly and unambiguously set a public policy against abortion in this State. In *Planned Parenthood I*, the Justices disagreed sharply over whether abortion implicates privacy at all. In this case, the Justices in the majority all agree on this important point: to the extent restrictions on abortion do implicate privacy

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<sup>17</sup> These numbers are incorrect, presumably because the calculations that led to them were based on the date of the last menstrual period rather than the date of fertilization. The correct numbers would be "2½ to 3 weeks."

interests under article I, section 10, the fact an abortion ends the life of an unborn child strongly influences the balancing of those privacy interests against the State's interest in regulating abortion. The relationship of privacy and choice to abortion is unique among all applications of the right to privacy because—when making the decision to have an abortion—the exercise of the right of privacy ends the life of an unborn child. In this respect, all the cases in which this Court has balanced privacy interests in the past are distinguishable—*Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993), the most prominent example—because abortion is different.<sup>18</sup>

The second point is the balancing of the State's interests against privacy interests begins in the General Assembly. *Gamble*, 337 S.C. at 434-35, 523 S.E.2d at 480. In the 2023 Act, the General Assembly chose to approach privacy and choice in an active sense, not merely as a choice arising upon the passive learning of an unwanted pregnancy, but as an active family planning process that begins at the outset of a sexually-active relationship and continues all the way to the threshold of "the steady and repetitive rhythmic contraction of the fetal heart" beyond which no abortions may take place unless an exception applies.

With these points in mind, I cannot say the abortion restrictions included in the 2023 Act are an unreasonable invasion of privacy. First, the State's interest in protecting the lives of unborn children is clearly articulated in the 2023 Act. The elimination of the interest of "informed choice" from the 2021 Act leaves this interest in life—which includes the life and health of the mother—as the sole purpose of the 2023 Act. With this purpose stated more clearly and without the countervailing statutory interest of informed choice, the correlation between reaching the threshold of a fetal heartbeat and the likelihood of a live, healthy birth stands out more clearly as a reasonable standard by which to regulate most abortion. In addition, I find it quite significant the State approached the idea of choice in terms of promoting active family planning. Couples who do not want to bring a pregnancy to term and have a baby are enabled by the 2023 Act to make that choice before a pregnancy by the

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<sup>18</sup> In *Singleton*, we held "the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution." 313 S.C. at 89, 437 S.E.2d at 61. I agree with Justice Kittredge when he stated, "If nothing else, *Singleton* and the other cases mentioning article I, section 10 are distinguishable because they did not involve an interest in protecting the life of an unborn child." *Planned Parenthood I*, 438 S.C. at 316 n.91, 882 S.E.2d at 839 n.91 (Kittredge, J., dissenting).

increased availability of contraceptives, and are encouraged through the use of Plan B and early pregnancy testing to meet the statutory deadline of "fetal heartbeat" in the event contraceptive measures are not effective.

I am certain many will find my analysis unsatisfying. Constitutional analysis, however, is not a team sport. I—and the other Justices of this Court—must remain mindful that the regulation of abortion is in the first instance a political question. It is a legal question only to the extent that any restriction on abortion may clearly violate a specific constitutional provision. The only constitutional provision at issue here is the article I, section 10 right of privacy. Article I, section 10 does not forbid all invasions of privacy, but only "unreasonable" invasions. My vote in *Planned Parenthood I* was based on the fact the General Assembly did not even consider what I then called the "key question." For that reason, the 2021 Act was arbitrary and, thus, unreasonable. In the 2023 Act, however, the General Assembly not only considered the key question, it changed the question—as it is absolutely entitled to do—to focus the attention of sexually-active couples in South Carolina on active family planning, thereby expanding the notion of choice to the period of time before fertilization, certainly before a couple passively learns of a pregnancy. The abortion restrictions in the 2023 Act are reasonable. I find the 2023 Act constitutional.

**CHIEF JUSTICE BEATTY:** I respectfully dissent. On May 23, 2023, the South Carolina General Assembly passed Senate Bill 474, the "Fetal Heartbeat and Protection from Abortion Act," which became effective upon the Governor's signing on May 25, 2023. See Act No. 70, 2023 S.C. Acts \_\_\_ ("the 2023 Act") (codified as amended at S.C. Code Ann. §§ 44-41-610 to -690 (West 2023)). The 2023 Act replaces prior legislation with the same name, "Fetal Heartbeat and Protection from Abortion Act" ("the 2021 Act"), that was deemed unconstitutional by this Court on January 5, 2023 in *Planned Parenthood South Atlantic v. State*, 438 S.C. 188, 882 S.E.2d 770 (2023) (*Planned Parenthood*).

The 2023 Act effectively reinstated the 2021 Act's ban on abortion in South Carolina upon the detection of a "fetal heartbeat." This term was statutorily defined then—as it is again now in the 2023 Act—as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac."<sup>19</sup> Although neither act specifies the number of weeks of gestation that is targeted, each has been informally characterized as a "six-week ban" based on similarly worded legislation introduced in multiple jurisdictions following the decision of the United States Supreme Court in *Dobbs*,<sup>20</sup> which overruled nearly fifty years of federal precedent on abortion.

In *Planned Parenthood*, several members of the Court noted that medical professionals have classified six weeks of gestation as the embryonic stage of development, not fetal, and have stated the only "cardiac activity" that could potentially exist at this point is the nascent flickering of electrical impulses from a group of inchoate cells. A "fetal heart" that is capable of "contraction," as provided in the statutory language, does not exist until later in the pregnancy, when the chambers of the heart have fully developed. See *Planned Parenthood*, 438 S.C. at 196 n.2, 882 S.E.2d at 774 n.2 (Hearn, J.); *id.* at 222, 882 S.E.2d at 788 (Beatty, C.J., concurring). Thus, the title and content of the legislation are a misnomer if it is viewed as a six-week ban because the terminology is medically and scientifically inaccurate. As such, it is the quintessential example of political gaslighting; attempting to manipulate public opinion and control the reproductive health decisions of women by distorting reality.

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<sup>19</sup> Compare S.C. Code Ann. § 44-41-610(6) (West 2023) (2023 version), with S.C. Code Ann. Ann. § 44-41-610(3) (Supp. 2022) (2021 version).

<sup>20</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

I say "if" the 2023 Act is viewed as a six-week ban because the majority now states there is uncertainty about what the language even means. The majority purports to take this case in the Court's original jurisdiction which, in addition to its legal role, also makes this Court the designated fact-finder under Rule 245, SCACR. However, the majority undertook no factual review in this case (or in *Planned Parenthood*). Further, it does not resolve the anomaly appearing on the face of the legislation regarding the timing of the "fetal heartbeat" ban. Instead, it acknowledges the uncertainty in a footnote and then leaves this question of fundamental importance—the meaning of the legislation—"for another day." *See* Majority Op. at n.4 ("We leave for another day (in an as-applied constitutional challenge) the meaning of 'fetal heartbeat' and whether the statutory definition—'cardiac activity, *or* the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac'—refers to one period of time during a pregnancy or two separate periods of time. (Emphasis added).")<sup>21</sup>

This omission, however, leaves our state with no guidance as to the 2023 Act's reach. How can anyone know how to comply with the law—particularly where it carries the threat of criminal penalties—and how can lawyers advise their clients, in the absence of a determination of this key point? In addition to the right to privacy, Planned Parenthood has raised issues to this Court regarding, *inter alia*, the legislation's vagueness, as well as due process and equal protection violations. However, the majority has summarily disposed of all of these arguments, including vagueness, in a single footnote. *See* Majority Op. at n.8 ("As to Planned Parenthood's arguments regarding due process, equal protection, vagueness, and collateral estoppel, we summarily reject them pursuant to Rule 220, SCACR, and the following authorities," followed by string citations). This appears to be

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<sup>21</sup> I question whether this is because it is also a threshold issue on which the majority could not agree, so "in the interest of unity," the majority postponed a decision on this problematic issue in order to reach its desired consensus. *See* Majority Op. at n.9 (noting "the four members of this Court comprising the majority here have differing views of the threshold issues leading to the ultimate question regarding the propriety of the legislature's balancing of the interests of privacy and bodily autonomy for the pregnant woman and protecting the life developing in the womb," but "[w]e elect not to address those threshold differences" because "the majority agree that while a close question is presented, the 2023 Act must be upheld").

inconsistent, however, with its earlier footnote stating the meaning of the statute (in other words, the statute's vagueness) is an issue "for another day."

Based on the discussions during oral argument, it appears the majority's reference to the possibility of cardiac activity beginning at two different points in a pregnancy might stem from the use of a comma after "cardiac activity" in the statutory language that defines "fetal heartbeat." *See* S.C. Code Ann. § 44-41-610(6) (West 2023) ("cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart"). I note, however, that the General Assembly has made three findings accompanying the 2023 Act, and the second finding provides additional clarification on the meaning of "cardiac activity":

(2) Cardiac activity *begins* at a biologically identifiable *moment in time*, normally when the fetal heart is formed in the gestational sac.

South Carolina Fetal Heartbeat and Protection from Abortion Act, Act No. 70, 2023 S.C. Acts \_\_\_, \_\_\_ § 1(2) (emphasis added). In my view, this legislative finding confirms that "cardiac activity" begins at only one unique "moment in time," so it cannot begin at two alternative points in a pregnancy, as postulated by the majority.

In addition, because the second finding provides "cardiac activity" commences "when the fetal heart is formed," it confirms my view that "cardiac activity" exists when the four chambers of the heart are fully developed and capable of "rhythmic contraction." This is also consistent with the plain reading of the statutory language, which refers to "the steady and repetitive *rhythmic contraction* of the *fetal heart*." *See* S.C. Code Ann. § 44-41-610(6) (West 2023) (emphasis added). A "fetal heartbeat," therefore, certainly cannot exist at six weeks of gestation, as only a nascent cluster of cells that will eventually develop into a heart is present at that time.

With this understanding of the meaning of when "cardiac activity" begins (i.e., when a heartbeat is first detected from the formed chambers of the heart), I would be inclined to concur in upholding the constitutionality of the 2023 Act. I would agree to do so if a ban at that point would allow women to make an informed choice about whether to continue a pregnancy, in accordance with South Carolina's constitutional right to privacy and our Court's precedent.



Whether informed choice can exist, however, depends upon a critical factual determination as to when a fetal heart is actually formed.<sup>22</sup> However, the majority noticeably did not explore this point, despite taking the unusual step of removing this topic (the validity of an abortion ban) from the circuit court and hearing it in this Court's original jurisdiction twice in one year. Because the majority has elected to leave the determination of what the 2023 Act means "for another day," yet has, paradoxically, upheld its constitutionality, I must dissent. Concluding the 2023 Act is valid while remaining silent as to its timing—and without clearly rejecting any implication that it is reinstating what is at least perceived to be, effectively, a six-week ban—is concerning to me, and the fear of political retribution in this matter is palpable. Today's result will surely weigh heavily upon the public and our state's medical professionals, in light of the threat of criminal penalties placed upon practitioners and the serious harm that could occur to women who could be denied reproductive health care during this uncertainty.

The remainder of my dissent will focus on responding to the decision of the majority (including the concurrence) as written, along with my analysis that the 2023 Act and the 2021 Act must have the same meaning, given that their operative terms are basically identical. Because the 2021 Act was deemed unconstitutional when viewed as a six-week ban, I would hold that the 2023 Act, enacted only four months after this Court's decision in *Planned Parenthood* with essentially the same terms, is unconstitutional under any reasonable analysis.

## I. Overview

Turning to the issues discussed by the majority, I cannot help but observe at the start that it has taken the extraordinary step of disregarding this Court's precedent as it struggles to justify its legally inconsistent result. This not only weakens the stability and reliance value of the law in this state, but ultimately undermines judicial independence and the integrity of the Court as an institution.

Earlier this year, the Court held the 2021 Act violated the right to privacy under article I, section 10 of the South Carolina Constitution. In doing so, we noted

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<sup>22</sup> In *Planned Parenthood*, I noted that some sources, such as the American College of Obstetricians and Gynecologists, have indicated that the chambers of the heart and a heartbeat develop when a fetus is at a gestation of seventeen to twenty weeks, and that at six weeks, a quarter-inch-long embryo has no detectable "heartbeat," as the "sound" heard is actually manufactured by the ultrasound machine itself. See *Planned Parenthood*, 438 S.C. at 222, 882 S.E.2d at 788 (Beatty, C.J., concurring).

that many women do not even know they are pregnant at the earliest stage of potential "cardiac activity," assuming at that time that it could occur at six weeks of gestation, as this arguably appeared to be the State's targeted goal. The Court held this early threshold likely precludes many women from making an informed choice about their reproductive health and obtaining care within the statutory timeframe. *See, e.g., Planned Parenthood*, 438 S.C. at 195, 882 S.E.2d at 774 (Hearn, J.) ("In 2021, the General Assembly passed the Act, which prohibits an abortion after around six weeks gestation. *See* S.C. Code Ann. § 44-41-680 (Supp. 2022). This is before many women—excluding those who are trying to become pregnant and are therefore closely monitoring their menstrual cycles—even know they are pregnant."); *id.* at 221–23, 882 S.E.2d at 788–89 (Beatty, C.J., concurring) ("The number of weeks of gestation is not specified in the law, but the parties indicate it is their understanding that the law was intended to target gestation of six weeks or more, based on the idea that nascent 'cardiac activity' emerges from a small cluster of cells at that time. . . . As medical experts have explained, at this early stage, a substantial number of women do not even know that they are pregnant, so there is no realistic opportunity to make a medical decision as to the (unknown) pregnancy at this point.").

Justice Few, the third member of the Court's majority in *Planned Parenthood*, found the 2021 Act was unconstitutional because the General Assembly did not even consider if women *could* make an informed choice about whether to continue a pregnancy. *See id.* at 278, 882 S.E.2d at 819 (Few, J., concurring in result) ("*[K]nowledge of a pregnancy is a predicate for informed choice. . . . Thus, if a substantial percentage of pregnant women cannot know of their pregnancy in time to have meaningful discussions, engage in sufficient deliberation and prayer, and then make timely arrangements to carry out an abortion, then I cannot envision a winning argument that meaningful choice exists or that the denial of that choice is not an unreasonable invasion of privacy.*" (emphasis added)). He found this rendered the law arbitrary because, while informed choice was included in the General Assembly's findings accompanying the 2021 Act, more importantly, informed choice exists as an inherent component of the constitutional right to privacy. *See id.* at 276, 882 S.E.2d at 818 ("Although the Fetal Heartbeat Act recognizes the interest of 'informed choice,' *a woman's interest in choice is not dependent on this portion of the Act. . . . The article I, section 10 right of privacy . . . includes choice.*" (emphasis added)).

While Justice Few stated he would refrain from formally reaching this point, he nevertheless conceded that it was "plainly obvious" that the timeframe allotted was inadequate, and he emphasized that six weeks of gestation as calculated under the 2021 Act was actually only four weeks post-conception. *See id.* (stating "it is

important to understand that under the six-week bill, a pregnant woman's choice must be made—and carried out—within *four* weeks of the time she becomes pregnant"); *see also id.* at 285–86, 882 S.E.2d at 823 ("[B]ecause the General Assembly did not consider the question, there is nothing for the Court to consider. I am nevertheless tempted to address whether there could be any evidence to support such a 'presumed finding' and find the Fetal Heartbeat Act in violation of article I, section 10 for the additional reason it is impossible for the General Assembly to reach any conclusion other than a substantial percentage of pregnant women cannot learn of their pregnancy, have time for sufficient deliberation and prayer, and if the choice is made to not continue the pregnancy, then carry out an abortion before the legality of doing so expires under the Act. *I am tempted for the obvious reason that it is plainly obvious a substantial percentage of women cannot learn of their pregnancy in time to make and carry out a meaningful choice under the Fetal Heartbeat Act.*" (emphasis added)).

In my view, because the material terms of the 2023 Act have not changed from the 2021 Act, logic and respect for the doctrine of stare decisis dictate that the 2023 Act should likewise be declared unconstitutional. To paraphrase legal scholars, the decisions of this Court represent the solemn determination of the Court as an entity, not its members, and this Court remains the same Court, even as its composition changes. As a result, the Court's decision rendered in January was not just a decision "for the time being." Rather, it was the considered determination of this Court after a lengthy deliberative process. This case presents the quintessential example of why stare decisis must be applied to uphold the integrity of the Judicial Branch's position as a separate, but co-equal branch of government.

After this Court's pronouncement, the invalidity of a six-week abortion ban was no longer an uncertainty in light of the state constitutional right to privacy, and the Court's decision became precedent in South Carolina. If the Court's decisions were subject to the vagaries of unending individual opinion, numerous points of "settled law" could be placed in turmoil from constant reexamination. For these reasons, stare decisis is a guiding principle that courts have used for centuries to bring stability to the law.

The majority and I agree about the separate functions of the three co-equal branches of government and this Court's role in reviewing the matter. Today, however, the majority has allowed the legislature to infringe upon this separation of powers by upholding the resurrection of a ban that this Court has already determined violates our state constitution. It does so by going to great lengths to reason "[t]he 2023 Act is new legislation" after "the General Assembly went back to the drawing

board." It does so because it must. Otherwise, its rejection of stare decisis falters. If the acts are the same, our decision in *Planned Parenthood* must control.

Our analyses diverge at the outset because we disagree on whether the 2023 Act differs from the 2021 Act. The majority points to changes the General Assembly made in its supporting findings and purposes, and to the availability of contraception as a tool for "family planning." As will be explained, in my view, these points do not alter the material terms of the 2023 Act and their effect. Both the 2021 Act and the 2023 Act—which bear the same name and ban abortion at exactly the same point in time—preclude many woman from being able to exercise informed choice over their reproductive health decisions because the prohibition takes effect before many women can realistically know that they are pregnant and obtain an abortion. Further, I strongly disagree with the suggestion by the majority that the availability of contraception to *prevent* a pregnancy has any bearing on the amount of time a pregnant woman has to *discover* and decide whether to *continue* a pregnancy, and to obtain medical care based on that decision. In my view, the notion that the existence of contraceptives expands the time for a woman to discover that she is pregnant is absurd. I seriously doubt that the legislature intended contraceptives to be viewed in that context.

The ban that was declared unconstitutional by this Court just months before has not changed in its core elements or intended effect. What has changed, however, is this Court's response. What was once acknowledged in *Planned Parenthood* to be "plainly obvious"—that a ban at such an early stage of pregnancy can often leave women with no choice at all—is now suddenly constitutional. The disregard of precedent and the reluctance to acknowledge what is still "plainly obvious" is unfortunate for the rule of law and, ultimately, the citizens of South Carolina, who must navigate the changing legal landscape that is controlling access to reproductive health care in this state. It also undermines the separation of powers by failing to undertake this Court's obligation to evaluate whether the determinations of the General Assembly, once made, are reasonable. I conclude, consistent with *Planned Parenthood*, that they are not, and the 2023 Act violates the constitutional right to privacy.

I am convinced of the appropriateness of my conclusion after considering (1) the doctrine of stare decisis, and (2) the inconsistency of today's result in view of the lack of change in the material terms of the 2023 Act and state precedent recognizing the right to privacy and bodily autonomy. I will examine each of these points in turn.

## II. Stare Decisis

"Stare decisis"—translated from Latin in the 18th Century as "to stand by things decided"—refers to "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, *Black's Law Dictionary* (11th ed. 2019). Thus, when a competent court decides a point, "it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases." *Id.* (quoting William M. Lile et al., *Brief Making and the Use of Law Books* 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914)).

This judicial principle predates the formation of the United States. "The doctrine of stare decisis in American jurisprudence has its roots in eighteenth-century English common law." Cong. Rsch. Serv., *ArtIII.S1.7.2.1 Historical Background on Stare Decisis Doctrine*, Constitution Annotated [hereinafter, Constitution Annotated], [https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ALDE\\_00001187/#ALDF\\_00021141](https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ALDE_00001187/#ALDF_00021141) (last visited Aug. 14, 2023). More than a century ago, this Court cited an example from English law that recognized the need for judicial consistency:

Lord Kenyon, in *Schumann* [*v. Weatherhead* (1801), 1 East 537, 541 (U.K.)], said, "I should be sorry to see one decision in 1798, and a different decision on the same facts in 1801."

*Gage v. City of Charleston*, 3 S.C. 491, 497 (1872).

A fundamental aspect of stare decisis is that, not only should a court apply the law consistently in subsequent cases before the same members, but it should also apply the law consistently even as its own composition changes. In 1912, Henry Campbell Black, the author of *Black's Law Dictionary* and other notable works, explained that a court's decision is not the view "for the time being," as the authority of a decision stems from the fact that it is the judgment of the court as an entity, and this fact does not change, even when its members do:

For, when considered as a precedent, it is not an expression of the individual views of the judges *for the time being*, which their successors may or may not share,

*but its authority is derived from the fact that it is the judgment of the court, which has not changed, though its members have.*

Henry Campbell Black, *Handbook on the Law of Judicial Precedents* 190 (1912) (emphasis added); *see also id.* at 189 ("Although the membership of a court may change from time to time, by the appointment or election of new judges in place of those who leave the bench, *yet it remains the same court.*" (emphasis added)).

Once a court has announced its decision, the law on that point is no longer uncertain. 1 William Blackstone, *Commentaries on the Laws of England* 69 (1765). Accordingly, the determination—even a close one—should not thereafter "waver with every new judge's opinion" because a new judge is "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." *Id.*

A century ago, Judge (later Supreme Court Justice) Cardozo stated "adherence to precedent should be the rule and not the exception." Benjamin N. Cardozo, *The Nature of the Judicial Process* 148 (1921). He observed that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." *Id.*

Despite the historical significance of this doctrine, today's majority resists the application of stare decisis based on its contentions the 2023 Act is completely new because the General Assembly has made statutory changes to remedy the constitutional defects present in the 2021 Act, the doctrine of stare decisis has less force in cases involving constitutional questions than in those involving statutory interpretation, and stare decisis cannot be applied based on only one case (i.e., *Planned Parenthood*).

As will be explored more fully in the next section examining the specific terms of the 2023 Act, I have no doubt that the 2023 Act is virtually identical in all material respects to the 2021 Act. This Court has previously held that it will not reconsider its precedent when there has been a later statutory change, but the substance of the statute is essentially the same, as the law should not be a "moving target." *See Wehle v. S.C. Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005). This reasoning should apply in the current matter because the 2023 Act has not fundamentally changed in its essential element—the imposition of a ban on abortion upon the detection of a "fetal heartbeat," as that term is statutorily defined.

To the extent the majority contends *stare decisis* has less force in constitutional cases, I note this position is, relatively speaking, a more recent expression of *stare decisis* that was created by the Supreme Court for the federal courts. It does not support a conclusion that *stare decisis* has *no* force in constitutional matters. It should also be of interest to advocates of originalism that this apparently was not the view of our nation's founders. The Congressional Research Service, which for over a hundred years has published a comprehensive, government-sanctioned record of the interpretations of the United States Constitution and provided research for Congress and the public, has indicated "the 'notion that the constitutional or statutory nature of a precedent affects its susceptibility to reversal *was largely rejected in the founding era* and did not gain majority support until well into the twentieth century.'" *See* Constitution Annotated, *supra*, ArtIII.S1.7.2.2 *Stare Decisis Generally* n.8 (emphasis added) (quoting Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 735 (1999)), [https://constitution.congress.gov/browse/essay/artIII-S1-7-2-2/ALDE\\_00013237/#essay-8](https://constitution.congress.gov/browse/essay/artIII-S1-7-2-2/ALDE_00013237/#essay-8) (last visited Aug. 14, 2023).

In addition, it is notable that one of the earliest invocations of the sentiment by this Court (regarding the weaker force of *stare decisis* in constitutional cases) involved a departure from constitutional precedent *in order to expand upon*—not restrict—a personal liberty interest. For example, in a 1908 case this Court concluded *stare decisis* had less force because the challenged law "attempts to deprive the citizen of one of the personal rights guaranteed by the Constitution of the state":

We shall not discuss at length the doctrine of *stare decisis*. It seems obvious it *has less force when the constitutional rights of the citizen to his personal liberty are involved than in those cases involving the fixedness of property rights and the regularity of procedure*. With the profoundest respect for the judges who delivered and concurred in these opinions, we cannot avoid the conclusion that the statute in question provides for imprisonment for debt without proof of fraud, and *therefore, attempts to deprive the citizen of one of the personal rights guaranteed by the Constitution of the state*.

*Ex parte Hollman*, 79 S.C. 9, 13–14, 60 S.E. 19, 21 (1908) (emphasis added).

The 2023 Act that is now before the Court involves the statutory *restriction* of a pregnant woman's right to make her own reproductive health decisions and have control over her own bodily integrity at an early stage of pregnancy. Accordingly, I believe stare decisis should carry great weight because its application would *prevent the deprivation of a personal right* guaranteed by the South Carolina Constitution—the right to privacy.

Stare decisis undoubtedly remains a foundational component of American jurisprudence to prevent arbitrariness and to ensure the steady and evenhanded application of the law. Despite the Supreme Court's overruling of federal abortion precedent in *Dobbs*, a researcher using data compiled by the Congressional Research Service has concluded "that the Supreme Court has overturned constitutional precedent in 0.005% of its decisions—an infinitely small or infrequent amount of the time." David Schultz, *Constitutional Precedent in US Supreme Court Reasoning* 22 (Edward Elgar Publishing 2022). This conclusion was based on comparing the over 26,000 judgments and opinions issued by the Supreme Court during its existence to the slightly over 140 Supreme Court decisions overruling its own *constitutional* precedent, as identified by the Congressional Research Service through 2018, which was then updated by the author (Schultz) through 2020. *Id.* at 21–22. Accordingly, it is clear that, for most of the Supreme Court's existence, it rarely rejected stare decisis in constitutional cases, having done so in *less than one-half of one percent of its cases* over more than two centuries.

The strength and value of stare decisis, even in constitutional cases involving abortion, was expressly reaffirmed by the Supreme Court's Chief Justice as recently as 2020 in a concurring opinion for *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). Chief Justice Roberts noted that four years prior, he had dissented from an opinion, *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), in which the majority concluded that a Texas law governing a physician's admitting privileges resulted in a substantial obstacle to women seeking an abortion and violated the Due Process Clause of the Fourteenth Amendment. The Chief Justice stated the Court was now faced with the same statute in Louisiana and was, consistent with precedent, likewise concluding the Louisiana statute was unconstitutional. The Chief Justice stated that, while he still stood by the views in his prior dissent, he was, nevertheless, voting to concur with the majority's determination in *Russo* to strike down the Louisiana statute based on the doctrine of stare decisis. In explaining his duty to uphold existing precedent, Justice Roberts stated:



The legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

*Russo*, 140 S. Ct. at 2134 (Roberts, C.J., concurring). *Russo* was ultimately one of the decisions abrogated by *Dobbs*. The abandonment of federal precedent by the Supreme Court in *Dobbs*, and the responses of some state legislatures and state courts, have had an enormous adverse impact on the reliance interests people have placed upon that precedent for nearly half a century. This includes not only pregnant women, but also their families and their doctors, as well as lawyers and state institutions.

In addition, federal courts rely upon a state court's determination of the constitutionality of a state statute, even if they have reached a different conclusion under federal law regarding similar provisions. *See Black's Handbook, supra*, at 552 ("The construction placed upon any clause or provision of the constitution of a state, by the highest court of that state, will be accepted as binding and conclusive by the federal courts, save only in so far as questions of federal law may be involved."). "It matters not that the federal courts have already reached entirely different conclusions in construing language of a similar or identical import in the federal constitution or laws." *Id.* at 553. "The final decision as to the meaning of the state constitution rests with the state courts." *Id.* Accordingly, the meaning of South Carolina's constitutional privacy clause rests solely with this Court. It is not controlled by the Supreme Court's decision in *Dobbs* or by any federal court.<sup>23</sup>

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<sup>23</sup> In overruling *Roe*, the Supreme Court concluded the authority to regulate or prohibit abortion was being returned "to the people and their elected representatives." *Dobbs*, 142 U.S. at 2284 (emphasis added). In 2022, six states added ballot initiatives where "the people" could vote to either uphold or restrict access to reproductive care, including abortion. In all six states—California, Kansas, Kentucky, Michigan, Montana, and Vermont—the voters supported abortion access, either by approving measures that expressly recognized a constitutional right to abortion, or by rejecting proposals to constitutionally restrict the right to abortion. Additional states are planning similar ballot measures in 2023 and 2024. *See* Ballotpedia, *2023 and 2024 Abortion-Related Ballot Measures*, [https://ballotpedia.org/2023\\_and\\_2024\\_abortion-related\\_ballot\\_measures](https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures) (last visited Aug. 14, 2023). As of the date of this opinion in 2023, however, there are no

Lastly, I am not persuaded by the majority's contention that *Planned Parenthood* is a singular decision and this justifies the rejection of stare decisis, based on the Court's comments in the unrelated case of *McLeod*. See *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 203 (2012) (stating "stare decisis is far more a respect for a body of decisions as opposed to a single case standing alone"). While the majority focuses on the sentence quoted above, it is instructive that the *McLeod* Court further explained: "*That is not to say that a single case garners no protection from stare decisis, for even in those circumstances we should hesitate to revisit and reverse our decisions without good cause to do so.*" *Id.* (emphasis added). Thus, a single decision is certainly precedential, and even one decision can be afforded respect under the doctrine of stare decisis. In fact, one of the cornerstone decisions of United States law, *Marbury v. Madison*, maintained its continuing influence under stare decisis despite the fact that it was, for many years, a single decision.<sup>24</sup>

In any event, the Court's determination that the state constitutional right to privacy extends beyond the search and seizure context and includes a person's right to bodily integrity and control over medical decisions is not a new concept limited to one decision, i.e., *Planned Parenthood*. It has been the law in this state for decades. For example, thirty years ago, in *Singleton v. State*, 313 S.C. 75, 89–90, 437 S.E.2d 53, 61–62 (1993), this Court recognized that an inmate has a constitutional right to privacy to be free from unwarranted medical intrusions, and we held the forced medication of an inmate to facilitate an execution would violate an inmate's right to privacy. In doing so, we agreed with the sentiment expressed by a Louisiana court that interpreted a similarly worded provision and concluded "the right to decide what is to be done medically with one's brain and body" was

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plans for South Carolina voters to be given an opportunity to vote directly on the subject of abortion access, as envisioned in *Dobbs*.

<sup>24</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803) (holding federal laws that conflict with the United States Constitution are invalid and establishing the principle of judicial review); see also Joseph Fawbush, *Marbury v. Madison Case Summary: What You Need to Know*, FindLaw, <https://supreme.findlaw.com/supreme-court-insights/marbury-v--madison-case-summary--what-you-need-to-know.html#Impact> (last visited Aug. 14, 2023) (noting *Marbury* became a cornerstone of United States law even though it was not actually cited by the Supreme Court for the principle of judicial review and used to strike down an unconstitutional law until many years later, in 1895).

encompassed in that state's constitutional right to privacy. *See id.* at 88, 437 S.E.2d at 60 (quoting *State v. Perry*, 610 So. 2d 746, 755 (La. 1992)).

In *Planned Parenthood*, this Court reiterated the holding in *Singleton* regarding the meaning of the right to privacy. *See, e.g., Planned Parenthood*, 438 S.C. at 205, 882 S.E.2d at 779 (Hearn, J.) ("Respondents' position to limit the reach of the constitutional right to privacy to the criminal arena of search and seizure is also contrary to the jurisprudence of this Court. We have found that the right to privacy may be implicated in many ways, from requiring a witness to divulge medical information during a criminal trial to forcing a convicted felon to take medication so that he may be competent enough to be executed."); *id.* at 259, 882 S.E.2d at 808 (Few, J., concurring in result) ("The State argues our 'unreasonable invasions of privacy' provision should be limited to search and seizure cases and to electronic surveillance, and thus is inapplicable in this case. I disagree. . . . [T]he word 'privacy'—though broad—is clear as to its scope: it includes all forms of privacy. When a constitutional provision is clear, we must discern the intent behind the provision only from its text, and should not resort to other evidence of intent.").

Notably, today's majority also concludes the state constitutional right to privacy is not restricted to only a narrow class of search and seizure issues, so *stare decisis* is respected as to that particular point. However, the majority goes to great pains to search for explicit references to "abortion" in the state constitution and, finding none, declares the right to privacy cannot exist for a medical decision if it involves abortion. As this Court recognized decades ago, however, it is the general concept of "privacy" that is expressly guaranteed. The constitution does not list all subjects for which privacy is afforded, but how would this ever be possible? The constitution is a short document outlining broad concepts concerning the structure of state government. It serves as a general roadmap for future guidance and must be supplemented with other provisions, such as statutory laws and local ordinances. It does not provide the exhaustive detail of a tax code.

As the Court explained in *Planned Parenthood*, in reaching the decision in *Singleton*, the Court "did not ask whether our constitution specifically prohibited forced medication of an inmate in order to carry out an execution." *Planned Parenthood*, 438 S.C. at 206, 882 S.E.2d at 780 (Hearn, J.). We observed: "Just as the [privacy] provision does not specifically refer to abortion, neither does it mention forcing medication on an inmate." *Id.* In my view, the majority's discussion regarding its failure to "find" abortion in the constitution is specious. It is more a

function of the majority's desire to avoid the result in *Planned Parenthood* than a true analysis of the extent of privacy afforded by our state constitution.

Furthermore, for nearly fifty years, there has actually been two bodies of precedent that intersected on the issue of abortion, the law of this state and the law of the United States, both of which protected a woman's right to make an informed choice as to pregnancy. Significant reliance interests were placed on those bodies of precedent. Those interests have continued with this Court's decision in *Planned Parenthood* upholding, under state law, a woman's right to privacy and to control her own reproductive health decisions at the early stages of her pregnancy. Consequently, there is more than just a single decision on this topic, even if there is only one decision from this Court regarding the interplay of the state constitutional right to privacy and the 2021 Act. As previously noted, South Carolina's right to privacy is not affected by the outcome in *Dobbs*, as federal law is not controlling of our Court's determinations regarding a state constitutional right.

### III. The 2023 Act

I turn now to my last point of divergence from the majority—it is also the most crucial to my conclusion the 2023 Act is unconstitutional—my determination that the material terms of the 2023 Act are virtually identical to the those in the unconstitutional 2021 Act. For convenience, the material terms of the 2023 Act and the 2021 Act are outlined below:

2023 ACT	2021 ACT
<p><b>The 2023 Act</b> prohibits an abortion upon a pregnant woman "if the unborn child's fetal heartbeat has been detected," with limited exceptions. S.C. Code Ann. § 44-41-630(B) (West 2023).</p>	<p><b>The 2021 Act</b> prohibited an abortion upon a pregnant woman if a "fetal heartbeat has been detected" in a "human fetus," with limited exceptions. S.C. Code Ann. § 44-41-680(A) (Supp. 2022).</p>
<p><b>"Unborn child"</b> is defined as "an individual organism of the species homo sapiens from conception until live birth." <i>Id.</i> § 44-41-610(14).</p>	<p><b>"Human fetus"</b> or <b>"unborn child"</b> was defined as "each mean[ing] an individual organism of the species homo sapiens from fertilization until live birth." <i>Id.</i> § 44-41-610(6).</p>

<p><b>"Conception"</b> is defined as the "fertilization of an ovum by sperm." <i>Id.</i> § 44-41-610(3).</p>	<p><b>"Conception"</b> was defined as "fertilization." <i>Id.</i> § 44-41-610(1).</p>
<p><b>"Fetal heartbeat"</b> is defined as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." <i>Id.</i> § 44-41-610(6).</p>	<p><b>"Fetal heartbeat"</b> was defined as "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." <i>Id.</i> § 44-41-610(3).</p>
<p><b>"Gestational sac"</b> is defined as "the structure that comprises the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy." <i>Id.</i> § 44-41-610(8).</p>	<p><b>"Gestational sac"</b> was defined as "the structure that comprises the extraembryonic membranes that envelop the human fetus and that is typically visible by ultrasound after the fourth week of pregnancy." <i>Id.</i> § 44-41-610(5).</p>
<p><b>"Gestational age"</b> is defined as "the age of an unborn child as calculated from the first day of the last menstrual period [LMP] of a pregnant woman." <i>Id.</i> § 44-41-610(7).</p>	<p><b>"Gestational age"</b> was defined as "the age of an unborn human individual as calculated from the first day of the last menstrual period [LMP] of a pregnant woman." <i>Id.</i> § 44-41-610(4).</p>

As can be seen from the foregoing comparison, the material terms of the 2023 Act and the 2021 Act are virtually identical. They both impose an abortion ban upon the detection of "cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac." As discussed in this Court's decision finding the 2021 Act unconstitutional, although the number of weeks gestation is not specified, this operative provision has been variously described as a "fetal heartbeat" law (as appears in the title of the legislation) or, more informally, a six-week abortion ban (which has been the perceived effect). The premise of the legislation, however, is factually and medically inaccurate. A fetal heart has not yet developed at six weeks LMP and the organism is not yet a fetus; rather, it is classified as an embryo. When pregnancy is measured using the LMP date (as provided in the statutory

definition of "gestational age"), it is important to understand that this date is calculated from a point that is usually approximately two weeks *before* a woman is actually pregnant. As a result, six weeks LMP is only about four weeks of actual embryonic development, as the Court previously recognized in *Planned Parenthood*.<sup>25</sup>

Changes in the wording of other key terms of the 2021 Act are inconsequential. For example, although the majority emphasizes that the State now has an interest in an unborn child from *conception* because the 2023 Act defines an unborn child "from conception until live birth," whereas the 2021 Act referred to an unborn child "from fertilization until live birth," this is a distinction without a difference. Both the 2023 Act and the 2021 Act expressly define "conception" to mean the same as "fertilization." *Compare* S.C. Code Ann. § 44-41-610(3) (West 2023) (2023 version) *with* S.C. Code Ann. § 44-41-610(1) (Supp. 2022) (2021 version). As a result, any change in this regard is one of phrasing only, not meaning.

Essentially, the majority characterizes the 2023 Act as "new" legislation and maintains it is cured of any constitutional defect present in the 2021 Act because it contains different findings and purposes. For example, the 2023 Act does not include finding eight that accompanied the 2021 Act regarding "informed choice."<sup>26</sup> In *Planned Parenthood*, the Court observed that a six-week ban can deprive pregnant women of an opportunity to exercise "informed choice" because there is insufficient time to discover a pregnancy, assess and weigh the options, consult with a partner and family, decide whether to continue a pregnancy, schedule an appointment, comply with the statutory waiting period, and obtain an abortion. As several members of the Court specifically noted, this window is substantially shortened by the fact that all of these actions must actually occur within *four weeks* of conception,

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<sup>25</sup> *Planned Parenthood* correctly points out that it is standard medical practice to date pregnancy using "gestational age," which is the number of weeks and days since the patient's LMP. Both the 2023 Act and the 2021 Act use LMP and "gestational age" in calculating the date of a pregnancy. Dating a pregnancy from LMP is distinguishable, however, from using the date of fertilization or conception. The LMP date is also distinguishable from the date of implantation, which is when a pregnancy actually begins from a medical point of view.

<sup>26</sup> *See* 2021 S.C. Acts 2, 3 § 2(8) (finding that, "in order to make an *informed choice* about whether to continue a pregnancy, a pregnant woman has a legitimate interest in knowing the likelihood of the human fetus surviving to full-term birth based upon the presence of a fetal heartbeat" (emphasis added)).

not six. *See, e.g., Planned Parenthood*, 438 S.C. at 222, 882 S.E.2d at 788 (Beatty, C.J., concurring) ("A pregnancy that is at six weeks gestational age (counted from the first date of the LMP) is actually at an embryonic age of only four weeks of development (counted from the date of conception).").

These circumstances have not changed since the opinion was published in January 2023. Although the General Assembly has removed finding eight accompanying the 2021 Act—that women are entitled to make an "informed choice" about pregnancy—the removal of this collateral finding should not alter this Court's analysis or its ultimate conclusion.

As an initial matter, I note the majority's reasoning about "informed choice" is primarily directed at the first step in this judgment process, i.e., when a woman *can discover* she is pregnant. As I will explain in the context of another point to follow, I disagree with its premise in this regard. However, even if I agreed, this point would not cure the lack of informed choice that makes the timing of the ban unreasonable and, therefore, unconstitutional because the *discovery* of a pregnancy is just *one* of the many steps that necessarily must occur *before* six weeks LMP (or four weeks post-conception) elapses.

In addition, the legislative finding regarding "informed choice" was not actually codified as part of the 2021 Act, and the majority's result in *Planned Parenthood* was not based on this finding. *See Planned Parenthood*, 438 S.C. at 274 n.56, 882 S.E.2d at 817 n.56 (Few, J., concurring in result) ("The legislative findings section of the 2021 six-week bill was not codified . . ."). As Justice Few and the rest of the majority recognized, informed choice is not dependent on the legislative finding because it exists as an inherent factor in the constitutional right to privacy. Consequently, the removal of the uncoded finding in the 2021 Act is not determinative. *See id.* at 276, 882 S.E.2d at 818 ("Although the Fetal Heartbeat Act recognizes the interest of 'informed choice,' *a woman's interest in choice is not dependent on this portion of the Act*. The choice of whether to continue a pregnancy or to have an abortion is an inherently private matter that implicates article I, section 10. The General Assembly's codification [i.e., inclusion] of 'informed choice' as an interest to be valued here simply recognizes this obvious fact that abortion is a private choice. *The article I, section 10 right of privacy, therefore, in this context, includes choice.*" (emphasis added)). I agree with Justice Few's original reasoning in this respect. Bodily autonomy does not depend on the General Assembly's findings. That protection is enshrined in the South Carolina Constitution.

Moreover, legislative findings are not law, and this Court may review them to determine if they are erroneous. *See generally Anderson v. Baehr*, 265 S.C. 153, 161, 217 S.E.2d 43, 46 (1975) (stating that, while legislative findings on an issue are entitled to weight, they are not conclusive); *Richards v. City of Columbia*, 227 S.C. 538, 560–61, 88 S.E.2d 683, 694 (1955) (stating legislative findings of fact are not binding on a court and are subject to judicial review, and a court may consider extrinsic evidence for this purpose, but a statute will not be held unconstitutional unless such legislative findings are clearly erroneous). *Cf. Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 114 S.E.2d 688, 700 (N.C. 1960) (stating while legislative findings and declarations of policy are entitled to weight, they "have no magical quality to make valid that which is invalid, and are subject to judicial review").

The majority next relies on what it describes as the General Assembly's "new" and improved balancing of the interests of the pregnant woman and the embryo, along with a "new" focus on contraceptives for "family planning." In doing so, the majority asserts at the outset that the General Assembly "had placed weight on the fact that a woman could learn of her pregnancy within seven to fourteen days of conception and would have several weeks after that to make her decision and have an abortion if she so chose," relying not on any specific evidence or findings by the General Assembly, but on comments contained in the South Carolina Senate Journal regarding Senate Bill 474. In my view, the majority's acceptance of the General Assembly's belief that a woman can discover a pregnancy (and secure an abortion) within the statutory period is unreasonable, particularly where the General Assembly has made no actual findings in this regard and, to the extent the General Assembly has made what could be characterized as *implied* findings, they are inaccurate.

As the concurring opinion by Justice Few acknowledges, these are implied findings because they form no part of the 2023 Act. Further, although Justice Few has signed on to the majority's disposition, he also readily acknowledges that the implied findings relied on by the majority are incorrect. Justice Few quotes the General Assembly's comments reported in the Senate Journal ("That means that a woman can find out that she is pregnant two weeks after conception and has another 4 1/2 to 5 weeks to make her decision and have an abortion.") and notes: "These numbers are incorrect, presumably because the calculations that led to them were based on the date of the [LMP] rather than the date of fertilization." *See Concurring Op.* at n.17.

I agree with his assessment of the inaccuracy of the General Assembly's timeline, although I disagree with his conclusion that sufficient time nevertheless



exists for informed choice. There is no factual data to support a determination that most women should learn of a pregnancy within seven to fourteen days of conception and would then have up to five weeks to decide whether to continue a pregnancy. The General Assembly's implied finding in this regard is neither accurate nor reasonable, and it presumes women should be constantly undertaking pregnancy testing throughout their reproductive years. As discussed in *Planned Parenthood*, unless they are constantly testing themselves in an effort to *become* pregnant, many women do not even know they are pregnant until their menstrual cycle is late (which can be five weeks LMP or more). Even women who are constantly monitoring their status in an effort to become pregnant are not usually keeping up this level of vigilance throughout the entirety of their reproductive years. Rather, it is a specific endeavor that is normally undertaken over a much more defined time. Blindly accepting an assertion that women should know they are pregnant within seven to fourteen days after conception imposes an inordinate financial and emotional burden on women to constantly test themselves, theoretically after any act of sexual intercourse, even before they have any objective indicia of a pregnancy. It does not give any true consideration to balancing the interests of women when analyzing when they should be able to know of a pregnancy.

In addition, I note the State's arguments to this Court in support of the 2023 Act are based, at least in part, on the misapprehension of data from the South Carolina Department of Health and Environmental Control ("DHEC") regarding abortion rates. This misapprehension stems from the fact that there are different methods for dating a pregnancy. The 2023 Act, like the 2021 Act, uses LMP to calculate "gestational age." As Justice Few explained in his concurrence in *Planned Parenthood*, the DHEC data reports the number of abortions beginning at six weeks *post-fertilization*, not six weeks LMP. As a result, the DHEC data the State cites regarding abortion rates at "six weeks" is not at six weeks LMP. Rather, it is the equivalent of *eight weeks LMP*—some two weeks later, and "approximately two weeks after the Fetal Heartbeat Act prevents an abortion." *See Planned Parenthood*, 438 S.C. at 281, 882 S.E.2d at 820 (Few, J., concurring in result). Thus, the conflation of gestational age based on LMP with age based on the date of fertilization leads to an almost impossible window for "informed choice" to occur in South Carolina.

This is also echoed in the reporting of the Centers for Disease Control and Prevention ("CDC"), which compiles abortion statistics. Recent figures show that, in South Carolina, only 22.1 percent of abortions occurred by six weeks of gestation. *See Table 10, Abortion Surveillance -- United States, 2020*, CDC (Nov. 25, 2022), <https://www.cdc.gov/mmwr/volumes/71/ss/pdfs/ss7110a1-H.pdf>. Accordingly,

existing data demonstrates the overwhelming majority of women (nearly eighty percent) in South Carolina historically have not been able to obtain an abortion within this very narrow timeframe.

To the extent the majority maintains a woman's access to birth control (including emergency contraception, i.e., "Plan B" pills) to *prevent* a pregnancy can somehow *increase the time* a woman has to know about a pregnancy and make an "informed choice" about *responding to a pregnancy*, I find the majority's adherence to this explanation to be not only illogical, but disingenuous. The majority holds the General Assembly accountable for "family planning" efforts in analyzing whether the time provided for informed choice in the 2023 Act was reasonable. Along these lines, Justice Few states in his concurring opinion that "[t]he most impactful change from the 2021 Act to the 2023 Act . . . [is] the idea of choice in terms of promoting active family planning." To support this "impactful change," Justice Few quotes portions of the Attorney General's brief that argue (1) "The timeline for a meaningful opportunity to make a decision begins prior to pregnancy," and (2) "Her awareness of the possibility of pregnancy further affords her the opportunity to control her reproductive health after sexual intercourse by taking a common, over-the-counter pregnancy test . . . ." Justice Few also opines that the General Assembly (and the State) have apparently changed the "key" question before the Court to now focus on family planning efforts to *prevent* a pregnancy as part of any constitutional analysis, and he indicates he approves this change in direction of the "key" question.

I disagree with the notion that the discussion surrounding "family planning" is a change that has *any* impact on the constitutionality of the 2023 Act. As I recall, Justice Few specifically acknowledged in *Planned Parenthood* that the constitutional right to privacy contains an inherent requirement of informed choice that is not dependent on the findings of the General Assembly, and the fundamental question before the Court was whether a woman has the ability to make an informed choice about "whether to continue a pregnancy." *See Planned Parenthood*, 438 S.C. at 276, 882 S.E.2d at 818 (Few, J., concurring in result) ("Although the Fetal Heartbeat Act recognizes the interest of 'informed choice,' a woman's interest in choice is not dependent on this portion of the Act. The choice of whether to continue a pregnancy or to have an abortion is an inherently private matter that implicates article I, section 10.").

That is still the question before this Court. While the General Assembly and the State are unquestionably entitled to change their arguments in support of the current legislation, that does not change this Court's focus on the issues that do impact whether the General Assembly's determinations are reasonable, as well as

ultimately whether the 2023 Act constitutes an unreasonable invasion of privacy. That being the case, how does the use of birth control have any bearing on *when* someone discovers an actual pregnancy and the time for deciding *whether to continue* a pregnancy? Any suggestion that the General Assembly can somehow alter the constitutional analysis of this Court simply by changing its assertions as to what it believes is reasonable is baseless.

The consideration of contraception illustrates how far afield the majority has gone in attempting to justify the impossible timeline that it advocates here. This Court has no factual information or record to justify the determination that the use of contraceptives *increases* the time to respond to a pregnancy. When we accepted original jurisdiction, we removed the case from the usual litigation process, and this Court has entertained no factual development of the record and instead relies on an unfounded and illogical premise.

Moreover, the implication is that women are solely responsible for a *couple's* unexpected pregnancy, possibly due to the lack of birth control. But what about situations where birth control fails? Or situations where someone does not have regular access to birth control due to circumstances beyond their control, such as a lack of insurance, low income, or an absence of nearby medical facilities? The financial and emotional burdens of repetitive pregnancy testing before a woman even has any reason to suspect a pregnancy, and the adverse effects from the use of hormonal contraceptives, such as Plan B, that are used before a woman can even know that she is pregnant (because it prevents implantation of the fertilized egg) are burdens that a woman will be forced to endure throughout her reproductive years. I believe the 2023 Act, by imposing its extreme deadline for compliance, fails to afford due consideration to these points when balancing the interests of women in this analysis.

In my view, the General Assembly's consideration of contraception and "family planning" clearly does not expand the time a woman has to decide whether *to continue* a pregnancy.<sup>27</sup> Further, the presence of birth control, as a general factor,

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<sup>27</sup> I believe it is arguable that the use of contraceptives could in some cases *shorten* the time available for a woman to discover a pregnancy. The use of contraceptives could falsely lull a woman into thinking there is a lessened likelihood of pregnancy, so she might not be as diligent with testing before she has any physical symptoms of a pregnancy. In addition, the use of some hormonal contraceptives can make women have variations in their menstrual cycles or in their fertility, which can interfere with both how quickly a woman can become pregnant and how quickly she may realize

existed at the time the 2021 Act was deemed unconstitutional, so it does not present a new or material change that would impact this Court's analysis regarding the right to privacy.

The majority rightly considers both the State's interests in regulating abortion and a pregnant woman's right to bodily autonomy. I agree that, "at a certain point in the pregnancy, a woman's interest in autonomy and privacy does not outweigh the interest of the [fetus] to live." Yet, because the material aspects of the two acts are the same, the line is drawn at exactly the same place—ostensibly, six weeks, or whenever a "fetal heartbeat" is detected. For this reason, the 2023 Act constitutes an unreasonable invasion of privacy. Our Court's role under Article V of the South Carolina Constitution does not require this Court to accept the findings or reasoning of the General Assembly as conclusive. In this case, the implied findings and policy choices of the General Assembly do not absolve the 2023 Act of its constitutional defects. Neither should the majority.

For all of the foregoing reasons, I firmly believe the State has shown no material differences in the key terms and the core application of the 2023 Act, and it suffers from the same infirmities that rendered the 2021 Act unconstitutional.

#### **IV. Conclusion**

I agree with the majority that, "[a]s judges, our solemn duty is to uphold the rule of law." Today, however, the majority has abandoned the precedent established just months earlier by this Court and, despite its insistence otherwise, has turned a blind eye to the obvious fact that *the 2021 Act and the 2023 Act are the same*. The result will essentially force an untold number of affected women to give birth without their consent. I am hard-pressed to think of a greater governmental intrusion by a political body. This outcome is not an affirmation of the separation of powers, as the majority declares, but an abdication of this Court's duty to ascertain the constitutionality of the challenged legislation. Although today's decision has impaired our role as an independent and co-equal branch of government, I am confident that we will quickly return to the question again. The majority itself predicts this by noting it is leaving "for another day . . . the meaning of 'fetal heartbeat' and whether the statutory definition . . . refers to one period of time during a pregnancy or two separate periods of time." In the absence of this critical determination, I fail to see how the majority's result today is legally justifiable.

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that she is pregnant compared to women whose cycles are regular.

While the majority makes much of the General Assembly's "plenary" power, I agree with the observation in the concurrence that, "[w]hen the General Assembly enacts legislation that violates the constitution, it has exceeded its 'plenary' power," and it is this Court's duty to say so. Unfortunately, this is such an instance.<sup>28</sup>

As previously noted, the fear of legislative reprisal is palpable. The lack of judicial independence renders a court powerless and places it on the edge of a slippery slope to irrelevance.

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<sup>28</sup> Our system of government is not limited to elected officials. All South Carolinians have a continued role to play in these political and constitutional questions. That has not changed, and will not change, despite the Court's opinion today.

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Lucinda Ruh, Plaintiff,

v.

Metal Recycling Services, LLC, Defendant.

Appellate Case No. 2022-000094

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**CERTIFIED QUESTION**

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ON CERTIFICATION FROM THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Opinion No. 28163  
Heard September 13, 2022 – Filed June 21, 2023

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**CERTIFIED QUESTION ANSWERED**

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James David George Jr., Graham L. Newman, and Mark D. Chappell, of Chappell, Smith & Arden, of Columbia, for Plaintiff.

Christopher A. Ogiba of Moore & Van Allen PLLC, of Charleston, and Scott M. Tyler of Moore & Van Allen PLLC, of Charlotte, NC, both for Defendant.

Robert Daniel Moseley Jr. and Robert Charles Rogers of Mosely Marcinak Law Group LLP, of Taylors, for Amici Curiae South Carolina Chamber of Commerce and the South Carolina Trucking Association, Inc.

Whitney B. Harrison, of McGowan, Hood, Felder, & Phillips, LLC, of Columbia, for Amicus Curiae South Carolina Association for Justice.

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**JUSTICE FEW:** The United States Court of Appeals for the Fourth Circuit certified the following question to this Court pursuant to Rule 244 of the South Carolina Appellate Court Rules:

Under South Carolina law, can an employer be subject to liability for harm caused by the negligent selection of an independent contractor?

We answer the certified question:

Yes, the principal<sup>1</sup> in an independent contractor relationship may be subject to liability for physical harm proximately caused by the principal's own negligence in selecting the independent contractor.

## **I. Background**

Metal Recycling Services, LLC, hired an independent contractor—Norris Trucking<sup>1</sup>, LLC—to transport scrap metal. A truck driver employed by Norris Trucking hit the car Lucinda Ruh was driving and injured her. Ruh sued Metal

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<sup>1</sup> The term "employer" suggests an employer-employee relationship. In such a relationship, the employer—even if not itself negligent—may be vicariously liable for the negligence of its employee. *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008) (citing *Sams v. Arthur*, 135 S.C. 123, 128-131, 133 S.E. 205, 207-08 (1926)). As we explain, one who retains an independent contractor is not vicariously liable for the contractor's negligence. This Court in previous opinions, the Fourth Circuit in the certified question, and the American Law Institute in Section 411 of the Restatement (Second) of Torts have all used the term "employer" to describe one who hires an independent contractor. To avoid any confusion between these different relationships and whether they give rise to vicarious liability, we believe the better term for an "employer" in an independent contractor relationship is "principal."

Recycling Services and its parent company, Nucor Corporation, in state court. The defendants removed the case to the United States District Court for the District of South Carolina. The district court granted the defendants' motion to dismiss, finding Ruh did not allege an employer-employee relationship between the defendants and Norris Trucking or its driver, nor did she otherwise allege any basis on which the defendants could be liable for the negligence of their independent contractor. *Ruh v. Metal Recycling Servs., LLC*, 436 F. Supp. 3d 844, 852 (D.S.C. 2020). The district court delayed entry of judgment to allow Ruh to seek leave to amend her complaint. *Id.* Ruh then filed a motion to amend her complaint to add a claim that Metal Recycling Services itself was negligent in selecting Norris Trucking to transport the scrap metal. The district court denied the motion to amend and dismissed the complaint. *Ruh v. Metal Recycling Servs., LLC*, No. 0:19-CV-03229-CMC, 2020 WL 1303136, at \*2-3 (D.S.C. Mar. 19, 2020). Ruh appealed to the United States Court of Appeals for the Fourth Circuit, which certified the question to this Court.

## II. Analysis

We begin by affirming the "general rule" that a principal "is not vicariously liable for the negligent acts of an independent contractor." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005); *see also Duane v. Presley Const. Co.*, 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978) (stating "an employer is not liable for the torts of an independent contractor committed in the performance of contracted work" (citing *Conlin v. City Council of Charleston*, 49 S.C.L. (15 Rich.) 201, 211 (1868))); *Caldwell v. Carroll*, 139 S.C. 163, 187, 137 S.E. 444, 452 (1927) (Cothran, J., dissenting from dismissal of petition for rehearing) ("In every clime, under every judicial sky, it has been the settled law that the proprietor of any kind of property to be constructed or improved is not liable in damages for the negligent act of an independent contractor . . ."). Ruh's claim in her proposed Amended Complaint, however, is not based on the allegation that Norris Trucking—the contractor—was negligent. Rather, her claim is based on the allegation that Metal Recycling Services—the principal—was negligent in selecting Norris Trucking to perform the work. Thus, nothing we say in this opinion affects the general rule that a principal is not liable for the negligence of its independent contractor.

On this issue—the negligence of the independent contractor—there is one point we must make clear. In most of these cases, the plaintiff contends the independent contractor has committed a negligent act, and thus, will also be a defendant. In this case, for example, Ruh brought a separate claim against Norris Trucking and its driver for the driver's negligence in causing her injuries. In most cases in which



the plaintiff sues the contractor *and* the principal—this case included—the plaintiff's theory is the contractor's negligence was one proximate cause of the injury, but also, the principal's negligent failure to select a competent and careful contractor was another proximate cause of the injury. *See generally J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (recognizing there may be more than one proximate cause of any injury); *Culbertson v. Johnson Motor Lines, Inc.*, 226 S.C. 13, 23, 83 S.E.2d 338, 342-43 (1954) (same). To be clear, however, proving the negligence of the independent contractor will not result in the liability of the principal. Under our decision today, there can be no recovery against the principal unless the plaintiff separately proves the negligence *of the principal* in selecting that particular independent contractor and that the principal's negligence was a proximate cause of the alleged injuries.

The question of whether the principal in an independent-contractor relationship can be held liable for its *own negligence* in selecting a particular contractor has never been squarely before this Court. We view our "yes" answer to the question, however, as a straightforward application of the defining principles of tort law in this State, and we believe our answer should come as no surprise to even a casual student of the law. *See Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 3, 282 S.E.2d 230, 231 (1981) ("lay[ing] this anachronism [of charitable immunity] to rest" and stating, "There is no tenet more fundamental in our law than liability follows the tortious wrongdoer."), *superseded in part by statute*, Act. No. 461, 1994 S.C. Acts 4963.<sup>2</sup> In fact, our predecessor Court—the Court of Appeals for the Courts of Law and Equity<sup>3</sup>—anticipated today's ruling over 150 years ago.

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<sup>2</sup> *See also Langley v. Boyter*, 284 S.C. 162, 183, 325 S.E.2d 550, 562 (Ct. App. 1984) (discussing "the basic premise of our fault system" is that a defendant "who is at fault in causing an accident" should not be allowed "to escape bearing any of its cost"), *opinion quashed*, 286 S.C. 85, 332 S.E.2d 100 (1985), *reasoning later adopted in, Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991); Ralph C. McCullough II & Gerald M. Finkel, *A Guide to South Carolina Torts IV* 2 (1st ed. 1995) ("The central theme underlying the whole of tort law is the idea that the tortfeasor . . . is usually held responsible . . . because he has departed from a reasonable standard of care.").

<sup>3</sup> The Supreme Court of South Carolina was not created until the adoption of the 1868 Constitution. *See* S.C. Const. of 1868 art. IV, §§ 1-5. From 1859 to 1868, appeals from trial courts were heard by the Court of Appeals for the Courts of Law and Equity, created by statute. *See* Act No. 4438, 12 Statutes of S.C. 647 (1859) ("*Be it enacted* by the Senate and House of Representatives, now met and sitting in

*See Conlin*, 49 S.C.L. at 211 (predicting that "under suitable allegations the owner might be made responsible for the misconduct or negligence of a contractor known to be unworthy of trust").<sup>4</sup> As the Fourth Circuit noted in its certification order to this Court, "every other state in the Fourth Circuit has . . . recognized a duty to hire a competent independent contractor." *Ruh v. Metal Recycling Servs., LLC*, No. 20-1440, 2022 WL 203744, at \*2 (4th Cir. Jan. 24, 2022) (citing cases). As Ruh points out in her brief, "thirty-seven states have [held a principal] owes a duty [of reasonable care] in the selection of an independent contractor."<sup>5</sup> As our own research reveals, no state has held that a principal is insulated from the consequences of its own negligence simply because its contractor was also negligent in causing the injury.

Nevertheless, Metal Recycling Services argues that to answer the question "yes" would "open the floodgates," and "expand . . . the scope of liability . . . to any [principal] who does not turn every stone to investigate and analyze the independent contractor's background, resources, and qualifications." Similarly, friends of the

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General Assembly, . . . That a Court of Appeals for the Courts of Law and Equity shall be, and the same is hereby, established."). *Conlin*—decided in January 1868—was one of the last decisions the court of appeals made before the new Justices of the Supreme Court were elected in July. *See* Barry Edmond Hambright, *The South Carolina Supreme Court 37-50* (1981) (Ph.D. dissertation, University of South Carolina) (on file with the Supreme Court of South Carolina Library) (discussing the creation of the 1859 Court of Appeals and the 1868 Supreme Court).

<sup>4</sup> *See also Caldwell*, 139 S.C. at 172, 137 S.E. at 446 (majority allowing negligence action against principal to proceed); 139 S.C. at 184-85, 137 S.E. at 451 (Cothran, J., dissenting) (stating in response to majority, "

49 S.C.L. at 211); *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670, 674-75 (D.S.C. 1992) (imposing liability on the principal for its own negligence in using a contractor to dispose of hazardous waste), *aff'd on this ground, rev'd in part on other grounds*, 996 F.2d 1212 (4th Cir. 1993) (unpublished table decision).

<sup>5</sup> Metal Recycling Services concedes "it is true that a majority of states have recognized such claims," but contends the majority comprises thirty-four states, not thirty-seven.

Court—South Carolina Chamber of Commerce and The South Carolina Trucking Association, Inc.—argue answering "yes" will create "unlimited liability upon any shipper who transports goods to or through the State of South Carolina" and "has the potential to drastically, and detrimentally, impact the business environment within the State of South Carolina." Because we are obligated to take these arguments seriously, we address how we anticipate our decision will play out in this and future cases, explain the limited impact we believe our decision will have, and hopefully assure those potentially affected by our decision that, in fact, the sky is not falling.

We turn, therefore, to section 411 of the Restatement (Second) of Torts, which provides:

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

- (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
- (b) to perform any duty which the employer owes to third persons.

Restatement (Second) of Torts § 411 (Am. L. Inst. 1965).

Ruh asks us to adopt section 411. While we find the text of and comments to subsection 411(a) will be useful in future cases as our circuit and appellate courts determine the parameters of this theory of liability, we deem it unnecessary to go so far as to "adopt" section 411. We will briefly explore four key features of subsection 411(a).<sup>6</sup> First—as in any negligence action—the plaintiff must prove the defendant—in these cases the principal—did not exercise reasonable care. Second, the standard for reasonable care will vary depending on the degree to which the work involves a risk of physical harm unless done "skillfully and carefully." Third, the question of reasonable care relates only to selecting a "competent and careful

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<sup>6</sup> This case involves potential liability only as set forth in subsection 411(a). We do not address liability under subsection 411(b). *Cf. Mentzer v. Ognibene*, 597 A.2d 604, 609 (Pa. Super. Ct. 1991) ("We agree that the scope of section 411 is properly limited to claims by third persons other than employees of the negligent independent contractor itself."); *Chapman v. Black*, 741 P.2d 998, 1005 (Wash. App. 1987) ("[T]he liability extends not to the employee of the independent contractor, but to innocent passersby.").

contractor." Finally, the plaintiff must establish the negligence of the principal was a proximate cause of the physical harm. Each of these features—and others not anticipated here—should be analyzed in future cases to develop a standard that allows an injured plaintiff to recover from an at-fault principal when such a recovery is warranted by the facts and the law, while avoiding unwarranted liability for principals who act reasonably in hiring independent contractors.

### **a. Reasonable Care**

The standard for the liability of the principal is reasonable care, or, "that [care] which a reasonable [principal] would exercise under the circumstances." Restatement (Second) of Torts § 411 cmt. c. During oral argument, we explored what the reasonable care standard may require of principals. Following up here on that discussion, first, reasonable care under subsection 411(a) is a matter of proof. The plaintiff must establish by proof a standard of care for selecting a contractor for the particular work and that the principal breached that standard. Second, most participants in the modern economy already act reasonably in selecting contractors. *See* Restatement (Second) of Torts § 411 cmt. c (recognizing "one who employs" a contractor to perform relatively simple and safe work within the contractor's field "is entitled to assume that [a contractor] of good reputation is competent to do such work safely"); *id.* (explaining the sophistication of the principal "is to be taken into account" in determining the standard of care, using an example of hiring a contractor to build a house); *Sievers v. McClure*, 746 P.2d 885, 891 (Alaska 1987) ("[Section 411] is not unduly burdensome, as in most cases it requires *no additional effort* from an employer who must act reasonably in the selection process . . . ." (emphasis added)). We do not foresee that our decision today will place any significant additional burden on the vast majority of principals to investigate a potential independent contractor.

### **b. Risk of Harm**

Subsection 411(a) contemplates liability of the principal only when the work of the contractor involves a "risk of physical harm unless it is skillfully and carefully done." Thus, the principal should make reasonable inquiry into the extent to which the work the contractor is being hired to complete involves danger—a foreseeable risk of physical harm—to third parties. *See* Restatement (Second) of Torts § 411 cmt. c (reciting "the general principle that the amount of care which should be used is proportionate to the danger involved in failing to use it"). The American Law Institute explains that "if the work is such as will be highly dangerous unless properly done and is of a sort which requires peculiar competence and skill for its successful

accomplishment," the principal "may well be required to go to considerable pains to investigate the reputation of the contractor . . . and ascertain the contractor's actual competence." *Id.* Thus, a more risky job generally requires a higher level of competence and care. A contractor hauling toxic chemicals on public highways, for example, needs expertise and equipment, and must act with a level of care, that would not be required for a contractor hauling paper products.

On the other hand, the American Law Institute explains, if the work is of a character that is within the competence of an average person—not requiring special skill and training—there will be a lower standard of care. *See* Restatement (Second) of Torts § 411 cmt. c (stating "whether the work lies within the competence of the average [contractor] or is work which can be properly done only by persons possessing *special skill and training*" is an "important" factor in "determining [the] amount of care required" (emphasis added)). Continuing with the trucking example, competence for hauling paper products may be nothing more than a commercial driver's license and a commercially sound vehicle, and carefulness may be indicated simply by not having a reputation for careless driving. Thus, hiring a trucking company to haul paper products may require no more than a surface level assessment of competence. *See, e.g., Lutz v. Cybularz*, 607 A.2d 1089, 1093 (Pa. Super. Ct. 1992) (holding section 411 required "only a minimal degree of care" from the principal in that case, and stating, "First, the foreseeable danger resulting from improperly delivered newspapers is significantly less than, for example, that of an improperly constructed building or machinery. The risk associated with delivering newspapers is unlikely to result in serious physical harm or property damage.").

### **c. Competent and Careful**

Subsection 411(a) requires a principal to exercise reasonable care in selecting "a competent and careful" contractor. Whether a particular contractor is sufficiently competent and careful to perform the work safely will depend on the difficulty and danger associated with the particular work. "The words 'competent and careful contractor' denote a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable [principal] would realize that a contractor must have in order to do the work . . . without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary." Restatement (Second) of Torts § 411 cmt. a. The American Law Institute explains, as an example of what is not meant by competent and careful, "The rule stated in this Section . . . has no application where the contractor, although competent and careful, is financially irresponsible." Restatement (Second) of Torts § 411 cmt. g.

As stated above, the standard for the competence and carefulness required for particular work is a matter of proof. Of course, a principal's actual knowledge that a contractor has demonstrated—or failed to demonstrate—competence and carefulness in prior work will always be relevant to whether the principal breached the standard of care.

#### **d. Proximate Cause**

As with any other theory of liability, the plaintiff must establish proximate cause. The American Law Institute addressed proximate cause in comment b to section 411, stating "it is . . . necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him." Restatement (Second) of Torts § 411 cmt. b. Sticking with the trucking example to illustrate the point, if a principal hires a contractor unqualified to handle emergencies that may arise while hauling toxic chemicals, the principal is negligent in hiring the contractor. But if the contractor causes an accident by negligently failing to yield the right of way, and the dangerous quality of his cargo plays no part in the accident or injury, then the plaintiff will be unable to establish cause-in-fact and thus unable to establish proximate cause. *See Wickersham v. Ford Motor Co.*, 432 S.C. 384, 390, 853 S.E.2d 329, 332 (2020) ("Proximate cause requires proof of cause-in-fact and legal cause."). In this example, the principal may be liable for his negligence in selecting the contractor only when the contractor's lack of qualifications to handle an emergency involving toxic chemicals is the cause-in-fact of the plaintiff's injury. *See, e.g., Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1010 (7th Cir. 1982) (explaining that even if the defendant/principal was negligent in hiring a contractor "because he had no experience with this particular type of job," the accident resulted from a completely different error: the contractor's "unaccountable failure to read or pay attention to the warnings on the can of glue," and thus the plaintiff could not establish probable cause because the "accident was no more probable because [the contractor] was inexperienced").

### **III. Conclusion**

We answer the certified question "yes." The potential liability we recognize today is consistent with fundamental principles of tort law. It is based solely on a principal's own negligence in hiring or selecting an independent contractor. It is not a form of vicarious liability nor is it an exception to the general rule that a principal is not liable for the negligence of an independent contractor.

**CERTIFIED QUESTION ANSWERED.**

**BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.**

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Hicks Unlimited, Inc., Petitioner,

v.

UniFirst Corporation, A Massachusetts Corporation,  
Respondent.

Appellate Case No. 2021-001042

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Anderson County  
R. Scott Sprouse, Circuit Court Judge

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Opinion No. 28158  
Heard March 29, 2023 – Filed June 14, 2023

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**REVERSED**

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James S. Eakes, of Allen & Eakes, and David James Brousseau, of McIntosh, Sherard, Sullivan & Brousseau, both of Anderson, for Petitioner.

Ian Douglas McVey, of Turner Padgett Graham & Laney, PA, of Columbia, and Jude C. Cooper, of Fort Lauderdale, Florida, both for Respondent.

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**JUSTICE HILL:** Hicks Unlimited, Inc. contracted to rent uniforms for its employees from UniFirst Corporation. The contract contained an arbitration



provision stating all disputes between them would be decided by binding arbitration to be conducted "pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association [AAA] and shall be governed by the Federal Arbitration Act [FAA]."

A dispute arose. After some procedural wrangling, UniFirst moved to compel arbitration. Hicks contended the arbitration agreement was unenforceable because it did not comply with the notice requirements of South Carolina's Arbitration Act (SCAA). S.C. Code Ann. §§ 15-48-10 to -240 (2005 & Supp. 2022). UniFirst responded that the arbitration provision was governed by the FAA, which preempts the SCAA's notice provision. The circuit court denied the motion to compel arbitration, ruling the contract did not implicate interstate commerce and, therefore, the FAA did not apply. The circuit court further ruled the arbitration provision was not enforceable because it did not meet the SCAA's notice requirements.

UniFirst appealed. The court of appeals reversed, holding arbitration should have been compelled because the contract involved interstate commerce and, therefore, the FAA preempted the SCAA. We granted Hicks' petition for a writ of certiorari to review the court of appeals' ruling that the FAA applied.

## I.

Whether a contract involves interstate commerce and, therefore, whether the FAA preempts the SCAA, is a question of law we review *de novo*. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). We will not, however, disturb the factual findings of the circuit court that have rational support in the record. *Id.*

## II.

Hicks contends the court of appeals erred in ruling the contract involved interstate commerce. UniFirst, on the other hand, argues there is no need to address the interstate commerce issue because the parties agreed by contract that any dispute between them would be resolved by binding arbitration and that the arbitration "shall be governed by" the FAA. UniFirst believes this is enough to summon the FAA's preemption power, knocking out the SCAA notice requirement. *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (although the FAA contains no express preemption provision, state laws are preempted to the extent they conflict with federal law in the sense that their application would undermine the goals and policies of the FAA).

We reject UniFirst's argument. A provision in an arbitration agreement declaring that the FAA applies is not a *fait accompli*. The FAA owes its existence to Congress' constitutional power to regulate interstate commerce. The heart of the FAA is 9 U.S.C. § 2, which states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

.....

We construe UniFirst's argument to be that parties may agree to have their dispute arbitrated by the FAA's methods and procedure, even if their contract only involves intrastate commerce. But the FAA does not furnish a set procedure for how the arbitration should go; that type of architectural detail is found in the AAA rules, which the parties had already settled on. What UniFirst is really asking us to do is to bless the principle that parties may agree—preemptively—that a court may apply the FAA's federal preemption power to their contract without first peeking behind the curtain to ensure interstate commerce is involved.

This we cannot do. The FAA is a sequential whole whose enforcement and preemption power may only be called upon when the dispute arises against the backdrop of a written provision in a "maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Supreme Court long ago announced that the FAA menu is not a la carte. In *Bernhardt v. Polygraphic Co. of America*, the Court confronted an issue instructive to the problem before us. 350 U.S. 198 (1956). Mr. Bernhardt sued his employer in a Vermont state court. The employer removed the suit to federal district court and then sought to stay the court action and compel arbitration pursuant to 9 U.S.C. § 3, contending the parties had an agreement to arbitrate all disputes before the AAA. *Id.* at 199. The district court denied the stay, ruling Vermont law provided arbitration agreements were revocable by any party up to the time of award. The Court of Appeals reversed. *Id.* The Supreme Court reversed the Court of Appeals, holding the FAA did not apply because there was no evidence the contract evidenced a maritime transaction or one involving interstate commerce. *Id.* at 200–02.

What is revealing for our purpose here is that the Court in *Bernhardt* took direct aim at and shot down the notion that a party could invoke the stay provision of § 3 of the FAA even when the underlying contract did not satisfy § 2's interstate commerce requirement. *Id.* at 201 (noting the Court of Appeals had floated the idea that § 3 "stands on its own footing. It concluded that while § 2 makes enforceable arbitration agreements in maritime transactions and in transactions involving commerce, § 3 covers all arbitration agreements even though they do not involve maritime transactions or transactions in commerce. We disagree with that reading of the Act"). The Court has since reaffirmed *Bernhardt* and this core principle. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019) ("[A]ntecedent statutory provisions limit the scope of the court's powers under §§ 3 and 4. Section 2 provides that the [FAA] applies only when the parties' agreement to arbitrate is set forth as a 'written provision in any maritime transaction or a contract evidencing a transaction involving commerce.'"). As the Court explained:

[T]o invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.

*Id.* at 537–38; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) ("[I]t is clear beyond dispute that the federal arbitration statute is *based upon and confined to* the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" (emphasis added) (quoting H.R.Rep.No.96, 68th Cong., 1st Sess., 1 (1924); S.Rep.No.536, 68th Cong., 1st Sess., 3 (1924))). In *Southland Corp. v. Keating*, the Supreme Court explained that Congress had to rely on its Commerce Clause power to make the FAA apply in state courts, which meant the FAA's "reach would be limited to transactions involving interstate commerce." 465 U.S. 1, 14 (1984); *see also id.* at 14–15 ("We therefore view the 'involving commerce' requirement in § 2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.").

We hold that a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce. Just as the parties may not prove the requisite connection to interstate commerce by agreeing their transaction or relationship "contemplates" interstate commerce, they may not make the connection

by declaring or contemplating the FAA will govern. Instead, the party pushing arbitration must prove the contract involves "commerce in fact." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). To the extent *Munoz v. Green Tree Fin. Corp.* and *Damico v. Lennar Carolinas, LLC* have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves interstate commerce, we clarify now they do not. *Munoz*, 343 S.C. 531, 542 S.E.2d 360 (2001); *Damico*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020), *aff'd in part, rev'd in part*, 437 S.C. 596, 879 S.E.2d 746 (2022). Consistent with our holding here, the *Munoz* and *Damico* courts held the FAA preempted South Carolina law only after finding the contracts at issue involved interstate commerce in fact. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363–64; *Damico*, 430 S.C. at 196, 844 S.E.2d at 70.

There are Texas cases to the contrary. *See, e.g., In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. App. 2002) ("We hold that when, as here, the parties agree to arbitrate under the FAA, they are not required to establish that the transaction at issue involves or affects interstate commerce.") This line of cases has proceeded unadorned by any logic or reasoning that we can find, and we decline to join it.

### III.

Although we have held the parties may not avail themselves of FAA preemption without satisfying 9 U.S.C. § 2's commerce requirement, we must still address the court of appeals' conclusion that the contract between Hicks and UniFirst implicated interstate commerce. The court of appeals reached its conclusion after noting the following points: UniFirst shipped the uniforms from Kentucky to South Carolina, and Hick's payments were made to and deposited by UniFirst in Massachusetts, the site of UniFirst's headquarters and board of directors.

The phrase "involving commerce" as used in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Commerce Clause grants Congress the power to regulate (1) the use of channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000); *see also Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013).

To ascertain whether a contract involves interstate commerce, the court examines "the agreement, the complaint, and the surrounding facts," including any affidavits

submitted. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014) (quoting *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("Both the United States Supreme Court and this Court have relied on affidavits when determining whether a transaction involves interstate commerce."). The inquiry is fact dependent and focuses on what the specific contract terms require for performance. The party claiming the FAA preempts state law bears the burden of proving the contract involves interstate commerce. *Bradley*, 398 S.C. at 458, 730 S.E.2d at 317–18.

Under the FAA, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Citizens Bank*, 539 U.S. at 56–57 (citation omitted). Unlike the banking industry at issue in *Citizens Bank*, the uniform supply business is not an activity that is, in general, subject to federal control. Reviewing the contract, the pleadings, and surrounding facts reveals that the contract was between a Massachusetts company and a South Carolina company. There is no other sign the contract was to be performed using instrumentalities or channels of interstate commerce, or that the uniform supply involved any thing or matter located beyond South Carolina's borders.

The problem we see with the court of appeals' conclusion is that the points it relied upon to find the contract between Hicks and UniFirst involved interstate commerce debuted too late: they first appeared in UniFirst's motion to alter or amend and were never mentioned by the circuit court. The court of appeals could not use them to rescue UniFirst's interstate commerce argument. See *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); *Spreeuw v. Barker*, 385 S.C. 45, 68–69, 682 S.E.2d 843, 855 (Ct. App. 2009) (stating evidence that first appeared as attachment to a Rule 59(e), SCRPC motion cannot be considered on appeal). At any rate, the points came from assertions made by UniFirst's counsel. They are not mentioned in the pleadings, not apparent from the language of the contract, nor supported by affidavits or other evidence. It was error to rely on them in deciding whether the contract involves interstate commerce. See *McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011) ("[A m]emorandum in support of a motion is not evidence."); 6 C.J.S. Arbitration § 70 ("Statements in motions and briefs do not constitute evidence to be considered by a trial court when ruling on a motion to compel arbitration.").

In sum, because the contract between Hicks and UniFirst did not involve interstate commerce in fact, the order of the circuit court denying UniFirst's motion to compel arbitration is affirmed, and the court of appeals' opinion is

**REVERSED.**

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

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Misty A. Morris, Claimant,

v.

BB&T Corporation, d/b/a BB&T Bank, Employer, and  
Hartford Accident & Indemnity Co., Carrier,

IN RE: Attorney's Fee Petition of David Proffitt,  
Petitioner,

v.

South Carolina Workers' Compensation Commission,  
Respondent.

Appellate Case No. 2020-001494

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from the Workers' Compensation Commission

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Opinion No. 28131  
Heard February 2, 2022 – Filed January 25, 2023

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**REVERSED AND REMANDED**

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Robert David Proffitt, of Proffitt & Cox, LLP, of  
Columbia, Petitioner.

Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA; James Keith Roberts, both of Columbia, for Respondent.

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**JUSTICE FEW:** The workers' compensation commission dismissed an appeal to its appellate panel because the attorney filing the appeal missed a deadline for his brief. The commission refused to reinstate the appeal even after the attorney explained he made an innocent calendaring mistake, and then the commission refused to reconsider its decision. In all three instances, the commission gave no explanation of its decision; it simply issued a form order with blanks checked indicating the commission's action. We reverse the commission's decision refusing to reinstate the appeal and remand to the appellate panel for consideration of the appeal on the merits.

Attorney David Proffitt represented Misty A. Morris in her 2016 workers' compensation claim against BB&T Corporation. After settling her claim, Proffitt filed a Form 61—"Attorney Fee Petition"—with the commission seeking approval of his contingent attorney's fee in the amount of \$36,633.33, along with costs in the amount of \$5,134.10. Commissioner Susan S. Barden approved attorney's fees in the amount of \$24,641.04 and all of the costs, but denied attorney's fees for the amount the settlement agreement allocated to future medical expenses. Proffitt filed a Form 30—"Request for Commission Review"—appealing Commissioner Barden's order to an appellate panel.

A member of the commission's staff issued a Form 31—"Briefing Schedule and Appellate Hearing"—setting the due date for Proffitt's brief as January 16, 2018.<sup>1</sup> After Proffitt failed to file his brief by January 16, the "judicial director" of the commission dismissed the appeal by administrative order pursuant to regulation 67-705(H)(3) of the South Carolina Code of Regulations (2012). Proffitt then filed a "Motion to Reinstate" the appeal arguing his calendaring mistake constituted "good cause." *See* S.C. Code Ann. Regs. 67-705(H)(4) ("An appeal administratively dismissed . . . may be reinstated for a good cause . . ."). In the motion, Proffitt admitted he had not calendared the deadline correctly and explained he thus wrongly believed the due date for filing his brief was January 31. He apologized to the commission for the delay. A commissioner denied Proffitt's motion without

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<sup>1</sup> The Form 31 listed the filing date for Proffitt's brief as January 14, 2018. However, January 14 was a Sunday and January 15 was a holiday. Therefore, the actual filing deadline was January 16, 2018.



explanation. The same commissioner later denied Proffitt's "Motion for Rehearing," again without any explanation.

The court of appeals affirmed in an unpublished opinion. *Morris v. BB&T Corp.*, Op. No. 2020-UP-235 (S.C. Ct. App. *withdrawn, substituted, and refiled* Nov. 4, 2020). We granted Proffitt's petition for a writ of certiorari to review the court of appeals' decision. We reverse.

We cannot better explain our reasoning for reversal than the court of appeals itself explained in a different case, decided approximately a year after it decided this case. *See Jordan v. Hartford Fin. Grp., Inc.*, 435 S.C. 501, 868 S.E.2d 400 (Ct. App. 2021) (explaining "the commission's summary denial of [a] motion to reinstate without rational analysis of the good cause standard was arbitrary and an abuse of discretion," 435 S.C. at 507, 868 S.E.2d at 403, and reinstating the appeal). At oral argument before this Court, Justices questioned counsel for the commission as to how *Jordan* does not resolve the question before us here. Counsel responded by arguing the commission made a discretionary decision and this Court should defer to the commission's decision. We publish this decision to clarify that no court is entitled to the deference associated with the discretion standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law.

Appellate courts apply the "discretion" standard to review decisions trial courts make on procedural questions such as the one at issue in this case, decisions to admit or exclude evidence, and other decisions. *See, e.g., Trotter v. Trane Coil Facility*, 393 S.C. 637, 645, 650, 714 S.E.2d 289, 293, 295 (2011) (applying the "discretion" standard in reviewing the workers' compensation commission's procedural decisions); *State v. Gibbs*, Op. No. 28215 (S.C. Sup. Ct. filed Jan. 4, 2023) (Howard Adv. Sh. No. 1 at 12, 18-20) (explaining the type of thorough trial court analysis that warrants our applying the "discretion" standard to evidentiary rulings); *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018) (reiterating the "discretion" standard is applied when reviewing procedural or evidentiary rulings by a family court); *Kovach v. Whitley*, 437 S.C. 261, 263, 878 S.E.2d 863, 864 (2022) (applying the "discretion" standard when reviewing a trial court's imposition of sanctions). When the commission actually exercises discretion in making a procedural decision such as this one, the Administrative Procedures Act requires we defer to that exercise of discretion. *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2022) ("The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . (f) . . . characterized by abuse of discretion or clearly

unwarranted exercise of discretion."). The law requires we defer to the exercise of discretion by any trial-level tribunal when making a procedural decision. *See* 5 C.J.S. *Appeal and Error* § 924 (2019) ("The disposition of procedural matters is reviewed for abuse of discretion."). We disagree the commission is entitled to any deference in this case, however, because there is no indication the commission actually exercised its discretion. *See State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion." (quoting *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997))); *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

The exercise of discretion is not to simply make a decision. The *exercise* of discretion requires first that the trial court recognize it has the responsibility of discretion. *See Jordan*, 435 S.C. at 505, 868 S.E.2d at 402 ("We cannot determine if the commission recognized it had the discretion . . . ."); *Lunneborg v. My Fun Life*, 421 P.3d 187, 194 (Id. 2018) (stating one of the "essential" considerations for reviewing a discretionary decision is "[w]hether the trial court . . . correctly perceived the issue as one of discretion"); *Johnson v. United States*, 398 A.2d 354, 367 (D.C.1979) ("[R]eversal should follow if . . . the trial court did not recognize its capacity to exercise discretion . . . .").<sup>2</sup> The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances. *See* 435 S.C. at 505, 868 S.E.2d at 402 ("The American tradition of rule of law has recognized from its earliest days that a 'motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" (citation omitted)). The trial court's recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process. Thus, when a trial court's—or the commission's—thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion, even when the judges on the appellate court might have made the decision differently.

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<sup>2</sup> *See also* 5 C.J.S. *Appeal and Error* § 826 (2022) ("The grounds for appellate review include the lower court's . . . erroneous belief that no such discretion exists, [or] not recognizing its capacity to exercise discretion . . . .").

In this case, the commission's initial decision to dismiss the appeal required no explanation. The Form 31 set a clear due date for Proffitt's brief, and Proffitt clearly failed to file the brief in time. Regulation 67-705(H)(3) specifically permits the commission in that circumstance to "issu[e] an administrative order dismissing the appeal." The commission's decision first to refuse to reinstate the appeal, however, and then its decision to deny reconsideration, are different. Regulation 67-705(H)(4) requires the commission to soundly apply the principle of "good cause" to the facts and circumstances before it. This "thought process" requires analysis, and the "discretion" standard we employ for reviewing the commission's analysis requires the analysis be explained.

Because the commission offered no explanation for its decision, we find the commission did not act within its discretion in refusing to reinstate Proffitt's appeal. The failure to accurately calendar a filing deadline will not constitute good cause for reinstating an appeal in every instance. We have reviewed the record in this case, however, and we find Proffitt demonstrated good cause. We reverse the commission's decision refusing to reinstate the appeal and remand to the appellate panel for consideration of the appeal on the merits.

**REVERSED AND REMANDED.**

**KITTREDGE, Acting Chief Justice, HEARN, J., and Acting Justices James E. Lockemy and Aphrodite K. Konduros, concur.**

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

The Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe, Petitioner,

v.

City of North Charleston, Leigh Anne McGowan, individually, Charles Francis Wohlleb, individually, and Anthony M. Doxey, individually, Respondents.

Appellate Case No. 2021-000721

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Charleston County  
The Honorable Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 28180  
Heard May 17, 2023 – Filed September 29, 2023

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**AFFIRMED IN RESULT**

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Gregg E. Meyers, of Byron, M.N., for Petitioner Jane Doe 202.

Sandra J. Senn, of Senn Legal, LLC of Charleston, and Andrew F. Lindemann, of Lindemann Law Firm, P.A. of Columbia, for Respondents City of North Charleston, Anthony M. Doxey, Leigh Anne McGowan, and Charles Frances Wohlleb.

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**JUSTICE JAMES:** This appeal arises from a defense verdict in a case alleging law enforcement officers and the City of North Charleston violated the civil rights of Jane Doe, a vulnerable adult. During its deliberations, the jury submitted several questions, the last of which was ambiguous. The trial court answered the question without requesting clarification from the jury and denied Doe's request to charge the jury on nominal damages for a third time. The court of appeals affirmed. *Est. of Doe 202 by Doe MM v. City of N. Charleston*, 433 S.C. 444, 858 S.E.2d 814 (Ct. App. 2021).<sup>1</sup> We hold the trial court erred in not requesting clarification, but we conclude the error was harmless. We therefore affirm the court of appeals in result.

## I.

In late 2012, Doe's daughter (Daughter) moved from North Carolina into Doe's home in a quiet neighborhood in North Charleston. Very shortly thereafter, Doe was diagnosed with Alzheimer's disease and dementia. She was unable to drive, make a telephone call, use the restroom unassisted, dress herself, prepare food, or even open containers of food.

On the evening of March 27, 2014, Daughter went out for a work event and, according to Daughter, returned home around 9:00 p.m. Daughter testified she went back outside around 10:00 p.m. to retrieve something from her car. She claims she locked herself out of the house, so she knocked on the front door and called for Doe to let her in. Daughter testified she went to the back of the house and Doe let her in through the sliding glass back door. Daughter went to bed upstairs. A few minutes after 10:00 p.m., a neighbor called the City of North Charleston Police Department and reported Daughter was outside Doe's home banging on the front door and yelling for Doe to let her in. Officer McGowan responded within minutes and knocked on the front door, but no one answered. Officer McGowan noticed the interior lights of a car parked in the driveway were on; she saw wine bottles in the back of the car and found a pair of high heels beside the driver's side door. Officer McGowan went around to the back of the house and found in the yard what she described as a leather bag with fresh blood on it. At Officer McGowan's request, dispatch called the neighbor who reported the disturbance. Dispatch was told by the neighbor that Doe had dementia. Officers Wohlleb and Doxey responded to the scene. The officers entered the dwelling through the unlocked back sliding glass door, where they encountered Doe. The officers asked Doe if everything was okay, and she said it

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<sup>1</sup> Doe died during the pendency of this appeal, but we still refer to the plaintiff as "Doe."

was. They asked Doe who else was in the home, and Doe told them Daughter was upstairs. The officers asked Doe to escort them upstairs.

Accounts of what occurred next differ significantly between the two sides, but the differing accounts mean little to the issues before us. Daughter testified she was asleep in her bed when she was awakened by a person in her bedroom; she claims she did not know who the person was and thought the person was there to do her harm, so she yelled at the person to get out. Daughter claims Officer McGowan flung her out of bed and restrained her. The officers contend Daughter was asleep fully clothed on top of the covers on the bed, had a large red wine stain on her shirt, and had a bleeding gash on her knee. One asked if Daughter needed medical attention and she said she did not. Wohlleb and Doxey left the room, and, according to Officer McGowan, Daughter began screaming at Doe, flailed her arms, and poked McGowan in the eye. Daughter was arrested for assault on a police officer and taken to jail. Doe was left alone until approximately noon the following day, when Daughter called Doe's brother and asked him to check on Doe. The brother testified he found Doe in obvious mental distress and wearing a soiled adult diaper. Doe was eventually taken to the hospital and was diagnosed with a urinary tract infection.

Doe sued the officers and the City. Pertinent to this appeal are Doe's causes of action against the officers and the City pursuant to 42 U.S.C. § 1983. Doe claims the officers violated her Fourth Amendment rights by entering the dwelling without a warrant. Doe's section 1983 claim against the City is based on Doe's contention that the City engaged in deliberate indifference to Doe's rights by failing to properly train its officers.

## II.

Doe's appeal centers on the trial court's response to the last of several questions submitted during deliberations.

The substance of the trial court's first and second overall charge to the jury is not an issue in this appeal, but a summary of the charge relevant to the section 1983 claims against the officers and the City will aid understanding of the issue before us. The trial court instructed the jury that in order to prove her section 1983 claim against the officers, Doe must establish: (1) the officers committed an act that deprived Doe of a right secured by the United States Constitution; (2) the officers acted under color of state law; and (3) the officers' actions proximately caused Doe's damages. The officers do not dispute they were acting under color of state law. As to the first element, the trial court charged the jury that a warrantless entry into one's dwelling is a per se violation of the Fourth Amendment to the United States Constitution. The

officers did not dispute they entered without a warrant but claimed exigent circumstances justified the warrantless entry. The trial court charged the jury that the existence of exigent circumstances, if proven by the officers, would excuse the warrantless entry. As to the third element of Doe's section 1983 claim against the officers, the trial court instructed the jury that Doe must prove the constitutional violation was the proximate cause of Doe's injuries.

With regard to Doe's deliberate indifference claim against the City, the trial court instructed the jury that Doe must prove (1) the officers violated Doe's constitutional rights; (2) they were acting under color of state law; (3) the City failed to train its officers, thus illustrating a deliberate indifference to the rights of those with whom the officers came into contact; and (4) the City's failure to train actually caused the officers to violate Doe's rights and was so closely related to the violation of rights as to have been the moving force that cause damage to Doe. The trial court's instructions on the specifics of deliberate indifference are not relevant to this appeal.

The trial court then gave a relatively typical jury charge on actual damages applicable to the claims against the officers and the City. Pertinent to this appeal is the trial court's subsequent instruction on nominal damages:<sup>2</sup>

[I]f you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claim[,] then you must award nominal damages of one dollar for that claim. A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the depr[i]vation of a federal right even where you find no actual injury occurred.

There were no objections to the foregoing instructions, and the jury retired to deliberate, accompanied by three separate verdict forms pertaining to the three officers and one verdict form pertaining to the City. The parties advised the trial court that all agreed to the verdict forms. The first question on the officers' forms was, "Do you find that Plaintiff has proven by a preponderance of the evidence that [the officer] violated [Jane] Doe's constitutional rights by making a warrantless entry into [Jane] Doe's residence . . . ?" The first question on the City's form was, "Do you find that the Plaintiff has proven by a preponderance of the evidence that the

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<sup>2</sup> Nominal damages are important in a section 1983 case because if a jury awards even nominal damages to the plaintiff, the trial court may award reasonable attorney's fees under 42 U.S.C. § 1988.

City of North Charleston violated [Jane] Doe's constitutional rights by being deliberately indifferent with regard to training its officers?" All four forms instructed the jury that if the answer to the first question was "No," the jury was to "stop deliberating on this cause of action and sign the bottom of this form."

The damages question on each officer's form read: "[D]o you find that Plaintiff has proven by a preponderance of the evidence that the constitutional violation caused damages to [] Doe?" The damages question on the City's form read substantially the same. None of the forms specifically referenced nominal damages.

The jury submitted several notes during deliberations. In its first note, the jury asked the trial court to repeat the entire jury charge, which the trial court did. Another note asked the trial court to define "preponderance," which it did. Another note requested a copy of section 1983, which the trial court declined.

Along with its note asking for a copy of section 1983, the jury submitted the note that is the focus of this appeal. The note read: "For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages." The trial court engaged in an extensive colloquy with counsel as to how this question should be interpreted and answered.

The trial court initially stated it was "not certain whether [the jury had] the concept of proximate cause or damages confused." The trial court read the note again and stated, "[T]he more I read this note the more I think they have confused damages in the elements of section 1983." The trial court continued the discussion and explained, "I think all they're asking is in order for there to be a violation of a civil right[] [under the] 4th Amendment the plaintiff must demonstrate . . . there must be bodily harm or injury and that's really not the inquiry." The trial court decided to recharge the jury on the elements of a section 1983 claim and stated it would reinstruct the jury on damages if the jury asked, and if the jury asked for more, it would reinstruct more. Doe argued the jury might be confused if it were not reinstructed on nominal damages, and counsel went back and forth with the trial court on that point. The trial court concluded the jury would submit another question if it wanted additional instructions.

During the subsequent reinstruction, the trial court repeated the three basic things a plaintiff must prove to establish a section 1983 claim: (1) a constitutional violation; (2) acting under color of state law, and (3) and that the plaintiff "must prove by the greater weight or preponderance of the evidence that the constitutional violation was the proximate cause of her injuries." The trial court stopped at that



point and did not go into detail about the various damages—including nominal damages—the jury could award Doe if it determined any defendant had violated her federal constitutional rights.

After this recharge, Doe argued the jury could "conceivabl[y] be hung up on whether the nominal damage fits as part of the injury." The trial court responded, "I think they were unclear about what constitutes the elements of the 1983 cause of action. They don't even get to nominal damages unless you've proven that there was a constitutional violation."<sup>3</sup>

The jury answered "No" to each of the first questions on all four verdict forms and deliberated no further. All four forms included subsequent questions pertaining to damages, which the jury did not reach because of its "No" answer to the first question.

### III.

#### A. Did the trial court err in failing to clarify the jury's question?

Doe contends the disputed question inquired into damages (including nominal damages), not the threshold issue of whether there was a constitutional violation. Doe argues the trial court's refusal to again instruct the jury on nominal damages was misleading, incorrect, and omitted the language responsive to the jury's actual question. In other words, Doe does not argue the disputed recharge was substantively incorrect; rather, Doe argues the recharge did not go far enough.

The court of appeals concluded the disputed question was ambiguous, stating, "The trial court could just as well have reached the conclusion the jury was asking about damages and not liability . . . . Still, given that we believe both views of the jury's question are possible, we believe the trial court did not abuse its discretion." *Doe*, 433 S.C. at 454, 858 S.E.2d at 819.

We agree with the court of appeals that the disputed question was susceptible of more than one meaning. However, the court of appeals erred in applying a deferential standard of review of the trial court's decision as to how it would respond to the question. Other jurisdictions have addressed the general question of how a

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<sup>3</sup> In her brief, Doe contends a simple "No" answer to the disputed question from the jury would have sufficed. During oral argument, Doe argued she requested the trial court to give the jury a "No" answer, but that request is not in the record.

trial court should respond to a jury question when the question reflects confusion about a legal issue:

"When a jury sends a note which demonstrates that it is confused, the trial court must not allow that confusion to persist; it must respond appropriately." *Alcindore v. United States*, 818 A.2d 152, 155 (D.C. 2003); *see also, e.g., Murchison v. United States*, 486 A.2d 77, 83 (D.C. 1984) (trial court is under obligation to respond to jury's confusion where jury "makes explicit its difficulties") (internal quotation marks omitted). The trial court is required to clear away any confusion "with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 90 L.E.d 350 (1946).

*Sanders v. United States*, 118 A.3d 782, 783-84 (D.C. 2015). If confronted with an ambiguous jury question, the trial court cannot select one reasonable interpretation and ignore other reasonable interpretations. If the parties do not agree how the trial court should respond to the question, the trial court must seek clarification from the jury. Failure to do so is an error of law.

### **B. Is a new trial required?**

Doe and the dissent contend the trial court's error requires reversal and a new trial. They correctly note, as did the dissent in the court of appeals, that a plaintiff in a section 1983 claim does not have to prove "traditional damages" and that "the violation of a [constitutional] right is itself considered an injury." *Doe*, 433 S.C. at 455, 858 S.E.2d at 819-20 (Geathers, J., dissenting) (citing *Uzuegbunam v. Preczewski*, 592 U.S. \_\_\_, 141 S. Ct. 792, 802 (2021)). Doe contends the question of whether there was a constitutional violation and the unique role of nominal damages in a section 1983 action go hand in hand such that a recharge on the elements of a section 1983 claim without a recharge on nominal damages is manifestly prejudicial. Under the circumstances present in this case, we disagree.

The officers' verdict forms instructed the jury to first determine whether "[the officer] violated [Jane] Doe's constitutional rights by making a warrantless entry into [Jane] Doe's residence . . . ." The specificity of that question—whether Doe had proven the officer had made an unconstitutional warrantless entry—is important. If the jury had answered "Yes" to that question, the jury would have moved to the damages questions. The jury's "No" answer to the first question establishes that the jury determined Doe had not proven an unconstitutional warrantless entry. The "No" answer renders moot the question of damages—nominal or otherwise.

We disagree with the dissent's contention that we are "repeating the trial court's mistake." Rather, we hold that in this case the trial court's mistake did not affect the verdict. A repeat of the nominal damages charge would not have resulted in a different answer to the first question on the verdict forms.<sup>4</sup> Therefore, the trial court's error in not seeking clarification of the question was harmless. *See State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (holding in a harmless error analysis, the inquiry is whether the erroneous charge contributed to the verdict rendered); *see also Horry Cnty. v. Laychur*, 315 S.C. 364, 368, 434 S.E.2d 259, 262 (1993) ("In order to warrant reversal for refusal of the trial judge to give requested jury instructions, such refusal must have been both erroneous and prejudicial.").

### **Conclusion**

The court of appeals erroneously applied a deferential standard of review in reviewing the trial court's reasoning of how the trial court would respond to the jury's ambiguous question. We hold that when a trial judge receives an ambiguous question from the jury and the parties do not agree how the trial court should respond, the trial court must seek clarification from the jury. Once the jury has clarified the question, the trial court may answer the question in the manner permitted by law. Here, we hold that a recharge on nominal damages would have had no impact on the jury's "No" answer to the first question on each verdict form. Therefore, the error was harmless and we affirm the court of appeals in result.

**AFFIRMED IN RESULT.**

**KITTREDGE, Acting Chief Justice, and Acting Justice Jean H. Toal, concur.  
HILL, J., dissenting in a separate opinion in which Acting Justice Kaye G.  
Hearn, concurs.**

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<sup>4</sup> The dissent refers to the verdict forms as "ambiguous" because they do not mention nominal damages. The parties agreed to the verdict forms.

**HILL, J., dissenting:** I agree with the majority that the trial court erred by not asking the jury to clarify its question. I respectfully dissent because, in my view, this error prejudiced Doe, and the trial court's ensuing recharge doomed her case at a pivotal point.

A jury's request for clarification of the law is often the defining moment (literally) of a trial, demanding a deft touch by the trial judge. *Horry Cnty. v. Laychur*, 315 S.C. 364, 369, 434 S.E.2d 259, 262 (1993); *State v. Smith*, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (Ct. App. 1991). We have held that the stakes are raised at this critical moment, and the risk of prejudice rises when a bad supplemental charge is given in response to the jury's question. *Laychur*, 315 S.C. at 369; *see also McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 362 (2008) (because bad charge was in a supplemental instruction, it "likely attained special significance in the minds of jurors"); *Lowry*, 376 S.C. 499; *State v. Blassingame*, 271 S.C. 44, 46–47, 244 S.E.2d 528, 529–30 (1978). One of the strongest presumptions in law is that jurors are presumed to follow their instructions. When, as here, a supplemental instruction dilutes and distorts a previous charge on the same point of law, then "the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). As best we can tell, the jury had been deliberating for about six hours before submitting the question that prompted the bad recharge. It reached a verdict less than fifteen minutes after it received the trial court's misleading answer.

The jury's question bears repeating: "[F]or there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or mental i.e. damages." One straightforward—and correct—answer to the question would have been the answer Doe urged the trial court to give: that a plaintiff in a §1983 case may prevail without proving damages. And, in fact, the trial court's initial instinct was that the jury appeared to be asking whether "in order for there to be a violation of a civil right," the plaintiff must prove she suffered bodily harm or mental injury. Unfortunately, the trial court suppressed that instinct, remarking "that's really not the inquiry. The inquiry is whether the plaintiff has proven by a preponderance of the evidence three elements [of a § 1983 claim]."

The trial court then recharged the jury, in part:

In order to prove her claims the plaintiff must establish by the greater weight or the preponderance of the evidence the following three elements: The defendants committed an act which operated to deprive the plaintiff of her rights secured by the United States Constitution. Second that the

defendants acted under color of state law. And finally the defendants actions were the proximate cause of the plaintiff's damages.

Each of these elements must be established separately for the plaintiff to prevail on her claim. If the plaintiff proves all these elements by the greater weight or the preponderance of the evidence for her claim then you must return a verdict in favor of the plaintiff on that claim. If however she fails to prove any of these elements for her particular claim you must return a verdict for the defendants on that claim.

The trial court therefore recharged the jury—in response to their expressed confusion about damages—that, to win her case, Doe had to prove three elements, one of which was that the Defendants' actions were the proximate cause of her damages. This is not the law; a plaintiff in a §1983 civil rights case does not have to "prove" nominal damages, and in fact, the trial court had already twice instructed the jury that it could award nominal damages only in the event the plaintiff had not proven any actual damages. Doe did not have to prove the existence, amount, or causation of nominal damages. The importance of nominal damages in §1983 cases—and its central importance to the issue before us—was well stated by Judge Geathers in his dissent to the majority opinion of the Court of Appeals. The trial court's third charge removed any reference to nominal damages, leaving the jury with the indelible impression that the answer to their question was: "Yes. For there to be a civil rights violation, the plaintiff must prove her damages by a preponderance of the evidence." This was consistent with the trial court's earlier charge that "[d]amages are never presumed and the burden is on the plaintiff to present evidence that supports the assessment of damages."

The trial court erred by rejecting Doe's suggestion that the jury was likely struggling to understand how the concept of nominal damages related to the elements of a § 1983 claim. The majority finds the error irrelevant because it believes the verdict forms cured any confusion the jury may have had regarding whether Doe was required to prove damages to prevail on her claim. I cannot agree. The verdict form against the City, for example, was structured as follows:

1. Do you find that the Plaintiff has proven by a preponderance of the evidence that the City of North Charleston violated Rhonda Doe's constitutional rights by

being deliberately indifferent with regard to training its officers?

yes (go to #2)

no (stop deliberations on this cause of action and sign the bottom of this form)

2. If you answered yes to #1, do you find that Plaintiff has proven by a preponderance of the evidence that any such constitutional violation by the City of North Charleston proximately caused damage to Rhonda Doe?

yes (go to #3)

no (stop deliberations on this cause of action and sign the bottom of this form)

3. If the answers to #1 and #2 are yes, please state the amount of damages that should be awarded to Plaintiff for the allegation that the City of North Charleston was deliberately indifferent with regard to training its officers.

\$ \_\_\_\_\_ (please state damages award in numbers)

The majority is quite right that had the jury answered question one "yes," it would have then "moved to the damages questions." But, with great respect, I disagree with my friends in the majority that, had the jury answered question one "yes," then they would have understood they had to then award her at least nominal damages. The verdict forms do not mention nominal damages, and this reading of the forms overlooks question two, which asks if Doe proved the defendants' constitutional violation proximately damaged her. The fact that proof of proximate cause was the gist of question two reinforces the reality that the verdict forms contradicted rather than clarified the court's instruction.

The majority is repeating the trial court's mistake. Rather than clearing up the muddle caused by the trial court's recharge, the ambiguous verdict forms added to the confusion. All we can know for certain is that the jury resumed its deliberations armed with a misleading instruction on the applicable law and almost immediately reached a verdict. (If nothing else, this case is a good example of when the jury should be furnished with a written copy of the charge).

The majority concedes it was error to recharge the jury without knowing what the jury was really asking. In other words, the majority rules it is error to answer a jury's ambiguous question about the law without seeking clarification. As the majority

suggests, when faced with a jury question that could be interpreted as asking two different things, a trial court should not take a gamble on which interpretation is correct. The majority rightfully holds that we, as an appellate court, should not defer to the trial court's gamble as an acceptable act of discretion. There is no way to give an unambiguous answer to an ambiguous question, nor is it possible to cure an ambiguous recharge with an ambiguous verdict form. We should not re-roll the dice by hoping the verdict forms filtered out the flawed charge.

I therefore respectfully dissent.

**Acting Justice Kaye G. Hearn, concurs.**



**South Carolina Bar**

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**Trial & Appellate Advocacy Section**

**Friday, January 19**

**AI-Assisted Litigation: Empowering Legal  
Practice with Chat GPT**

*Ernie Svenson*



# A.I. Assistance for Lawyers

## Introduction

Artificial intelligence is taking the world by storm, including the legal profession. There are new opportunities for doing legal work faster, better, and more easily. The key is to leverage those opportunities in the most efficient way possible.

The newest form of A.I. is ChatGPT, a GPT technology garnering the most attention (and even a lot of hype and misinformation). There are other competing GPT tools, which are outside the scope of this paper.<sup>1</sup>

## GPT Technology

GPT technology has been developing quietly for many years. But in early 2023, it exploded into public view. And the most exciting development is an A.I. chatbot known as ChatGPT. Lawyers are understandably interested in this technology.

No matter what your level of tech proficiency is, [ChatGPT](#) has the potential to transform your practice in astonishing ways.

And it's probably safe to say that lawyers who ignore the opportunities offered by GPT technology will fall behind. When I [made this assertion on LinkedIn](#) (in April of 2023), many lawyers agreed.



**Ryan McKeen**

100 Million Dollar Jury Verdict | Co-Founder an...

I agree with you Ernie, the impacts of this won't all be felt at once. But I think we are months and not years away from seeing significant impacts,

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<sup>1</sup> I believe it's important to focus on one keystone tool, which is what ChatGPT is. If you want to consider one more option, check out [Claude.ai](#) which is free to use (currently) and equally capable to ChatGPT.

Obviously, some lawyers fear the use and evolution of GPT technology, perhaps with justification. Others, like [Carolyn Elefant](#) see it differently.

“As a small law firm owner, I once relied on freelance lawyers to draft basic contracts, conduct "lay of the land" research or prepare motions. But the truth is, since the launch of ChatGPT, and [Casetext](#) Co-Counsel, it's quicker and easier for me to do that kind of research myself. AI-powered research produces superior results to a mediocre freelancer, costs less and delivers an answer in under five minutes.”

I recommend you start using GPT tools and develop a solid foundation upon which to make sensible assessments about its upsides and downsides.

Having said that, let's turn to some basic questions lawyers often have.

## What is ChatGPT?

[ChatGPT](#) is an app built by [OpenAI](#). Using the GPT language models, it can answer your questions, write copy, [draft emails](#), hold a conversation, explain code in different programming languages, translate natural language to code, and more—or at least try to—all based on the [natural language prompts](#) you feed it.

It's a chatbot, but a really, really good one. And in March of 2023, OpenAI introduced GPT-4, which has been even more impressive.

Right now, ChatGPT offers two GPT models. The default, GPT-3.5, is less powerful but available to everyone for free. The more advanced GPT-4 is limited to ChatGPT Plus subscribers. With the free account, you only get a limited number of questions daily. But GPT-4 is so powerful that many people don't mind paying for the extra capabilities. GPT-4 is the one getting most of the attention.

For example, GPT-4 [scored in the top 10% on a simulated bar exam](#) (the prior version of ChatGPT scored in the bottom 10%). So ChatGPT's capabilities are rapidly developing. And that's why it's important to learn to use it now rather than later.

## What can ChatGPT do?

You can ask ChatGPT to help with many things that involve text, including using it to:

- brainstorm first drafts of articles or blog posts
- summarize articles or popular books
- craft detailed outlines using rough, unstructured input
- write emails or revise them to make them easier to read
- come up with a list of questions for an interview

- compose scripts for podcasts and YouTube videos
- help you learn to [speak & write a foreign language](#)

In my [80/20 Principle podcast](#), I demonstrated how easy it is to use GPT technology to [simulate a conversation with Tom Hanks](#). Using A.I. to mimic people's voices is shockingly accurate now.

This can be good or bad. As usual, it depends on how the technology is used.

## What's it like to use ChatGPT?

ChatGPT is easy to use. Just type in a request on the [ChatGPT website](#). When you start using ChatGPT, you'll be able to see for yourself how surprisingly-accurate many responses are.

However, ChatGPT-4 takes time to produce responses, as seen [in this video](#).

One of ChatGPT's big features is that it can remember the conversation you're having with it. This means it can glean context from whatever you've asked it previously and then use that to inform its conversation with you.

You can also ask for reworks and corrections, and it will refer back to whatever you've been discussing before. It makes interacting with the AI feel like a genuine back-and-forth.

## What do lawyers need to know about ChatGPT?

Well, first, they should not be using it for legal research (like [a New York lawyer did to his great misfortune](#)). GPT technology is powerful but it does require you to keep using your critical thinking skills.

In this paper, we'll cover several things that most lawyers want to know, such as:

- What are the ethical concerns and privacy issues for lawyers?
- What are the best ways to craft ChatGPT requests (termed "prompts")?
- What kinds of requests are not likely to produce helpful answers?
- Why does GPT hallucinate or give false answers, and how can you avoid or minimize that problem?
- What special GPT software is there for practicing lawyers?

Most lawyers can use GPT properly if they don't abandon the use of common sense and critical thinking.

## General Utility of GPT Technology

Here are some general things that ChatGPT can do.

- help you [write articles or blog posts](#)
- help you [write better emails](#) (e.g., make them easier to read)
- help you [prepare for an interview](#)
- help you summarize a long document into bullet points
- help you [lower your bills or plan meals](#)
- translate legalese into plain English
- help [teach you to speak a foreign language](#)

## What can it do for Lawyers?

Things like these:

- Streamline **legal research**: helping lawyers quickly find relevant case law, statutes, and regulations.
- **Draft legal documents**: Assist lawyers in drafting contracts, pleadings, and other legal documents with greater speed and accuracy.
- Summarize important concepts (e.g., [Right of First Refusal](#))
- **Draft a demand letter, petition, or request for admission** ([click to see examples](#))
- Draft a common type of legal contract  
[Summarize a legal code provision](#)

## The GPT Adoption Curve

Like the technology challenges faced by using cameras and electronics in the courtroom, the adoption of ChatGPT will face many hurdles. One of the main sticking points is the concern about inaccuracies and privacy protection.

## Challenges for Lawyers

Even though it can give incredibly accurate answers, ChatGPT isn't always right, and it's not trained to be a lawyer (obviously). So, for now, it won't replace lawyers.

When using ChatGPT, it's important to consider your ethical duties. Those are more important than the benefits of ChatGPT.

For instance, the potential for client confidentiality to be jeopardized when transmitting data between the user and the ChatGPT platform exists.

Consequently, it is imperative that legal practitioners thoroughly acquaint themselves with ChatGPT's [Privacy Policy](#) and [Terms of Use](#) before using the service in conjunction with sensitive client-related data.

I recommend you read those provisions to see how they might affect your use of ChatGPT.

## Law-Specific GPT Applications

Of course, some software is already created specifically for lawyers, which no doubt addresses privacy or ethics concerns.

If you handle litigation matters, you should know about [Clearbrief.ai](#).

### Clearbrief.ai

ClearBrief.ai uses patented AI technology to massively improve the process of drafting legal briefs inside Microsoft Word. After analyzing your draft brief, it will suggest relevant information that should be included.

It can also analyze your opponents' briefs, find specific text in PDFs, and detect citations. And it will generate exhibits, accelerate cite checking, and automatically create a table of authorities.

Finally, it allows sharing of hyperlinked PDF documents in court filings and creates password-protected links for public litigation documents.

### Demonstration

To learn more, watch [this 7-minute video](#) with [excerpts](#) from a demo that the founder of Clearbrief.ai provided to a group of solo/small firm lawyers on Zoom.

## How exactly does GPT work?

ChatGPT operates by interpreting your request and then producing sentences it believes best address your query, based on its training.

So, what's this training about? It's a method where the young AI receives basic instructions and is then exposed to vast amounts of data to refine its functions. GPT-3 was trained using about 500 billion "tokens."

These tokens help the AI understand and predict text. Most words are represented by a single token, but longer words might use more. Usually, tokens are about four characters in length. While OpenAI hasn't shared all details about GPT-4, it's clear that it was trained using a similar, if not larger, amount of data since it's even more advanced.

If you want the Wikipedia explanation [click here](#), but [this is a nice, simple explanation](#).

Here's [another good article](#) that is pretty easy to understand. And if you really want to go down a rabbit hole, [read this Wired article](#).<sup>2</sup>

**Bottom Line:** not even super tech-savvy people understand exactly how it gets the answers it produces. But this simplistic explanation is good enough to start wrapping your head around how it works.



In the end, the simplest way to imagine it is like one of those "finish the sentence" games you played as a kid.

## Predictions of GPT power

The hype machine is in full force with A.I., especially when it comes to predictions of what it will ultimately be able to do. Here's a short list of interesting articles to help you get a sense of what kinds of predictions are being made:

- [Generative AI will upend the professions](#)
- [Generative AI Could Reduce Law Firm Revenue by 23.5%](#)
- [Human Beings Are Soon Going to Be Eclipsed by AI](#) (*NY Times Opinion piece*)

Here's [an interesting take](#) on how people react to AI systems. Note the article's sensational headline:

# What Makes Employees Trust (vs. Second-Guess) AI?

by Rachel Layne

You can [read the article here](#), but first, read how an A.I. chatbot summarized the article's key points.

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<sup>2</sup> It's entitled [The Genius Neuroscientist Who Might Hold the Key to True AI](#) (it may require a subscription to read)

- Research by the Laboratory for Innovation Science at Harvard suggests that **employees are likelier to trust AI algorithms when they know less about how they work but trust the people who designed them.**
- Understanding the inner workings of AI does not necessarily increase confidence in its recommendations.
- Employees tend to trust their own intuition and anecdotal experience over AI's interpretation of data.
- **Trust in the developers and testers of AI systems is crucial for the acceptance of AI recommendations.**
- The study conducted with luxury fashion retailer Tapestry Inc. showed that employees were more likely to accept recommendations from a "black box" algorithm they couldn't interpret, resulting in better decision-making and financial results.
- **AI can improve human decision-making but will not replace human decision-makers entirely.**

Sensational articles aren't that helpful. If you want a thoughtful examination by a thoughtful lawyer, read Jordan Furlong's article: [Leading your law firm into the Gen AI Era](#).

In [this excellent podcast episode](#), two tech prominent experts discussed the recent surge in public fascination and the increasing use of AI-powered systems like ChatGPT, which now enables more human-like dialogues. Despite these impressive strides, they said it's clear we have not yet attained true [artificial general intelligence](#) (AGI).

They discussed the worry about possible misuses of AI, such as propagating false information, launching cyber attacks, or even personal scams. Protective measures are underway, but they observed that mitigating these threats entirely is a complex task.

They noted that capabilities of an AI system are directly tied to the diversity and volume of data used for its training. More data, especially from the internet, enhances its abilities, but can also increase the likelihood of generating incorrect or harmful content.

As AI-generated content becomes more common, fact-checking remains a formidable challenge. Hence, they emphasized the importance of going back to original sources and discerning where AI-generated information actually came from.

While AI presents a tremendous opportunity to boost productivity and enrich human lives if leveraged correctly, several unresolved issues concerning its risks, ethical implications, and regulation still loom large.

## An Example of a ChatGPT conversation

I recently asked ChatGPT to explain the concept of “functional fixedness” to me (don’t ask why). The conversation was interesting, so I’m reproducing it below.

**My Question:**

*Are you familiar with the term "functional fixedness"?*

**ChatGPT Answer**

Yes, I am familiar with the term "functional fixedness." It's a cognitive bias that limits a person to use an object only in the way it is traditionally used. This concept was first introduced by Karl Duncker, a Gestalt psychologist, in his work on problem-solving tasks.

For instance, if you needed to prop open a door and had a heavy book nearby, functional fixedness might prevent you from seeing the book as a potential doorstop because we typically think of a book's function as something to read.

Functional fixedness can limit our problem-solving capabilities and creativity because it narrows our perception of how we can use the objects and resources available to us. Overcoming functional fixedness can lead to innovative solutions and new ways of using familiar objects.

**My Question:**

*How might this bias creep into the problem solving tendencies of lawyers who rely on precedent in constructing arguments?*

**ChatGPT Answer**

That's an interesting question. Functional fixedness in the context of law might manifest as overreliance on established precedents, potentially hindering creative legal reasoning or novel interpretations of the law.

Legal precedents are fundamental to the legal systems, particularly in common law jurisdictions where prior court decisions serve as a guide for decision-making in current and future cases. However, a lawyer who is "functionally fixed" might only see the application of law in terms of these established precedents and might overlook or undervalue unique or novel aspects of a new case that could potentially justify a different interpretation or application of the law.



Such a lawyer might fail to propose new arguments or strategies, especially ones that might involve challenging existing precedents or advocating for the evolution of the law to better fit contemporary social realities. For example, the digital era has brought up numerous challenges in areas such as privacy, intellectual property, and contractual arrangements that often require new legal thinking beyond existing precedents.

This is not to say that reliance on precedent is detrimental—on the contrary, it brings consistency and predictability to the legal system. The key is to strike a balance, recognizing when existing precedents adequately address a problem and when new legal arguments or interpretations are needed.

Overcoming functional fixedness in this context may involve actively encouraging lateral thinking, questioning assumptions, seeking input from diverse perspectives, and staying abreast of societal, technological, and legal developments to understand how they might affect the interpretation and application of the law.

How might the cognitive bias of “functional fixedness” hinder lawyers’ ability to appreciate and understand the practical implications of using generative AI tools like ChatGPT?

That’s a question for you to ponder. And it’s best to ponder it as you use it firsthand, formulating your own understanding of its strengths and weaknesses.

## **Conclusion**

Even if ChatGPT is not thinking in the way humans do, it’s certainly doing something that looks remarkably similar. The best way to understand ChatGPT (and other AI-driven tools) is to use them, but with a sensible dose of caution.

And if you want additional information on ChatGPT use in the legal profession, [check out my short email course](#) (*it’s free*). Or email me at: [ernie@lawfirmautopilot.com](mailto:ernie@lawfirmautopilot.com) if you want to.

### **About the Author**

Ernie Svenson helps lawyers use technology to reduce overhead, improve efficiency, and gain freedom. He's a veteran law blogger, award-winning consultant, ABA Author, speaker, and podcaster. To learn more, visit his website: <https://erniethelawyer.net>.



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**Friday, January 19**

**Harnessing Technology for Effective Litigation  
and Practice**

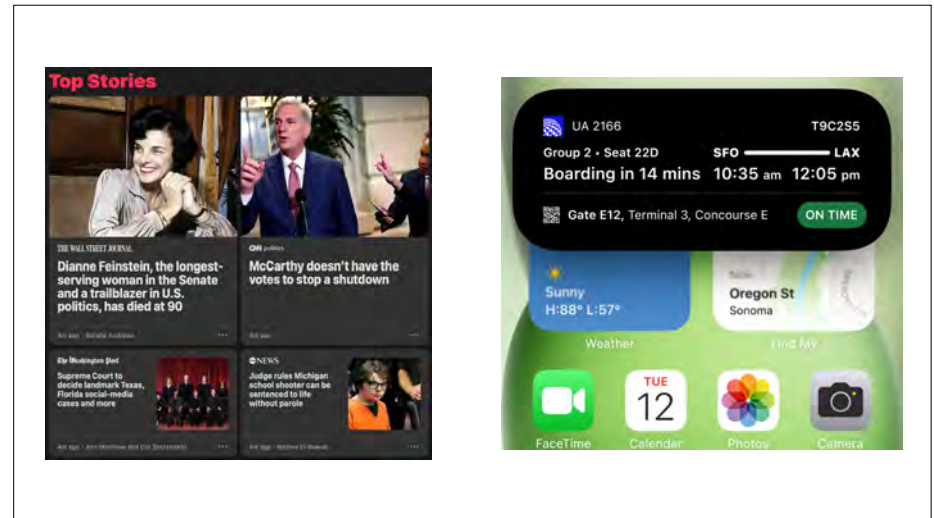
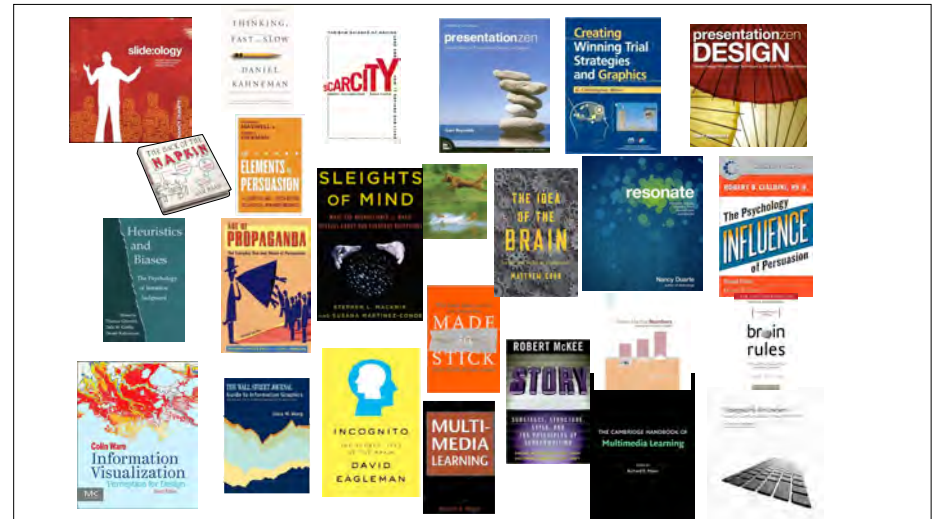
*Justin S. Kahn*



# HARNESSING TECHNOLOGY FOR EFFECTIVE LITIGATION AND PRACTICE

**JUSTIN S. KAHN**

KAHNLAWFIRM.COM



## Closing Example



Process?

No such  
as misdi



IT'S ALL THE **CONTROL**  
OF **ATTENTION**

Understanding  
**Attention**

Watch what happens as the  
unsuspecting pedestrian  
provides directions.

## Change Blindness

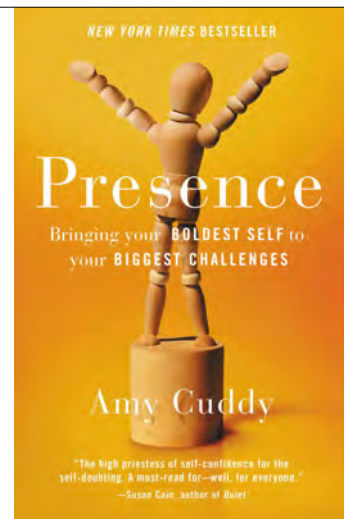
- Selective Attention
- < likely notice other

Count how many times  
the players wearing  
white pass the ball

# CONFIDENCE



Amy Cuddy



Tiny Physical → Big Mental

**Testosterone**

**Cortisol**

# Cortisol

Think of cortisol as nature's built-in alarm system. It's your body's main stress hormone. It works with certain parts of your brain to control your mood, motivation, and fear.

# Cortisol

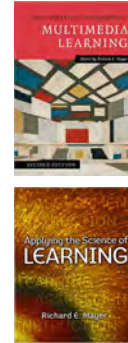


**Nature's Alarm System**





# Multi-Media Learning



**Prof. Richard E. Mayer**

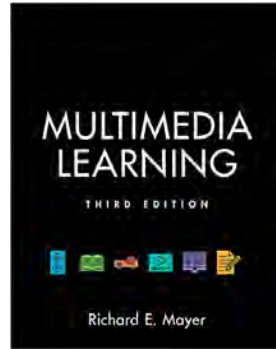
# Teaching Best ?

Instruct using  
words and pictures

# Multimedia Principle

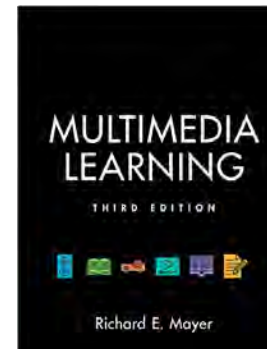
**words &**





# Stroop

YELLOW BLUE ORANGE  
BLACK RED GREEN  
PURPLE YELLOW RED  
ORANGE GREEN BLACK  
BLUE RED PURPLE  
GREEN BLUE ORANGE



# Cognitive Load

COGNITIVE SCIENCE 32, 201-208 (2008)

## Cognitive Load During Problem Solving: Effects on Learning

JOHN SWELLER  
University of New South Wales

Convergent evidence indicates that domain-specific knowledge in the form of schemas is the primary factor distinguishing experts from novices in problem-solving skill. Evidence that conventional problem-solving activities is not effective in schema acquisition is also accumulating. It is suggested that a major reason for the ineffectiveness of problem solving as a learning device is that the cognitive problem required for the use of domain-specific knowledge, and the conventional problem solving in the form of rote tasks, actually requires a relatively large amount of cognitive processing capacity which is consequently unavailable for schema acquisition. A computational model and experimental evidence provide support for this contention. Theoretical and practical implications are discussed.

Problem-solving skill is highly valued. For most of this century, many theorists and educational institutions have placed a heavy emphasis on this ability, especially in mathematics and science (see DeVries, 1950, 1946). Classic movements such as "discovery learning" (e.g., Bruner, 1961) were spawned, at least in part, by the presumed importance of fostering problem-solving skills. This emphasis on problem solving was not associated with a comprehensive knowledge of its characteristics and consequences. In the last few years, this state of affairs has begun to change with our knowledge of relevant mechanisms increasing markedly. These mechanisms have implications for learning, as well as problem solving. The purpose of the present paper is to suggest that contrary to current practice and many cognitive theories, some forms of problem solving interfere with learning.

The research was supported by a grant from the Australian Research Councils (Sweller, The computational model was reviewed while the paper was in press at the Learning Research and Development Centre, University of Perth, WA, to Mark J. Gosses and R. Dixon for identifying aspects of the model with the "Cognitive Science" journal and the PRISM language, and T. Cahn for research assistance. The permission to use New South Wales Department of Education and Training, Australia, J. Ward, Digital Psychology and the R. King, Melbourne, Victoria, South Eastern High School is gratefully acknowledged. Correspondence and requests for reprints should be sent to J. Sweller, School of Education, University of New South Wales, P.O. Box 1, Kensington, NSW 2052, Australia.

Split-Attention Principle

## Big Ideas Presenting

Point  
Image  
Emphasis



Some Principles

- **Coherence**
- **Segmenting**

# Coherence

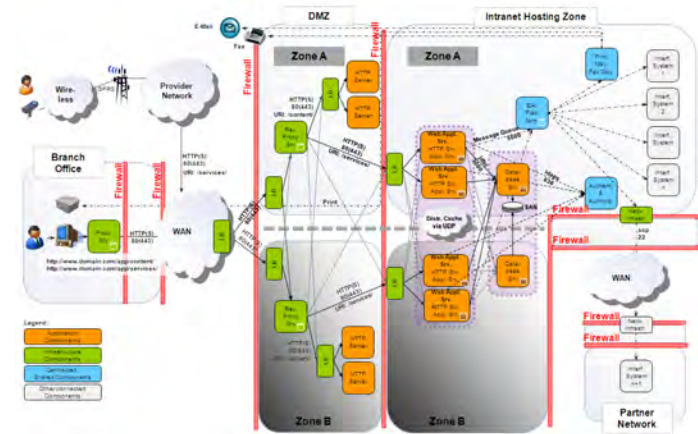
People learn better when extraneous material is excluded from the images and slides that are shown to them. This is an example of too much information because you are still reading and do not need any of this information.

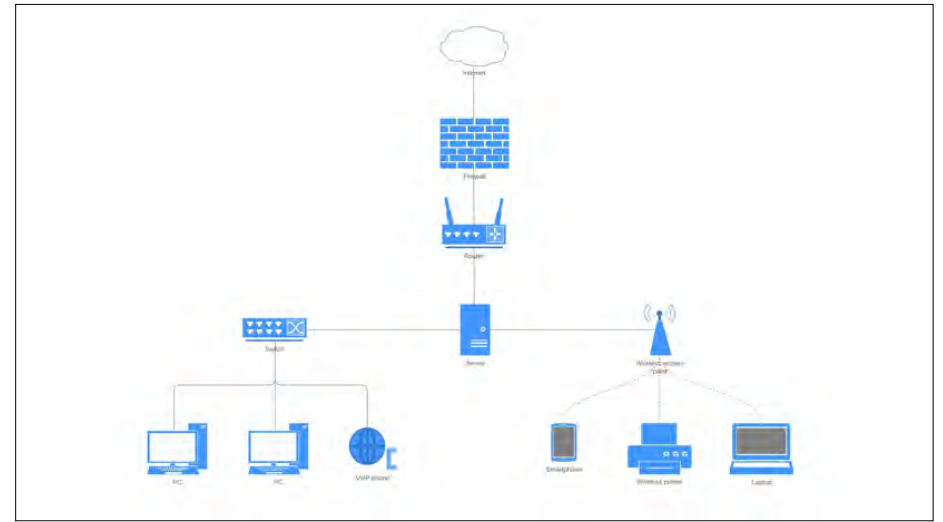
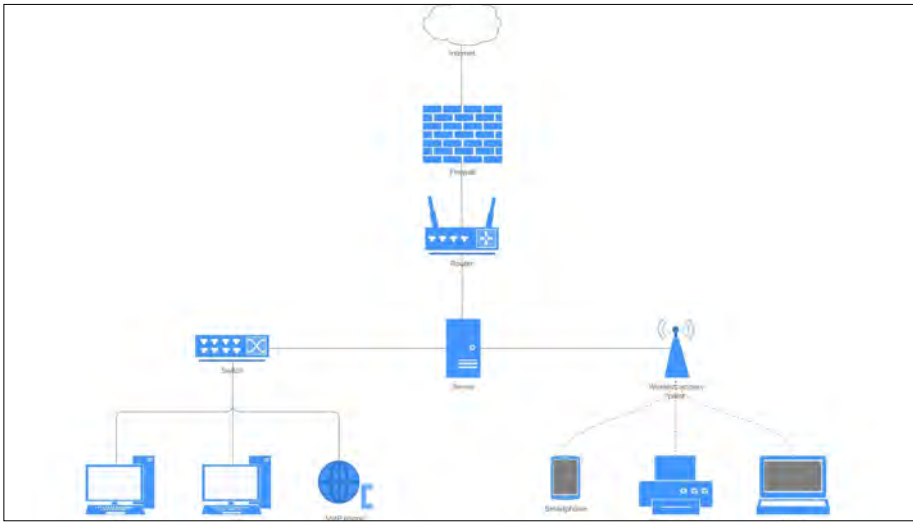
Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum. § 11 123.

# Coherence

Decrease  
Cognitive Load

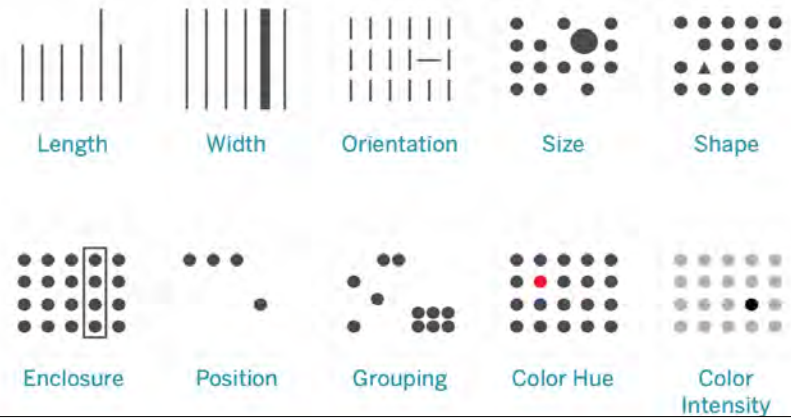
# Seg - ment - ing





# PREATTENTIVE PROCESSING

## Pre-Attentive Attributes



# COLOR

10294245090234098239408  
23049820450254570923402  
10204091823498984129810  
12938470981274019234012  
39485739856091247112098  
28479813275412983470923

10294245090234098239408  
23049820450254570923402  
10204091823498984129810  
12938470981274019234012  
39485739856091247112098  
28479813275412983470923

1 Q Because it was wet and raining?  
2 A Because it was wet and I slid. If it was any  
3 other day I would have been able to avoid the collision.  
4 But...  
5 Q But it was raining that day?  
6 A It was raining that day.  
7 Q And the roads were wet?  
8 A The roads were very wet.  
9 Q And so when you slammed on the brakes you just  
10 slid into the back of her?  
11 A Just slid into her. Didn't hardly -- I don't  
12 even remember the rate of speed dropping. It just seemed  
13 like the car just slid.  
14 Q Okay.  
15 A Like it was a ice skater on a skating rink.  
16 Q Alright. So at about forty-five miles an hour,  
17 like an ice skater on an ice rink you slid into the back  
18 of her?  
19 A Yes.  
20 Q And...?  
21 A If you want to go ahead and use that exact  
22 thing I just said, then yeah, go ahead.  
23 Q Okay. Well, that's what you said?  
24 A Yeah.  
25 Q Correct?

A. Just slid into her. Didn't hardly -- I don't even remember the rate of speed dropping. It just seemed like the car just slid.

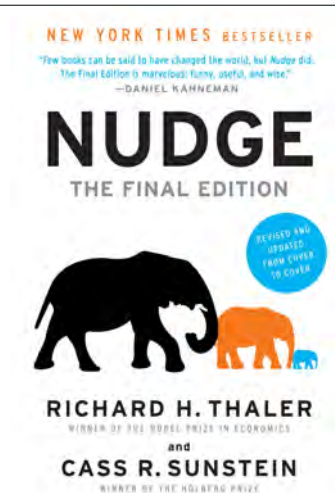
Q. Okay.

A. Like it was a ice skater on a skating rink.

Q. Alright. So at about forty-five miles an hour, like an ice skater on an ice rink you slid into the back of her?

A. Yes.

## Loop - To Teach

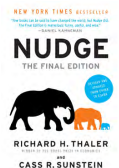


decisions

*influenced*

way choices presented

Thaler, R. H., Sunstein, C. R., & Balz, J. P. (2013).  
Choice architecture. The Behavioral Foundations  
of Public Policy, 428-439.

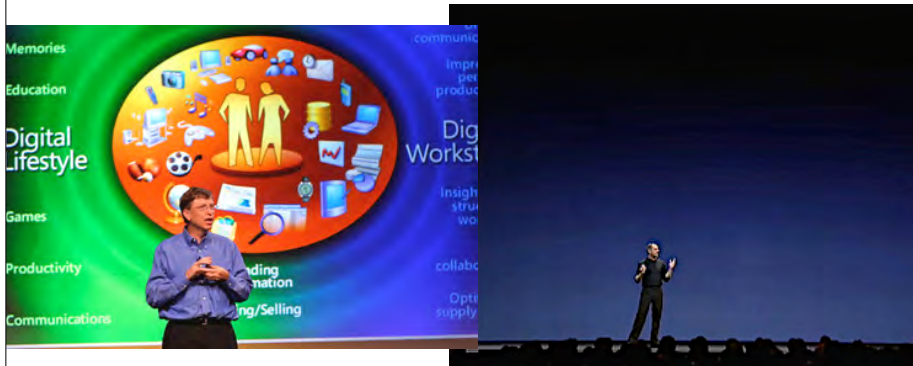




## Order Creates Meaning



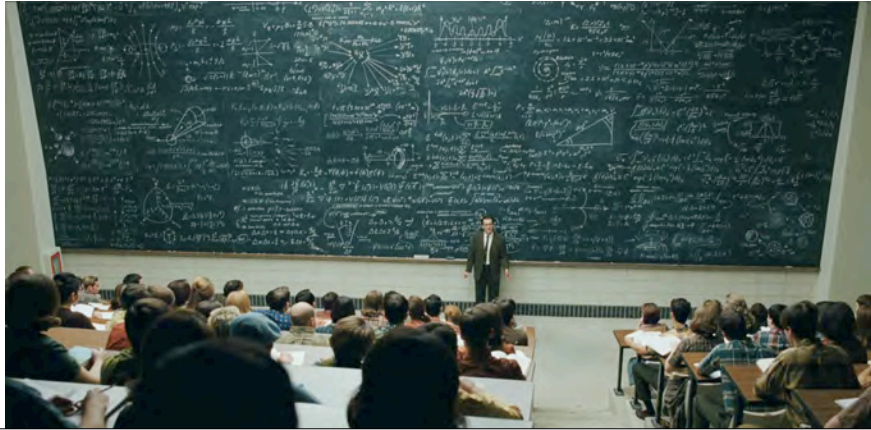
## Who Persuades Better?



## Bullet points are Boring



# Remember Your Audience



H1  
164.49 pt **Lorem ipsum dolor sit**

H2  
101.66 pt **Lorem ipsum dolor sit amet**

H3  
62.83 pt **Lorem ipsum dolor sit amet**

H4  
38.83 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

H5  
24 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

Body  
24 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

Caption  
16 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

Super  
696.72 pt

# 74

H1 Dark  
164.49 pt **Lorem ipsum dolor sit**

H2 Dark  
101.66 pt **Lorem ipsum dolor sit amet**

H3 Dark  
62.83 pt **Lorem ipsum dolor sit amet**

H4 Dark  
38.83 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

H5 Dark  
24 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

Body Dark  
24 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

Caption Dark  
16 pt **Lorem ipsum dolor sit amet,  
consectetur adipiscing elit.**

Super Dark  
696.72 pt

# 74


Steve Jobs = Lawyer's Job

- ID PROBLEM
- PRESENT SOLUTION
- SHOW HOW IT WORKS



## iPod



- Bullet Points
  - Are
  - Not
  - Meant
  - To
  - Replace
  - What
  - You
  - Say
  - text
  - so
  - you
  - can
  - just
  - read
  - the
  - bullet
  - points
  - say
  - rather
  - they
  - should
  - emphasize
  - 1 or 2
  - points
- 
- A single bullet point is shown horizontally, pointing to the right. It is a standard brass bullet with a copper jacket and a pointed tip. The bullet is positioned between the words 'Say' and 'should' in the list.

## PowerPoint Lessons

### Most Common Mistakes

People tend to put **every word** they are going to say on their PowerPoint slides. Although this eliminates the need to memorize your talk, ultimately this makes your slides **crowded**, wordy and *boring*. When you do this, you will lose your AUDIENCE'S ATTENTION LONG before you even reach the bottom of your...

### Most Common Mistakes

[continued] ... first slide.

### Most Common Mistakes

2) Mini people do not ruin spel  
cheek befoure there presetation -

**BIG MISTACK !!**

Nothing makez you loak stupder  
then speling end tiepo erors.

### Bad Color Schemes

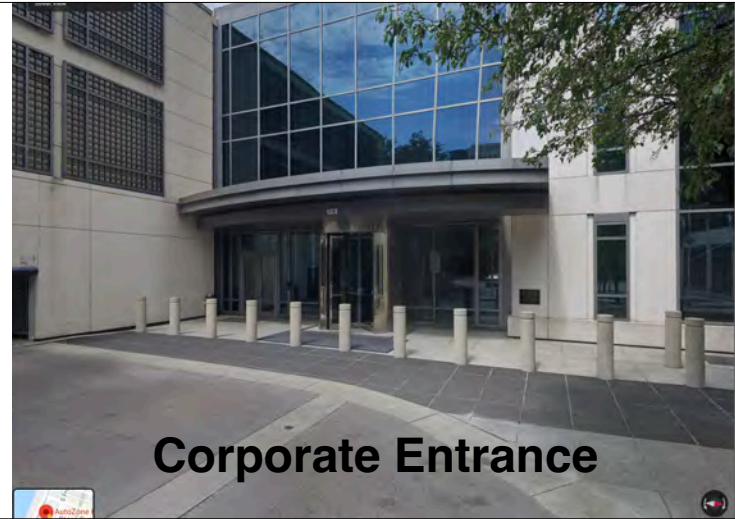
- Clashing background and font colors can lead to:
  - ***Distraction***
  - **Confusion**
  - **Headache**
  - **Vomiting**
  - **Loss of Bladder Control**

*juxtaposition*

**PERSUADES**



Customer Entrance



Corporate Entrance

## Grids

### GOTTI IS ACQUITTED BY A FEDERAL JURY IN CONSPIRACY CASE

#### NEW CHARGES ARE LIKELY

Verdict is the First Setback in Recent Government Drive Against Mafia Leaders

By LEONARD BENDER

John Gotti was acquitted of Federal racketeering and conspiracy charges yesterday in the Government's first major setback in its recent assault on organized crime.

Mr. Gotti, who the Government says is the leader of the nation's most powerful Mafia family, and six co-defendants were found not guilty of charges they took part in a criminal enterprise. They were accused of carrying out illegal gambling and loan-sharking operations, armed hijackings and at least two murders over an 18-year period.

Despite yesterday's verdict, Federal investigators said the 46-year-old Mr. Gotti might face additional new charges as head of the Gambino crime family. "I can't guarantee that I won't sleep at night," said Thomas L. Sherr, head of the Federal Bureau of Investigation in New York, when asked if the F. B. I. was building up another case against Mr. Gotti.

"We'll Be Starting Again"

"They'll be ready to try me again in two weeks," Mr. Gotti told a reporter before leaving the Brooklyn courthouse in a gray Cadillac that was waiting for him. "In three weeks we'll be starting again, just watch."

Until yesterday, Federal prosecutors in the Southern and Eastern Districts of New York had recorded a string of successes in major organized-crime cases.

Within the last six months, the heads of the city's four oldest Mafia families have been convicted after trials in Manhattan and Brooklyn. There, too, Mr. Gotti and his co-defendants, had been charged under the Federal Racketeer Influenced and Corrupt Organizations Act, or RICO.



**The last piece of evidence requested by the jury for re-examination was a chart introduced by the defense that showed the criminal backgrounds of seven prosecution witnesses. It listed 69 crimes, including murder, drug possession and sales and kidnapping.**

Mr. Gotti, who has been dubbed "Donkey Don" because of his aggressive attire and imperious personality, and his co-defendants, hugged and kissed each other and their lawyers.

They then stood and applauded as the 13 members of the jury — whose identities had been kept secret to prevent possible tampering — left the courtroom by Federal marshals.

Prosecutors in the seven-month trial of John Gotti said the underlying weakness of the prosecution's case was its apparent reliance on various career criminals as key witnesses against Mr. Gotti and six co-defendants.





**News Analysis**

A signal that the credibility of the prosecution's principal witnesses was in doubt came yesterday morning when the jury, in its final request before accepting the defendants of all charges, reviewed an exhibit introduced by the defense.

It was a chart listing the lengthy criminal records of seven prosecution witnesses who had obtained promises of immunity and other favors from the Government in return for their testimony against Mr. Gotti.

CRIMINAL ACTIVITY OF GOVERNMENT EMPLOYEES							
CRIME	CARDINALE	LOFARO	MALONEY	POLISI	SENATORE	FORONJY	CURRO
MURDER	X	X					
ATTEMPTED MURDER		X	X				
HEROIN POSSESSION AND SALE	X	X		X			X
COCAINE POSSESSION AND SALE	X		X	X			
MARIJUANA POSSESSION AND SALE						X	X
GAMBLING BUSINESS		X		X		X	
ARMED ROBBERIES	X		X	X	X		X
LOANSHARKING		X		X			
KIDNAPPING			X	X			
EXTORTION			X	X			
ASSAULT	X		X	X			X
POSSESSION OF DANGEROUS WEAPONS	X	X	X	X	X		X
PERJURY		X				X	
COUNTERFEITING					X	X	
BANK ROBBERY			X	X			
ARMED HIJACKING				X	X		
STOLEN FINANCIAL DOCUMENTS			X	X	X		
TAX EVASION				X		X	
BURGLARIES	X	X		X	X		
BRIBERY		X		X			
THEFT: AUTO, MONEY, OTHER			X	X	X	X	X
BAIL JUMPING AND ESCAPE			X	X			
INSURANCE FRAUDS				X	X		
FORGERIES				X	X		
PISTOL WHIPPING A PRIEST	X						
SEXUAL ASSAULT ON MINOR							X
RECKLESS ENDANGERMENT							X

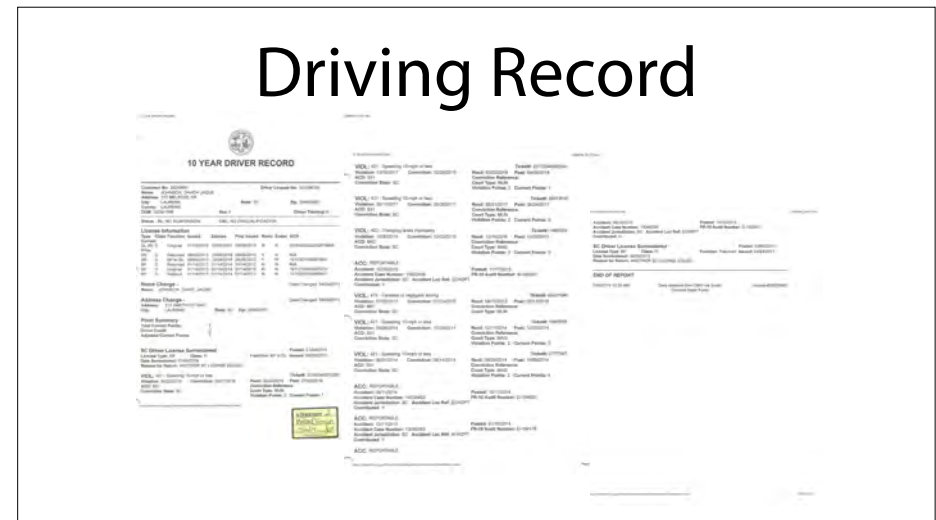
## Damages

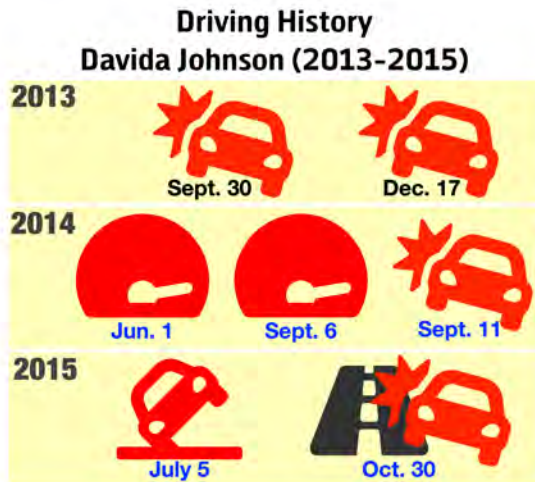
	Past	Future
Dr. John Smith		
Dr. Frank Lies		
Dr. Make Itup		

**Rule 1006. Summaries to Prove Content**

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.

The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.





## Tips

- Mark Small for Court Reporter
- Keep Original
- Put on Record

## Case Differences

Report Manager	Thompson, Ryan	Driver's Info, and
2013	Sept. 30	10/10/2013
2014	Sept. 6	10/10/2014
2015	July 5	10/10/2015

<b><i>Dwyer v. Margono,</i></b> 128 N.C. App. 122, 493 S.E.2d 763 (1997)	<b><i>Thompson v. Three Guys Furniture Co.</i></b> 122 N.C. App. 340, 469 S.E.2d 583, (1996)	<b><i>Green v. Avis, et al</i></b>  <b><i>This Case</i></b>
<b>SJ proper</b>	<b>SJ NOT Proper with Facts</b>	<b>SJ NOT Proper with Facts</b>
Valid International Driver's License	<b>Suspended Driver's License</b>	<b>Suspended Driver's License</b>
No Prior Driving Convictions	<b>Prior DWI Conviction</b>	<b>Prior DWI Conviction</b>
	<b>Stranger</b>	<b>Stranger - Never Rented</b>

	<b>Stranger</b>	<b>Stranger - Never Rented</b>
	<b>Fail to return timely</b>	<b>Fail to return timely</b>
	<b>Did not ask about driving record</b>	<b>Did not ask about driving record</b>
	<b>Did not see drive</b>	<b>Did not see drive</b>
	<b>Fail to ask to see license</b>	<b>No Admissible Facts License Presented. Avis admits looking does not show suspension or DWI conviction</b>

	<b>Drove while intoxicated causing collision</b>	<b>Drove while intoxicated causing collision</b>
		<b>Prior Speeding conviction</b>
		<b>Avis's Safety policies not followed</b>
		<b>1 in 5 N.C. Driver's Licenses are suspended about 20% (1 in 5) thus reasonable to inquire</b>
		<b>Free NC DMV Check</b>
		<b>Paid Check Used By</b>

## AVIS® Safety Policies Not Followed



Clean Driving Record



Electronic DMV



Safe Driving History



Signed Addendum



No DWI Conviction



No Citation for DWI



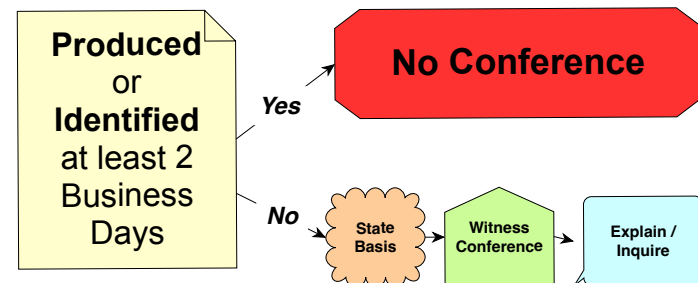
- Off-The-Record Deposition Conference Parameters**  
In re Anonymous Member of S.C. Bar, 346 S.C. 177, 190-91, 552 S.E.2d 10, 16-17 (2001)
- **Off-The-Record Conference Only Decide Whether**
    - Assert Privilege [30 (j)(5)]; Or
    - Discuss Previously Undisclosed Document [30 (j)(8)]
  - **Before Conference**
    - Deponent's Attorney Note Break Needed To Discuss
      - Possible Assertion Privilege; Or
      - Newly Produced Document
  - **After Conference, Attorney States**
    - Why Conference Occurred; And
    - Decision Reached
  - **Whether / Not Privilege Asserted**, Deposing Counsel May
    - Inquire On Record Subject of Conference To Determine If Witness Coaching
  - **Conferences Can Never Be Done To**
    - Assist In Framing An Answer,
    - Calm Down Nervous Client, Or
    - Interrupt Flow Of Deposition.

**If Improper Conference Occurs  
Sanctions Warranted**

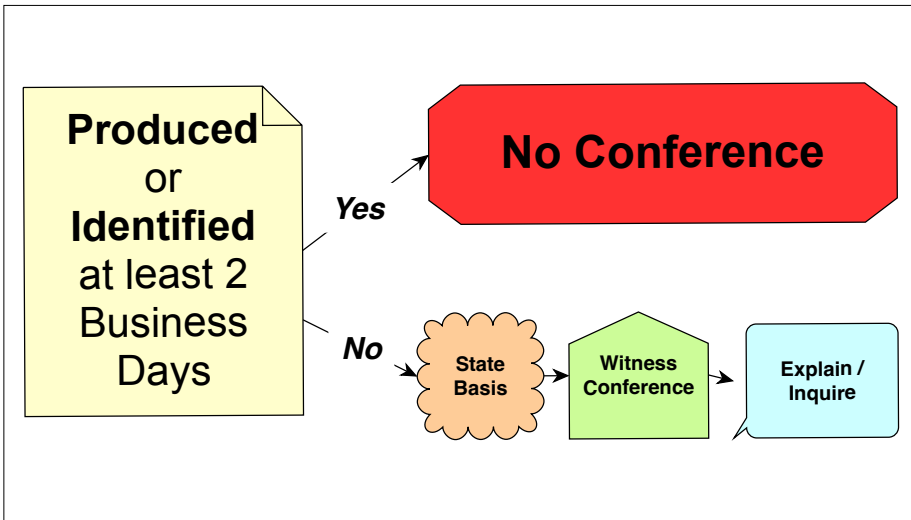
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- Decision Reached
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**If Improper Conference Occurs  
Sanctions Warranted**



Rule 30(j)(5) and (8), SCRPC and  
In re Anonymous Member of South Carolina Bar,  
 346 S.C. 177, 191, 552 S.E.2d 10, 16 (2001)

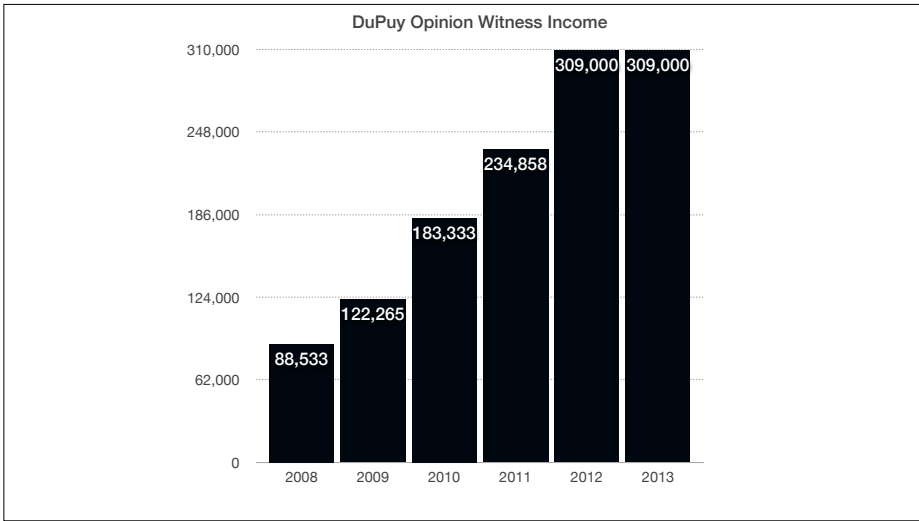


Dash Cam

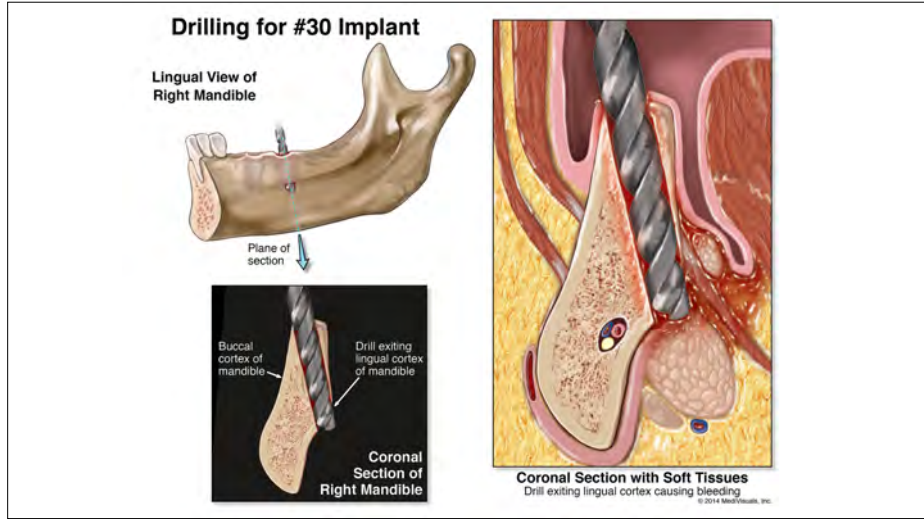


Show \$ Influence

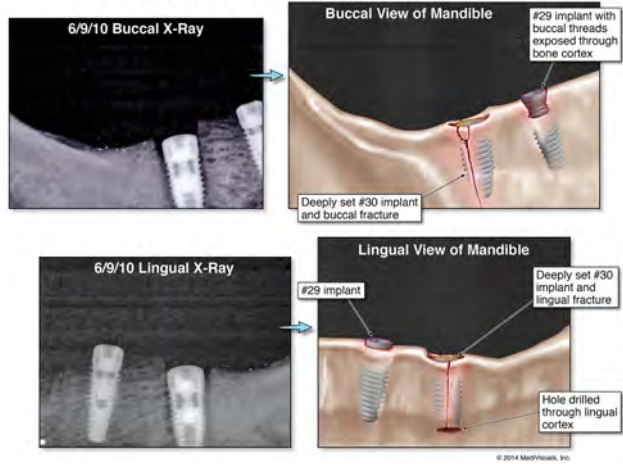




Use  
Silence



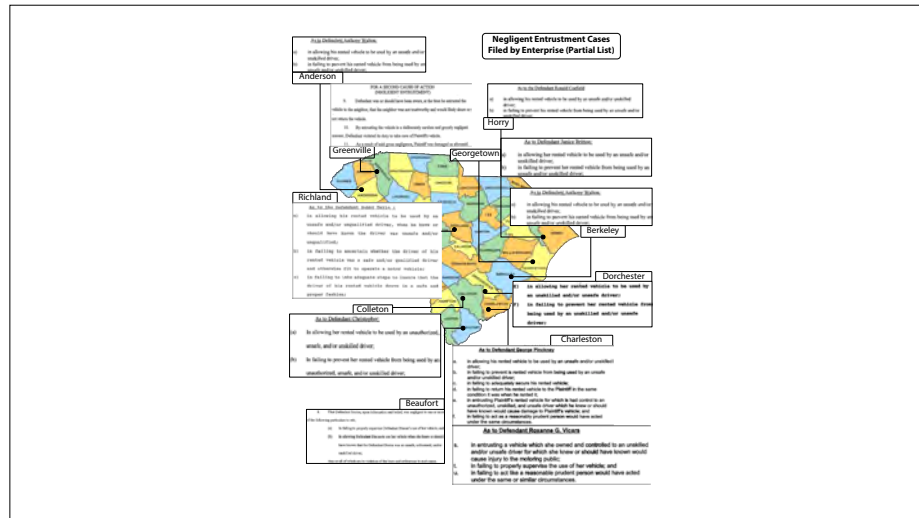
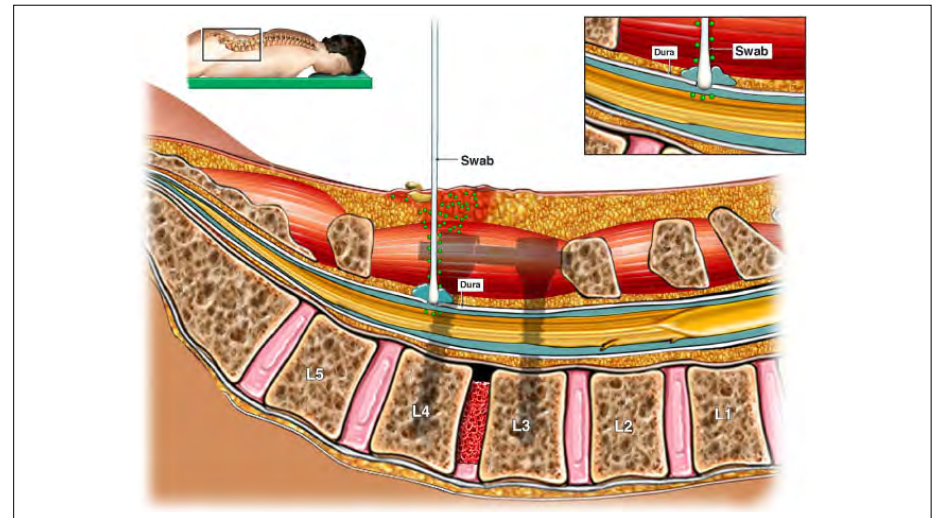
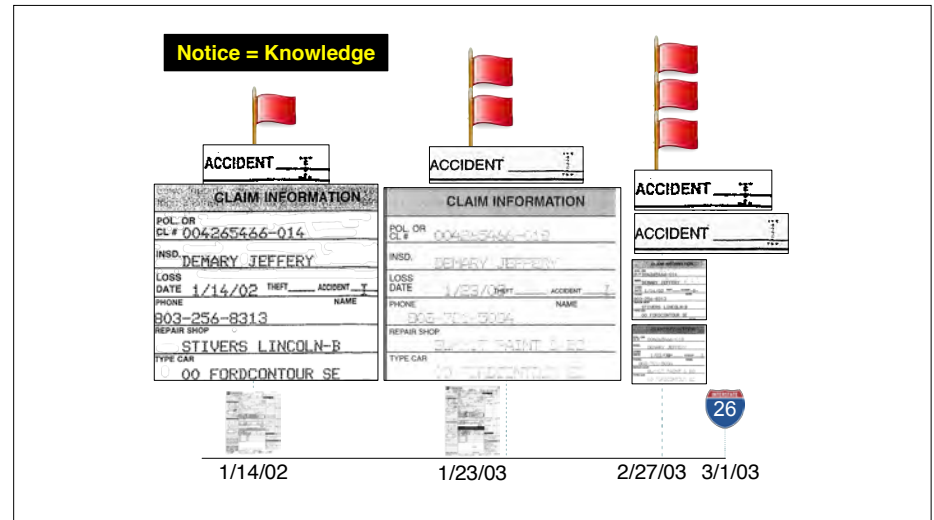
### Implants within Mandible on 6/9/10



### Juxtaposition + Silence



# Motion Hearings



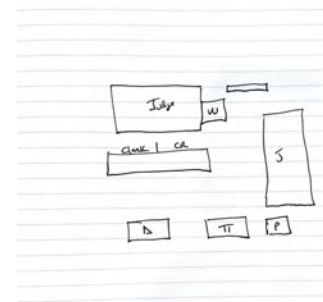
# Courtroom Prep



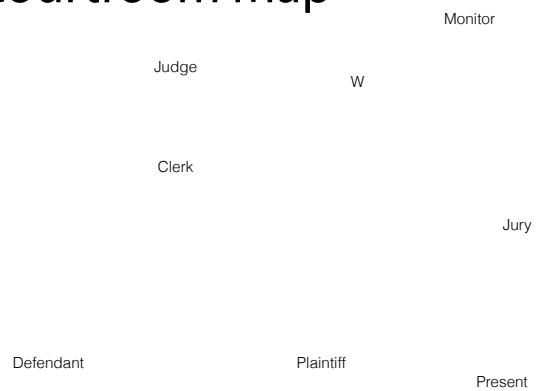




## Courtroom Map



## Courtroom Map



Picture of Connections



## Dongles

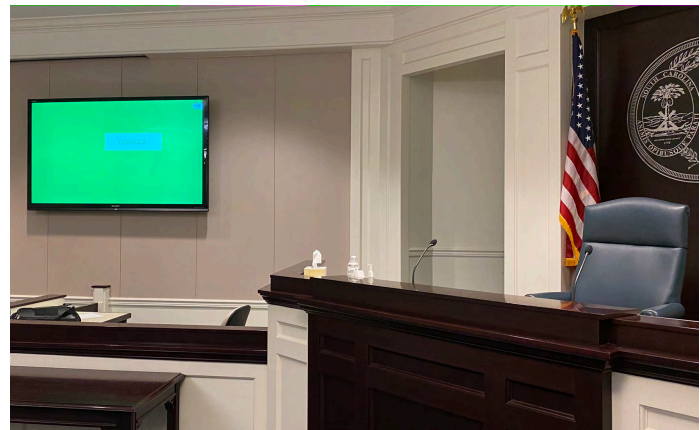


## Find Problems Early

Call Clerk

Ask what works for them

Take THE device



# HDCP Content

# Court Memos

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

JENNIFER L. STOUT AND  
JAMES A. STOUT,  
PLAINTIFFS,

v.

AUTOZONE, INC. AND  
AUTOZONE SYSTEMS, INC.,  
DEFENDANTS.

C.A. No. 0:14-CV-00873-MGL

PLAINTIFFS'  
MEMORANDUM IN  
OPPOSITION TO  
DEFENDANTS' MOTION  
FOR CLARIFICATION  
PURSUANT TO RULE 35, FRCP

### Table of Contents

I. Concise Summary of the Nature of the Case and brief argument as to why motion should be denied.....	1
II. Concise statement of the pertinent facts.....	5
A. History of Identification and Expert Disclosures.....	5
1. Plaintiff's Expert Reports and CV Provided Months before Deadline.....	5
2. Consultant Does Not Equal Expert Examination Request.....	6
III. Argument.....	8
A. Rule 35 Exam Request Has Requirements – It's Not A Right.....	8
B. Court Must Assess Credentials of Examiner Who Falsifies His CV and Board Certification.....	8
C. Failure to Provide Required Case List Further Warrants Not Ordering Examination.....	12
D. Willingness to Engage in Unethical Conduct Warrants Finding that Examination Should Not Take Place.....	12
E. Defendants Concede Records and Materials Are Sufficient for Opinions without Examination.....	13
F. Vocational Expert Robert Taylor is Not Suitable to Perform Physical or Mental Exam.....	15
G. Defendants Fail to State Manner, Conditions and The Scope of the Examination.....	15
H. Defendants Concede Material From Other Sources Sufficient to Render Opinions – Thus, Good Cause Cannot be Shown.....	15
I. Vocational Expert Is Not Suitable to Conduct a Physical or Mental Examination.....	16
IV. Conclusion.....	18

IN THE UNITED STATES DISTRICT COURT  
OF SOUTH CAROLINA  
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C.A. No. 0:14-CV-00873-MGL

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A. History of Identification and Expert Disclosures.....	5
1. Plaintiff's Expert Reports and CV Provided Months before Deadline.....	5
2. Consultant Does Not Equal Expert Examination Request.....	6
III. Argument.....	8
A. Rule 35 Exam Request Has Requirements – It's Not A Right.....	8
B. Court Must Assess Credentials of Examiner Who Falsifies His CV and Board Certification.....	8
C. Failure to Provide Required Case List Further Warrants Not Ordering Examination.....	12
D. Willingness to Engage in Unethical Conduct Warrants Finding that Examination Should Not Take Place.....	12
E. Defendants Concede Records and Materials Are Sufficient for Opinions without Examination.....	13
F. Vocational Expert Robert Taylor is Not Suitable to Perform Physical or Mental Exam.....	15
G. Defendants Fail to State Manner, Conditions and The Scope of the Examination.....	15
H. Defendants Concede Material From Other Sources Sufficient to Render Opinions – Thus, Good Cause Cannot be Shown.....	15
I. Vocational Expert Is Not Suitable to Conduct a Physical or Mental Examination.....	16
IV. Conclusion.....	18

**I. CONCISE SUMMARY OF THE NATURE OF THE CASE AND BRIEF ARGUMENT AS TO WHY MOTION SHOULD BE DENIED**  
 This is a premises liability case. Mrs. Stout tripped and fell in Defendants' parking lot, shown below. Defendants conducted regular inspections of the parking lot that identified "severely degraded" areas. Managers knew of and warned Defendants of the dangerous condition. No action was taken.



As a result of striking her head against the concrete, Mrs. Stout suffered a traumatic brain injury, fractured skull and immediately began seizing. Defendants do not dispute that Mrs. Stout suffered a traumatic brain injury. Defendants deposed Dr. Arthur Smith, Mrs. Stout's treating neurologist. He testified about the cause and extent of her brain injuries. The illustration below is from his deposition.

**Intracranial Brain Injuries**



Rule 25 motions can be granted with a proper showing. However, Defendants' motion seeking an order requiring Mrs. Stout to "submit to physical and mental examinations by Defendants' expert witnesses" Robert Taylor (Taylor), a vocational consultant, and Mark T. Wapner, Ph.D. (Wapner), a neuropsychologist, should be denied because Defendants fail to meet their burden of establishing "good cause." fail to have suitably qualified experts and for other reasons cited.

Defendants claim "key issues" in controversy "include whether a preexisting medical condition or drug complication caused the fall at issue and whether Plaintiff Jennifer Stout's alleged current cognitive deficits resulted from her fall or are

<sup>1</sup>Defendants' Motion p. 3, Docket #1 (emphasis added).



**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION**

Sporn/Kayleigh, Plaintiff, Case Number 3:14-CV-1096-MBS  
 Plaintiff's Memorandum in Opposition to Defendant's Motion to Substitute Expert Out of Time  
 Tawney Regional Medical Center, Thorney D. Hemming, M.D., Gregory A. Fruch, P.A. and Midlands Emergency Physicians, P.A., Defendants

**I. Concise Summary of the Nature of the Case** ..... 2  
**II. Concise Statement of the Pertinent Facts** ..... 3  
 A. Good Cause Required To Substitute and Moving Party Must Demonstrate Due Diligence Before the Deadline ..... 3  
 B. Defendant Cannot Show Its Due Diligence and Good Cause Expert for the Last 5 Years in this Case ..... 4  
 C. Good Cause Not Satisfied Because Defendant's Proposed Expert Was Deceased Because South Carolina's Statute of Limitations Was Available To Defend Against Other 2012 ..... 4  
 D. Court Determined Defendant Cannot Withstand Knowledge of Expert Status ..... 5  
 E. Only After Reconsideration to Other Medical Was Granted Did Defendant Contact Plaintiff's Counsel ..... 6  
**III. Argument** ..... 6  
 A. Better Available Experts, Fair Diligence Must Be Shown to Justify Good Cause ..... 6  
 B. No Due Diligence Before Deadline or Waiver Expert ..... 7  
 C. Information About Expert Available Available Before 2012 ..... 7  
 D. Defendant Cannot Show Due Diligence ..... 8  
 E. Attorney Available Once ..... 8  
 F. Defendant Not Due Diligence After Deadline ..... 10  
 G. Plaintiff's Failure to Identify an Expert - Defendant's Failure to Show Good Cause and Due Diligence Ends Inquiry ..... 10  
 H. Plaintiff Must Show Due Diligence to Substantiate off expert ..... 11  
 I. Reason Why Not Available ..... 11  
 J. Expert Not Available and Statute of Limitations of Expert and Expert Competence ..... 11  
 K. Statute of Limitations of Expert and Expert Competence ..... 12  
 L. Statute Available to Defendant - After Proposed Expert and Due Defendant Issues ..... 13  
**IV. Conclusion** ..... 13

**I. CONCISE SUMMARY OF THE NATURE OF THE CASE**  
 In this medical malpractice case, Mr. Ukaybaj is suing the hospital, emergency room physician, the physician's assistant and the physician's practice because they failed to perform a mental health examination or otherwise properly evaluate or treat him for mental problems when he presented to the Thorney Hospital emergency team on December 11, 2012. Defendants erroneously discharged him and, as a result, he was struck by a car. He suffered permanent brain damage, fractured bones and other serious problems.

**II. CONCISE STATEMENT OF THE PERTINENT FACTS**  
 The scheduling order required Defendants Hemming, Fruch, and Midlands Emergency Physicians, P.A. (hereinafter "Defendants" or "Doctors") to identify all experts by August 27, 2013. On that date they identified one expert, Eric Larson, MD.

Now, more than 12 days after the deadline, and with less than 4 weeks before the close of discovery, Defendants seek to substitute another expert for Dr. Larson. The claimed basis is that they recently learned Dr. Larson had testified untruthfully about a wrongful death lawsuit involving his mistress that was filed against him in Charleston County in 2003, as well as about his arrest for using counterfeit tickets to gain entry into a college football game in 2012.



Even the arrest report related to this matter is available online via the following link to [arrest records](#)<sup>1</sup> (Ex. H – Arrest Report of Oct. 20, 2012.)

<sup>1</sup> Clicking on the link below takes one to the court records concerning the expert. After going to the site, one must simply click on the docket tab and then click on the magnifying glass symbol related to the record one wants to view.

[https://www.alacbaclerk.org/court\\_records/index.cfm?section=caselist&p=0&MqKzF0YVMjV6zSU0JTFEXSM6IHU20NelyBDLUMmVygnoQ053D&casegrp=ALL&StartEtkDate=&EndEtkDate=](https://www.alacbaclerk.org/court_records/index.cfm?section=caselist&p=0&MqKzF0YVMjV6zSU0JTFEXSM6IHU20NelyBDLUMmVygnoQ053D&casegrp=ALL&StartEtkDate=&EndEtkDate=)





# **HARNESSING TECHNOLOGY FOR EFFECTIVE LITIGATION AND PRACTICE**

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