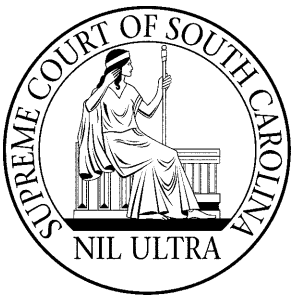

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12
March 16, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Milton Hiott, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Bamberg County
Reginald I. Lloyd, Post-Conviction Relief Judge

Opinion No. 26615
Heard February 18, 2009 – Filed March 16, 2009

REVERSED

Appellate Defender Robert M. Pachak, of the South Carolina Office of Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David Spencer, all of Columbia, for Respondent.

JUSTICE BEATTY: Milton Hiott's application for post-conviction relief (PCR) was denied. The PCR judge found Hiott's testimony and claims were frivolous and sanctioned him $3,000 pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. The Court of Appeals affirmed, holding as a matter of first impression that Rule 11 is applicable in PCR proceedings. Hiott v. State, 375 S.C. 354, 652 S.E.2d 436 (Ct. App. 2007). We granted Hiott's petition for a writ of certiorari and now reverse.

I. FACTS

Hiott was convicted of incest with his daughter after a two-day criminal trial on January 16 and 17, 2003. He filed a PCR application on June 9, 2003. Hiott was represented by counsel at the PCR hearing.

During the hearing, Hiott asserted that his trial counsel was ineffective for, among other things, failing to discover that his daughter had previously been molested by a family friend. He also contended the prosecution committed a Brady[1] violation by not disclosing this information to the defense.

Hiott's trial counsel apparently first became aware of the incident when one of Hiott's family members advised him about it during Hiott's criminal trial. Hiott maintained the incident did not occur to him because he had put it out of his mind, but if counsel had adequately questioned him it likely would have "jogged [his] memory" and he probably would not have been convicted.

The PCR judge found Hiott's claims in this regard were "absurd" and "patently frivolous" because Hiott was the complaining party in the molestation case, yet he supposedly forgot to mention it to his trial attorney. The PCR judge further found the prosecution did not commit a Brady

[1] Brady v. Maryland, 373 U.S. 83 (1963).

violation as the information was readily available to Hiott. The PCR judge ruled the remaining issues raised by Hiott were also without merit.

The PCR judge imposed a $3,000 sanction on Hiott under Rule 11, SCRCP, finding Hiott's testimony and claims were frivolous. The PCR judge stated that he considered many variables in making this decision, including the time and expense incurred by the South Carolina Attorney General's Office, the South Carolina Department of Corrections, Hiott's appointed attorney, and the court.

The Court of Appeals affirmed the imposition of a sanction under Rule 11, SCRCP. Hiott v. State, 375 S.C. 354, 652 S.E.2d 436 (Ct. App. 2007). We granted Hiott's petition for a writ of certiorari.

II. STANDARD OF REVIEW

The decision of the PCR judge may be reversed when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). This Court is entitled to decide a novel question of law without any particular deference to the lower court. Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005).

III. LAW/ANALYSIS

Rule 11(a), SCRCP provides in relevant part as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
>
> . . . .
>
> . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own

> initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

The sole issue before the Court of Appeals, as here, is whether the PCR judge erred in finding Rule 11 applies to PCR proceedings.[2] The Court of Appeals, noting this was a case of first impression, affirmed the PCR judge's ruling. The court first noted that the Uniform Post-Conviction Procedure Act specifically provides that the South Carolina Rules of Civil Procedure are applicable in PCR actions. Hiott, 375 S.C. at 357, 652 S.E.2d at 437.

Section 17-27-80 of the Act provides: "All rules and statutes applicable in civil proceedings are available to the parties." S.C. Code Ann. § 17-27-80 (2003). The Court of Appeals stated all rules that apply in civil cases apply to PCR actions; therefore, "Rule 11 would apply to PCR proceedings because PCR actions are civil." Hiott, 375 S.C. at 357, 652 S.E.2d at 437.

The Court of Appeals next observed that the South Carolina Legislature has specifically limited the application of discovery in PCR proceedings in section 17-27-150[3] of the Act, and stated that "[i]f the legislature sought to limit the applicability of Rule 11 to PCR proceedings as it sought to limit the

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[2] The Court of Appeals noted that "Hiott does not argue the PCR judge abused his discretion by imposing sanctions. The sole issue on appeal is whether the PCR judge had authority to issue Rule 11 sanctions. Thus, we do not address whether the PCR judge abused his discretion in sanctioning Hiott." Hiott, 375 S.C. at 358 n.5, 652 S.E.2d at 438 n.5.

[3] See S.C. Code Ann. § 17-27-150(A) (2003) ("A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.").

discovery process, the legislature would have inserted constricting language to that effect in the Act." Id.

Finally, citing Rule 1 and Rule 71.1(a), SCRCP, the Court of Appeals observed that "the South Carolina Rules of Civil Procedure support the conclusion that Rule 11 is applicable to PCR actions." Id. at 357-58, 652 S.E.2d at 437.

Rule 1, SCRCP states: "These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81." Rule 81 contains no exception stating Rule 11 is inapplicable in PCR actions.

Rule 71.1(a), SCRCP, regarding PCR actions, provides as follows:

> **(a) Procedure.** The procedure for post-conviction relief is provided by the Uniform Post-Conviction Procedure Act (Act), S.C. Code Ann. §§ 17-27-10 to -120 (1985).[4] The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.

The Court of Appeals concluded: "Given the plain language of Rules 1 and 71.1 and that Rule 11 is consistent with the Act, ample justification exists to conclude Rule 11 applies to PCR situations." Hiott, 375 S.C. at 358, 652 S.E.2d at 438.

On review, Hiott asserts that Rule 11 sanctions should not apply in PCR proceedings because "[t]o hold otherwise would be to put a chilling effect on an applicant's right to file for post-conviction relief." Hiott states PCR applications are often prepared by the petitioners themselves or other inmates, and they are often not educated in the law and are not readily able to discern meritorious issues.[5]

[4] The Act has been updated to S.C. Code Ann. §§ 17-27-10 to -120 (2003).

The State, in contrast, contends a circuit court judge has the authority to sanction a PCR applicant just like any other plaintiff in a civil action and that PCR applicants "do not have special rights to present frivolous claims and testimony." The State argues "an applicant's education, representation by counsel, potential reliance on an individual [who] is unlicensed to practice law, and the manner in which a claim is raised are all considerations that a circuit court could properly examine to determine if sanctions are appropriate." Moreover, any "[s]anctions imposed . . . can be reviewed on appeal."

The Court of Appeals correctly determined there is currently no provision in either the Uniform Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure that expressly prohibits the application of Rule 11 in PCR actions.

In an analogous case, however, this Court previously held that a statute revoking inmate credits for prisoners submitting frivolous claims or giving false testimony should not be applied to PCR applicants. In Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002), the petitioner filed a PCR application, which was denied. The PCR judge also revoked petitioner's inmate credits under section 24-27-200 of the Inmate Litigation Act (ILA) for testifying falsely at the PCR hearing.[6] Id. at 257, 559 S.E.2d at 844.

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[5] Hiott also maintains the Court of Appeals "apparently" found it was frivolous that he did not present testimony for some of the claims he raised in his PCR application and penalized him. He asserts that requiring a petitioner to present meritless claims, however, would create an undue burden on the courts. As the State correctly points out, the Court of Appeals made no such finding and did not examine the validity of Hiott's PCR claims. Thus, there is no merit to this allegation.

[6] See S.C. Code Ann. § 24-27-200 (2007) (providing for the forfeiture of inmate credits by a prisoner who submits a frivolous claim, testifies falsely, unreasonably delays a proceeding, or abuses the discovery process).

We stated this provision "may not stop a prisoner from utilizing the PCR structure, but it would assuredly chill a prisoner's exercise of a constitutional right," and "[s]uch a result is contrary to the long tradition of giving prisoners ready access to PCR [proceedings]." Id. at 262, 559 S.E.2d at 846.

Further, we reasoned that, although the ILA applies to civil actions, and PCR actions are civil, courts treat PCR actions differently than traditional civil cases:

> Courts treat PCR differently than traditional civil cases. For example, PCR actions are the only type of case which this Court mandates appellate counsel must brief all arguable issues, despite counsel's belief the appeal is frivolous. A lawyer knowingly filing a frivolous claim in any other civil case violates Rule 11, SCRCP. Additionally, a PCR applicant who is granted a hearing has a statutory right to be represented by a court-appointed attorney. This right does not generally exist for plaintiffs in civil cases.

Id. at 263, 559 S.E.2d at 847 (internal citations and footnote omitted) (emphasis added).

In Hiott, the Court of Appeals, citing Wade, stated that it was "cognizant that '[c]ourts treat PCR differently than traditional civil cases,'" but nevertheless concluded PCR courts have the authority to issue Rule 11 sanctions against PCR applicants "given the plain language of the [Uniform Post-Conviction Procedure] Act and the South Carolina Rules of Civil Procedure[.]" Hiott, 375 S.C. at 358, 652 S.E.2d at 438.

Although the PCR judge in the current case was understandably concerned with the potential abuse of PCR proceedings by inmates filing meritless claims, as noted in Wade, "the legislative and judicial systems already place limitations to deter inmate litigation abuse in the PCR process." Wade, 348 S.C. at 263, 559 S.E.2d at 847.

"First, a petitioner must raise all available grounds for relief in the first PCR application since successive actions are usually barred." Id. at 263-64, 559 S.E.2d at 847; see also Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) (discussing successive applications); S.C. Code Ann. § 17-27-90 (2003) (stating all grounds for relief must be raised in the first PCR application unless the court finds there is a sufficient reason why they were not asserted in the original application).

"Second, an applicant must file the PCR application within one year of the final resolution of the criminal conviction." Wade, 348 S.C. at 264, 559 S.E.2d at 847; see also S.C. Code Ann. § 17-27-45(A) (2003) (stating a PCR application "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later").

"Third, a petitioner faces a one-year deadline to file an application asserting a newly created standard or right, and to raise newly discovered material facts." Wade, 348 S.C. at 264, 559 S.E.2d at 847; see also S.C. Code Ann. § 17-27-45(B), (C) (2003) (providing one year from the determination of a newly created standard or right in subsection (B) and one year from the time new evidence was discovered, or could have been discovered by due diligence, in subsection (C)).

Together, these provisions effectively grant an individual "one chance to argue for relief" within a year of the final appeal; consequently, "[t]hese limitations adequately prevent inmates from abusing the PCR process." Wade, 348 S.C. at 264, 559 S.E.2d at 847.

Given the public policy considerations involved, including our recognition in Wade that PCR actions are treated differently than traditional civil cases and that sanctions of any kind could chill a petitioner's pursuit of PCR, as well as the fact that there are already limitations in place that serve to curb the potential abuse of the PCR process, we hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings. We can discern no practical benefit to be obtained by imposing sanctions on PCR petitioners who are often indigent. Further, the increase in appellate

review that would be necessitated by the challenges to any sanctions imposed would create an additional burden on the resources of the courts, which would effectively thwart the stated purpose of imposing sanctions in the first place.

IV. CONCLUSION

Based on the foregoing, we hold, as a matter of public policy, that Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings. Accordingly, the decision of the Court of Appeals is

REVERSED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Timothy M. Cain, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marsha Tennant, Petitioner,

v.

Beaufort County School District, Employer, and S.C. School Board Insurance Trust, Carrier, of whom Beaufort County School District is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Curtis L. Coltrane, Circuit Court Judge

Opinion No. 26616
Heard January 7, 2009 – Filed March 16, 2009

AFFIRMED

James H. Moss, Esquire and H. Fred Kuhn, both of Moss, Kuhn & Fleming, of Beaufort, for Petitioner.

Kirsten L. Barr, Jamie C. Guerrero, and Kathryn C. Thompson, all of Trask and Howell, of Mt. Pleasant, for Respondent.

CHIEF JUSTICE TOAL: In this workers' compensation case, the single commissioner denied benefits, and the full commission, the circuit court, and the court of appeals affirmed. *Tennant v. Beaufort County Sch. Dist.* Op. No. 2007-UP-056 (S.C. Ct. App. filed February 8, 2007). This Court granted a writ of certiorari to review the court of appeals' decision. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner Marsha Tennant worked as a special education teacher for thirty years prior to working for Respondent in that same role. In the fall of 2001, after being employed for approximately one year with Respondent, two new aides were assigned to assist Petitioner with her students in the classroom. As the year progressed, Petitioner was concerned that the aides were not performing their job in violation of federal Individualized Education Programs regulations and worried that the aides' performances would jeopardize the education program. Both Petitioner and the aides complained to the supervisor.

On October 18, 2001, after an argument with the aides, Tennant felt faint and went to the nurse's office, where the nurse recorded Petitioner's blood pressure as elevated. Petitioner later returned to the nurse's office complaining of chest pains and dizziness. The nurse recorded a higher blood pressure and called an ambulance. The emergency room doctor diagnosed Petitioner with a stress reaction.

At the hearing, Petitioner's family doctor ("Family Doctor") testified that Petitioner suffered a panic attack that was caused by work conditions and diagnosed Petitioner with "situational depression and panic disorder." Additionally, Petitioner submitted the deposition testimony of a licensed social worker ("Sociologist") who began treating Petitioner at her psychotherapy practice after the anxiety attack. Sociologist diagnosed Petitioner with post traumatic stress disorder and continued panic attacks and concluded that Petitioner should not return to work as a special education

teacher. Respondent submitted a letter from a psychiatrist ("Psychiatrist") who evaluated Petitioner. She concluded that Petitioner suffered a single anxiety attack, but that Petitioner did not require additional medical treatment and could return to work.

The single commissioner found that Petitioner failed to prove that the conditions of her employment were either extraordinary or unusual. Additionally, the single commissioner gave greater weight to the testimony of Psychiatrist than to the testimonies of Family Doctor and Sociologist and ruled that Sociologist was not qualified to render an opinion on causation under South Carolina case law. The full commission ruled that Sociologist's testimony should be made a part of the record, but affirmed the denial of benefits. The circuit court and the court of appeals found that substantial evidence in the record supported a finding that Petitioner did not suffer a compensable injury, and therefore, affirmed the full commission's decision.

We granted a writ of certiorari to review the court of appeals' decision, and Petitioner presents the following issue for review:

> Did the court of appeals err in affirming the order denying benefits because the full commission's decision is not support by substantial evidence?

STANDARD OF REVIEW

This Court must affirm the findings of fact made by the full commission if they are supported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

LAW/ANALYSIS

Petitioner argues that the court of appeals erred in affirming the full commission's finding that she did not suffer a compensable injury. We disagree.

In order to recover for mental injuries caused solely by emotional stress, or "mental-mental" injuries, the claimant must show that she was exposed to unusual and extraordinary conditions in her employment and that these unusual and extraordinary conditions were the proximate cause of the mental disorder. *Powell v. Vulcan Materials Co.*, 299 S.C. 325, 384 S.E.2d 725 (1989). This standard, also known as the "heart attack standard," balances the employee's interests with the employer's interests and provides a framework which ensures that the claimant shows that she suffered a work-related injury. Requiring a claimant to prove exposure to "unusual or extraordinary" circumstances in a mental-mental injury claim is consistent with the heightened burden required to prove a claim for intentional infliction of emotional distress claims, a cause of action that also allows recovery for mental injuries in the absence of physical injury. *See Hasson v. Scalise Builders of South Carolina*, 374 S.C. 352, 356, 650 S.E.2d 68, 71 (2007), quoting *Ford v. Hutson*, 276 S.C. 157, 166, 276 S.E.2d 776, 780 (1981) (recognizing that "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious").

In the instant case, Petitioner alleges that the aides' insubordination created the unusual and extraordinary conditions, which caused her panic attack. Petitioner testified that the aides would walk out of the classroom and refused to escort the children to the bathroom and that several of her students regressed in their progress as a result of the aides' actions. She also testified that she reported her concerns to her supervisor, but the supervisor sided with the aides and would not help her.

We find substantial evidence in the record supports the full commission's findings. Although the conflict may have been stressful, it was

not an unusual or extraordinary circumstance of Petitioner's employment. Neither the aides nor Petitioner's supervisor threatened her, and the conflict never involved physical contact. Petitioner admits that a special education teacher is an inherently stressful job, and Social Worker conceded that a panic attack may be triggered absent unusual or extraordinary circumstances. Additionally, Petitioner's supervisor testified that conflicts like the one between Petitioner and the aides were not unusual. In our view, cases in which the Court has found unusual and extraordinary circumstances that resulted in a mental injury involve much more extreme and severe facts. *See Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (finding the combination of death threats, gun incidents with violent drug dealers, high tension confrontations, fear of being uncovered, and loss of security as a police officer constituted unusual or extraordinary conditions of employment when they occur over several months); *Stokes v. First Nat. Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991) (concluding that the extreme prolonged increase in employee's work hours, combined with additional job responsibilities, constituted unusual and extraordinary conditions of employment); *Powell*, 299 S.C. at 328, 384 S.E.2d at 727 (holding that an intense verbal exchange between the employee and the supervisor constituted unusual and extraordinary condition of employee's work).

Accordingly, we hold that substantial evidence in the record exists to support the commission's decision that Petitioner failed to meet her burden that she suffered a compensable injury.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision upholding the denial of benefits.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Dean Gainey, Respondent,

v.

Jody Lee Gainey, Appellant.

Appeal From Sumter County
George M. McFaddin, Jr., Family Court Judge

Opinion No. 4515
Heard December 2, 2008 – Filed March 4, 2009

AFFIRMED

Steven S. McKenzie, of Manning, for Appellant.

Michael W. Self, of Sumter and Robert L. Widener, of Columbia, for Respondent.

PER CURIAM: This appeal arises from the denial of motions under Rule 60(b)(1)-(4), SCRCP, to set aside a decree of separate support and maintenance issued for Jody Lee Gainey (Wife) and James Dean Gainey (Husband). The family court found that Wife had failed to carry her burden of proof on all issues raised in her motions. Wife appeals, asserting that the

family court erred in failing to vacate the decree of separate support and maintenance under Rule 60(b), SCRCP, because (1) the family court lacked subject matter jurisdiction to approve the agreement; (2) Husband committed fraud upon the court; (3) Wife's neglect in not having an attorney present at the hearing was excusable; (4) Wife's entry into the agreement was not free and voluntary; (5) the agreement was unfair; and (6) the family court failed to attempt reconciliation of the parties. We do not find sufficient grounds to vacate the decree of separate support and maintenance.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married in 1988 and have two children. During the course of the marriage, Wife's primary responsibilities included managing the family home and raising the children, while Husband provided all of the financial resources for the family. Early in 2004, Husband informed Wife that he wanted a divorce, and both parties proceeded to meet with an attorney, Richard Jones.

Shortly after Husband informed Wife that he wanted a divorce, Wife sought medical treatment and was diagnosed with progressive anxiety and situational-related depression. Wife was treated with anti-depressant therapy on a monthly basis until April 2004 and again in September 2004.

Attorney Jones informed the couple that he would represent only the Wife. A short time later, Jones met solely with Wife and informed her that the proposed property and separation agreement the parties had presented to him was not fair to her. Jones also met with Husband's accountant and that meeting confirmed to Jones that the proposed agreement was not in Wife's best interest. Subsequently, Wife twice instructed Jones to cease any further representation in her case. Jones stated in his affidavit that during one of Wife's telephone conversations with Jones, he heard Husband in the background telling Wife what to say.[1] Wife later asked Jones to resume representing her, but she never executed the attorney-client agreement reaffirming its terms, as requested by Jones. After Wife signed the property

[1] Jones' affidavit dated January 12, 2005 was filed with the family court in support of Wife's motion to vacate order and set aside agreement.

and separation agreement with Husband, she again met with Jones and requested that he resume representing her, but Jones refused and recommended she seek other counsel.

The present case commenced in family court when Husband filed a complaint in which he sought a decree of separate support and maintenance, claiming that irreconcilable differences had arisen between the parties. In addition, Husband alleged, among other things, that the parties had entered into a property and separation agreement to resolve all of their marital issues.[2] The parties sought review and approval of the agreement. The pro se answer signed by Wife admitted the allegations of the complaint and requested that the court grant the relief.

The parties acknowledged at the hearing for separate support and maintenance that each had made full financial disclosure to the other; that each was satisfied with the terms of the agreement and thought it was fair; that neither was under the influence of any drugs, intoxicants or medications that could affect his or her judgment; and that neither was forced or felt stressed or pressured to enter into the agreement. In addition, Wife indicated that she had consulted an attorney regarding the agreement but wanted to proceed without an attorney because she did not need counsel. The family court issued a decree of separate support and maintenance on July 21, 2004.

On December 27, 2004, Wife attempted to acquire a copy of the transcript from the July 21, 2004 hearing. On April 15, 2005, after receiving no response regarding the transcript, Wife filed a motion to vacate order and set aside agreement under Rule 60(b), SCRCP.[3] The motion was based on alleged fraud on the part of Husband and on the contention that Wife was forced to enter into the property and separation agreement. Wife further alleged that on the date of the hearing, she was being treated for severe depression and was under the influence of medications for mental illness that clouded her judgment.

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[2] The agreement resolved all issues except for the divorce, which was granted at a later date.

[3] Wife's motion to vacate was filed within the one-year time period specified in Rule 60(b), SCRCP.

Subsequently, Wife made a second attempt to obtain a copy of the transcript but she did not receive the transcript until August 2005. Thereafter, she filed her first and second amended motions. In her first amended motion to vacate order and set aside agreement, Wife asserted that the family court lacked subject matter jurisdiction to hear the matter under S.C. Code Ann. § 20-3-130(G) (Supp. 2008) because the parties were still residing together at the time the matter was heard,[4] and as such the judgment was void under Rule 60(b)(4), SCRCP. The second amended motion contended that the family court erred when it failed to attempt reconciliation of the parties. The family court denied the motions and this appeal followed.

ISSUES ON APPEAL

1. Did the family court lack subject matter jurisdiction to approve the agreement under S.C. Code Ann. § 20-3-130(G) (Supp. 2008)?

2. Did the family court err in failing to vacate the original order under Rule 60(b), SCRCP, where Husband allegedly committed fraud upon the court; where Wife's neglect in not having an attorney present at the hearing was excusable, and her entry into the agreement was allegedly not free and voluntary; and where the agreement was unfair?

3. Did the family court err in failing to attempt reconciliation of the parties?

STANDARD OF REVIEW

"The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." Lanier v. Lanier, 364 S.C. 211, 215-16, 612 S.E.2d 456, 458 (Ct. App. 2005) (citing Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). Therefore, the decision can be reversed only if the family court abused its discretion. Raby Constr., L.L.P. v. Orr,

[4] Husband did not vacate the marital home until the day of the hearing.

358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). An abuse of discretion occurs when the judge issuing the order was controlled by an error of law or the order is based on factual conclusions that are without evidentiary support. BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) (citing Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

However, as to the family court's findings of fact, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Ables v. Gladden, 378 S.C. 558, 564, 664 S.E.2d 442, 445 (2008). This does not require the appellate court, however, to disregard the findings of the family judge, who saw and heard the witnesses. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005); Badeaux v. Davis, 337 S.C 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999).

LAW/ ANALYSIS

A. The Court's Jurisdiction

Wife contends the family court lacked subject matter jurisdiction to issue a decree for separate support and maintenance and approve the agreement because the parties were not living separate and apart. We disagree that subject matter jurisdiction was implicated. Further, we find that because this issue was not presented to the family court at the time the agreement was approved, any error was not preserved and cannot be raised successfully in this collateral attack via a Rule 60, SCRCP motion. Therefore, we hold that the family court correctly denied Wife relief under Rule 60(b)(4), SCRCP, and we need not reach the propriety of the family court's exercise of authority under S.C. Code Ann. § 20-3-130(G) (Supp. 2008).

A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4). Thomas & Howard Co., Inc. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); Rule 60(b)(4) (stating a court may relieve a party from a final judgment if the judgment is void). "A void judgment is one that,

from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable.'" Thomas & Howard Co., 318 S.C. at 291, 457 S.E.2d at 343 (1995) (citation omitted).

However, subject matter jurisdiction refers to the court's "power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (citations omitted); Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000) (citations omitted); see also State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Numerous cases have held that subject matter jurisdiction is not implicated when the court possesses the power to hear and determine cases of the general class to which the proceedings in question belong. See State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008); Johnston v. S.C. Dep't of Lab., Licensing, and Reg., S.C. Real Estate Appraisers Bd., 365 S.C. 293, 617 S.E.2d 363 (2005); Fryer v. S.C. L. Enforcement Div., 369 S.C. 395, 631 S.E.2d 918 (2006).

In the instant case, Wife did not challenge the family court's authority under section 20-3-130(G) at the time of the hearing for separate support and maintenance, nor did she file a direct appeal from that order. Instead, some thirteen months after issuance of the order, Wife asserted the family court lacked jurisdiction to approve the agreement in her Rule 60(b)(4), SCRCP, motion to vacate the judgment. Wife knew that she and Husband were still living together on the day of the hearing; therefore, this issue could have been raised at the hearing, and because it does not implicate the family court's subject matter jurisdiction, it could not be raised at any time and is unpreserved. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (finding a party may not use a post-trial motion to raise an issue that could have been raised at trial).

Accordingly, the family court correctly denied Wife relief under Rule 60(b)(4) and we need not reach the issue of whether the family court properly exercised authority under section 20-3-130(G).

B. Husband's Fraud

Wife asserts that the family court erred in denying her motion to vacate because Husband allegedly committed fraud when he misrepresented his financial condition, deliberately oppressed Wife, and prevented her from having access to her attorney until after the agreement was signed.

Rule 60(b)(3), SCRCP, provides:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;

Rule 60(b)(3), SCRCP. (emphasis in original).

In South Carolina, extrinsic fraud is the only type of fraud for which relief may be granted under Rule 60(b)(3), SCRCP. Raby Const., L.L.P., 358 S.C. at 20, 594 S.E.2d at 483; Jamison v. Ford Motor Co., 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct. App. 2007). Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Hilton Head Ctr. of S.C. v. Public Serv. Commn., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Id. On the other hand, intrinsic fraud is fraud which was presented and considered at trial. Hagy v. Pruitt, 339 S.C. 425, 431-32, 529 S.E.2d 714, 718 (2000) (citing Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988)). It is fraud which misleads and induces the court to find in favor of the party perpetrating the fraud. Hilton Head Ctr., 294 S.C. at 11, 362 S.E.2d at 177.

The court grants relief for extrinsic but not intrinsic fraud on the theory that intrinsic deceptions should be discovered during the litigation itself, and to permit such relief would undermine the stability of all judgments. Raby Const., L.L.P., 358 S.C. at 20, 594 S.E.2d at 483 (citing Mr. G v. Mrs. G, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995)). The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud. Ray v. Ray, 374 S.C. 79, 84, 647 S.E.2d 237, 239 (2007).

Here, if Husband did in fact misrepresent his financial condition, his actions would constitute intrinsic fraud because the deception was the type that would have misled the court in determining the issues, and his fraud could have been discovered during the action itself. Such fraud is not a ground for Rule 60(b)(3) relief.

Further, Wife is not entitled to relief for any alleged fraud or misconduct pursuant to Rule 60(b)(3), because the evidence that was presented in her motion to vacate could have been discovered during the litigation. "[A] party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." Raby Const., L.L.P., 358 S.C. at 21, 594 S.E.2d at 484; Bowman v. Bowman, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) (where a party could have discovered the "new" evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2) or (3)). Wife had an attorney assisting her prior to commencement of the original action (whom she later released). Her attorney met with Husband's accountant to review Husband's business records prior to approval of the agreement. In addition, apart from Husband's financial declaration, Wife had other financial information in her possession at the time of the hearing. Thus, she is not entitled to relief.

Wife likens her case to Ray v. Ray, which holds that "an act of perjury or concealment of a document coupled with an intentional scheme to defraud justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud." 374 S.C. at 86, 647 S.E.2d at 241. However, we distinguish Ray because in that case, Wife concealed assets through an unknown third party not subject to discovery and, therefore, engaged in conduct or activities

outside of the court proceedings which deprived Husband of the opportunity to fully exhibit and try his case. Here, Wife had access to inaccuracies in Husband's representations at the time of the alleged misconduct.

In addition, Wife failed to offer sufficient proof that Husband deliberately oppressed her and that he prevented her from having access to her attorney until after the agreement was signed. When a party asserts grounds for relief because of fraud, misrepresentation, or other misconduct of an adverse party under Rule 60(b)(3), SCRCP, the movant must prove her entitlement by clear and convincing evidence. Chewning v. Ford Motor Co., 354 S.C. 72, 86, 579 S.E.2d 605, 612 (2003).

While the record clearly indicates that Wife did not have an attorney at the time of the hearing, there is insufficient evidence that this was a result of Husband's actions. Jones' affidavit indicates that while Wife entered into a fee agreement with him in April 2004, she instructed him to cease representing her on May 10, 2004. Wife returned to see Jones a week later to resume representation. Jones informed her that he could not represent her until she signed a copy of the attorney-client agreement reaffirming its terms and conditions. Wife never signed the agreement and never contacted Jones again prior to the hearing for separate support and maintenance. Wife testified at the hearing that she did not want an attorney. Wife later testified that Husband instructed her to fire Jones because he was giving her bad advice and Husband would not pay Jones any additional money. Jones also expressed his opinion that Husband overreached Wife and instructed her to fire Jones. However, this is insufficient evidence that Husband committed any act of deception that prevented Wife from being represented by an attorney. It does not indicate extrinsic fraud.

C. Duress

Wife contends that she was forced to enter the property and separation agreement and as such, the court erred in refusing to vacate the judgment. We disagree. Wife's argument was properly rejected because Wife failed to present sufficient evidence that she was under duress when she entered into the agreement.

The central question when determining whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will by threats or the wrongful conduct of another.[5] 17A Am.Jur.2d Contracts § 218 (2004). Freedom of will is fundamental to the validity of an agreement. Id. A party claiming duress can prevail if she shows that she has been the victim of a wrongful act or threat that deprives her of free will, with the result that she was compelled to make a disproportionate exchange of values. Id.

Three factors must be proved in order to establish that a contract was procured through duress: (1) that the person was coerced to enter into the contract; (2) that the person was put in such fear that he was bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind. In re Nightingale's Estate, 182 S.C. 527, 527, 189 S.E. 890, 897 (1937). If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. Willms Trucking Co., Inc. v. JW Constr. Co. Inc., 314 S.C. 170, 179, 442 S.E.2d 197, 202 (Ct. App. 1994). Whether duress exists in a particular case is a question of fact to be determined according to the circumstances of each case, such as the age, sex, and capacity of the party influenced. See Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., 273 S.C. 784, 786, 260 S.E.2d 178, 179 (1979) (stating whether or not duress was present is a question ordinarily determined on a case-by-case basis).

[5] In South Carolina jurisprudence, marital settlement agreements are viewed as contracts. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001); see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (enforcement of the terms of a settlement agreement is a matter of contract law); Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986) (applying the general rules of contract construction to a marital settlement agreement).

In Forsythe v. Forsythe, the court found no evidence that the agreement was not freely and voluntarily entered into where, upon being questioned by the trial judge, the wife answered affirmatively that she understood the agreement, had entered into it of her own free will and accord, was not under duress or fear, and was satisfied with the services of her attorney. Forsythe v. Forsythe, 290 S.C. 253, 255-56, 349 S.E.2d 405, 406 (Ct. App. 1986). Likewise, in Burnett v. Burnett, the court concluded that the Wife freely and voluntarily entered into a separation agreement where there was no evidence that Wife was compelled to enter into the agreement as a result of being overreached or subjected to any duress, "nor was there any evidence that she was not of sound mind or under any unusual stress, other than the stress normally attendant to the breakup of a marriage." Burnett v. Burnett, 290 S.C. 28, 30, 347 S.E.2d 908, 909 (Ct. App. 1986); see also Sauls v. Sauls, 287 S.C. 297, 300, 337 S.E.2d 893, 895 (Ct. App. 1985) ("Based on the evidence here, we find the agreement was freely and voluntarily entered into by Mr. and Mrs. Sauls. Both parties had the benefit of legal advice before signing it.").

In the present case, Wife asserts, as the grounds for her allegation of duress, mental abuse by Husband, his refusal to vacate the marital home until the agreement was signed and approved, and his complete control over Wife's access to legal representation. However, Wife fails to demonstrate specific instances of mental abuse that influenced her state of mind to such an extent that she could not exercise her free will. There is no evidence that Husband made any improper threat to Wife that left Wife with no reasonable alternative. Nor is there sufficient evidence that Wife was under any unusual stress, other than the stress normally attendant to the breakup of a marriage. Wife simply has not shown sufficient facts to support her contention that she was coerced to enter into the property and settlement agreement. Indeed, Wife testified that she read every line of the agreement and understood it and was not under stress or pressure to sign the agreement. Thus, the family court did not err in denying Wife's motion to vacate on the ground of duress.

D. Wife's Excusable Neglect

Wife asserts that the family court erred in denying her motion to vacate, because her neglect in not having an attorney present at the hearing for

approval of the agreement was excusable. She contends that she was living under extreme duress and also suffered from a medical condition that prevented her from making decisions on her own at the time. We disagree.

Rule 60(b)(1), SCRCP, authorizes the trial court to relieve a party from a final judgment where the party demonstrates "mistake, inadvertence, surprise, or excusable neglect . . . ." The decision to grant or deny a motion to set aside a judgment for excusable neglect lies within the sound discretion of the trial court. RRR, Inc. v. Toggas, 378 S.C. 174, 180, 662 S.E.2d 438, 441 (Ct. App. 2008).

The evidence presented to the family court was insufficient to support Wife's contention of excusable neglect. The only evidence of Wife's medical condition is a letter from her internist, who had treated Wife for depression. However, there is no evidence that Wife was being treated at the time of the hearing for separate support and maintenance or at the time she entered into the property and settlement agreement. In fact, the internist's letter reports that Wife had not received any treatment from about April 2004 to September 2004. There is no evidence that Wife was being treated for depression in July 2004, no evidence of any medications taken by Wife during that period, and no evidence of any medical condition that adversely affected her ability to make decisions at the time she executed the agreement. Further, the family court, which had the opportunity to observe Wife's demeanor at the July 2004 hearing, found no indication that she was emotionally distraught or that her judgment was clouded.

Moreover, the family court questioned Wife extensively about the agreement, and she indicated that she entered into the agreement without any coercion, and the stress of the situation did not make her feel as if she had no choice but to sign the agreement. She also stated that she was not under the influence of any drugs or medications that may have affected her judgment when the parties negotiated the agreement or at the hearing. The family court stated, in reference to Wife's demeanor during the hearing: "I find her to be most attentive in answering my questions. She is engaged in the process . . . ."

Thus, there was no abuse of discretion and the family court correctly denied Wife's request to vacate the judgment on the ground of excusable neglect.

E. Unfairness of the Agreement

Wife asserts that the agreement was procedurally and substantively unfair to her because she was unrepresented by an attorney, and the property division was more favorable to her husband. She contends that for those reasons, the family court erred in refusing to vacate the judgment. We disagree. Wife's argument was properly rejected because lack of fairness is not a ground for relief under Rule 60(b), SCRCP.

F. Failure of the Court to Attempt Reconciliation of the Parties

Wife asserts that because the family court did not attempt reconciliation at the hearing, the judgment was void pursuant to Rule 60(b)(4), SCRCP. We disagree.

When interpreting the language of a statute the court should give words their plain and ordinary meaning, without resorting to subtle or forced construction to limit or expand the statute's operation. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). Here, clearly, the reconciliation requirement in S.C. Code Ann. § 20-3-90 (1976) is required only in divorce actions. No other meaning can be derived from a plain reading of the statute:

> In all cases referred to a master or special referee, such master or special referee shall, except in default cases, summon the party or parties within the jurisdiction of the court before him and shall in all cases make an earnest effort to bring about a reconciliation between the parties if they appear before him. No judgment of divorce shall be granted in such case unless the master or special referee to whom such cause may have been referred shall certify in his report or, if the cause has not been

> referred, unless the trial judge shall state in the decree that he has attempted to reconcile the parties to such action and that such efforts were unavailing.

S.C. Code Ann. § 20-3-90 (1976).

In view of the fact that the July 21, 2004 hearing was for the issuance of a decree of separate support and maintenance, and not one for divorce, the family court was not required to inquire into the possibility of reconciliation, and failure to do so did not void the order.

Wife also cites S.C. Code Ann. § 20-7-850 as authority for the proposition that a reconciliation inquiry is required. However, that statute applies to child support actions. This was an action for separate support and maintenance, and therefore, it was not necessary that the family court inquire into reconciliation. Consequently, no error occurred.

CONCLUSION

Accordingly, the family court's order is

AFFIRMED.

HEARN, C.J., HUFF, J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appeal From Marion County
J. Michael Baxley, Circuit Court Judge

The State, Respondent,

v.

Fred R. Halcomb, Jr., Appellant.

Opinion No. 4516
Heard November 18, 2008- Filed March 11, 2009

AFFIRMED

Deputy Chief Attorney for Capital Appeals, Robert M. Dudek, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and John Gregory Hembree, of Conway; for Respondent.

GEATHERS, J.: This is an appeal from a murder conviction. In a joint trial with Luzenski "Allen" Cottrell (Cottrell), Appellant Fred R.

Halcomb (Halcomb) was found guilty of the murder of Jonathan "Jon Jon" Love (Love). Halcomb asserts the trial court erred when it denied his motion for severance of trial and when it refused to admit certain evidence that allegedly demonstrated codefendant Cottrell's personal motive for murdering Love. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After Halcomb and Cottrell were indicted for Love's murder, Halcomb made a pretrial motion for severance of trial that was denied. Subsequently, Halcomb and Cottrell were convicted under the "hand of one is the hand of all" theory of accomplice liability.[1] The State asserted that Halcomb and Cottrell killed Love when Love, working at their command, botched an intended arson of reputed drug dealer Brett Smalls' (Smalls) house. The State then alleged that Halcomb and Cottrell sought to burn down Smalls' residence because Smalls and his comrades demanded payment for marijuana that Halcomb and Cottrell stole from Smalls.

The evidence presented at trial was predominantly testimonial. Halcomb's girlfriend, Diane Lawson (Lawson), testified that Halcomb directed Love to commit arson. When Halcomb discovered that the arson attempt had failed, he conspired with Cottrell to kill Love because he believed that Love had become a liability. In fact, the State theorized that in this particular instance, Halcomb exercised control over Cottrell and ordered him to kill Love.

On the night of the murder, Halcomb, Cottrell, Love, and Lawson went to a wooded location in Marion County, and Halcomb directed Cottrell and Love to dig a hole. Halcomb had instructed Lawson, who stayed in the car, to monitor the surroundings for approaching vehicles and to warn Halcomb

[1] Under the "hand of one is the hand of all" theory of accomplice liability, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the common design or purpose. State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002).

of nearing vehicles by turning on the headlights of their car. At one point during the digging, Halcomb took the shovel and showed the parties how to "corner off" the hole. Moments later, Halcomb returned to the car.

Later, Cottrell and Love stopped digging and returned to the car for a smoke break, and it was at that time that Halcomb surreptitiously handed a gun to Cottrell. All three men then returned to the woods to finish the digging.

Subsequently, Lawson heard several gunshots coming from where the parties were digging. Moments later, Halcomb returned to the car and asked Lawson whether she had heard anything. She replied that she had, and Halcomb went back to the hole and did not return for an hour. When Halcomb and Cottrell reappeared, Love did not accompany them. After they returned to the house, Halcomb told Lawson that he and Cottrell "had to go get rid of the evidence." Cottrell later joked about the "smoke" coming from Love's head "like a mushroom cloud" after he was shot. Halcomb also quipped about the fact that Love was still gurgling when they buried him. Cottrell indicated to another witness that he was disgusted when he killed Love because Love had "used the bathroom on himself." The pathologist testified that Love had received four gunshot wounds, two of which proved fatal.

Further, Amber Counts (Counts), one of Cottrell's girlfriends at the time, stated to law enforcement that while she and Cottrell were separately incarcerated, Cottrell allegedly wrote her a letter in which he stated that "J.J. had tried to sexually assault Cottrell's girlfriend and that J.J. would never hurt anyone again." Apparently, the alleged letter did not indicate the identity of J.J., but Halcomb asserted that those are the initials for Jon Jon, a nickname for Love. Law enforcement testified that they never received the letter and that Counts stated that she had destroyed the letter. The only evidence of the existence of the letter or its contents was Counts' statements.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler,

353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The appellate court is limited to determining whether the trial court abused its discretion. State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998); State v. Bowie, 360 S.C. 210, 216, 600 S.E.2d 112, 115 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003); State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793-94 (Ct. App. 2003).

This Court does not reassess the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003). Furthermore, this Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

ISSUES ON APPEAL

1. Did the trial court err in refusing to grant a severance of trial when a joint trial was allegedly prejudicial to Halcomb because the exclusion of certain evidence hindered his ability to present a defense?

2. Did the trial court err in excluding evidence of Cottrell's letter to Counts in which Cottrell allegedly revealed a personal motive for murdering Love that would have exculpated Halcomb?

LAW/ANALYSIS

A. Severance of Trial

Halcomb contends the trial court erred in refusing to grant him a separate trial. Halcomb maintains that the joint trial was prejudicial to him because it limited his ability to present evidence (1) that could have rebutted the State's theory that Halcomb controlled Cottrell, and (2) of Cottrell's letter

to Counts that revealed Cottrell's personal motive for murder. We find no error.

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998); State v. Garrett, 350 S.C. 613, 620, 567 S.E.2d 523, 526 (Ct. App. 2002). A motion for severance is addressed to the sound discretion of the trial court. State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002); State v. Walker, 366 S.C. 643, 656, 623 S.E.2d 122, 128 (Ct. App. 2005). The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. Harris, 351 S.C. at 652, 572 S.E.2d at 272; State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Walker, 366 S.C. at 656, 623 S.E.2d at 129; State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002).

There is no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. State v. McIntire, 221 S.C. 504, 504, 71 S.E.2d 410, 415 (1952); State v. Avery, 374 S.C. 524, 533, 649 S.E.2d 102, 107 (Ct. App. 2007); State v. Castineira, 341 S.C. 619, 624, 535 S.E.2d 449, 452 (Ct. App. 2000), aff'd, 351 S.C. 635, 572 S.E.2d 263 (2002). A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. Harris, 351 S.C. at 652-53, 572 S.E.2d at 273; State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001).

A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction. Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Thompson, 279 S.C. 405, 408, 308 S.E.2d 364, 366 (1983). The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the

crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Smith, 359 S.C. 481, 489-90, 597 S.E.2d 888, 893 (Ct. App. 2004). A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. Hughes, 346 S.C. at 559, 552 S.E.2d at 317.

In the instant matter, the trial court did not abuse its discretion in denying Halcomb's pretrial motion to sever the joint trial because the court's decision was based upon a just and proper consideration of the circumstances in this case. The trial court carefully considered whether any harm would result to either defendant as a result of a joint trial. In addition, the trial court noted that there were valid administrative and judicial economy reasons for denying the motion to sever.

Halcomb asserts he should have been granted a separate trial so he could present evidence that Cottrell acted independently of him when he killed a police officer ten days after Love's murder. According to Halcomb, such evidence is relevant because it would rebut the State's theory that Halcomb controlled Cottrell. However, the trial court correctly found that evidence of Cottrell's subsequent crime would not have been admissible even if Halcomb was tried separately. The trial court's assessment regarding the evidence was correct because it is not evident that such evidence would have been relevant. Further, the State's theory was not that Halcomb controlled Cottrell at all times but only that he controlled him during the act of killing Love. Thus, evidence of the subsequent police killing, which was a completely separate incident from Love's murder, was not competent evidence to rebut the State's theory.[2]

In addition, Halcomb contends that a separate trial would have enabled him to introduce evidence of Cottrell's letter to Counts, which would have

[2] Halcomb's argument regarding his cooperation with the police about Cottrell's killing of the police officer is abandoned on appeal because it was not argued in his brief. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal); Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (where an issue is not argued within the body of the brief, it is abandoned on appeal).

indicated that Cottrell had his own personal motive for killing Love, and that this evidence would have exculpated Halcomb. However, the record fails to indicate that evidence of the letter would have exculpated Halcomb.

Further, Halcomb has not demonstrated that he was prejudiced by the joint trial and that he would have obtained a more favorable result in a separate trial. The evidence presented against Halcomb was overwhelming. The State alleged that both defendants participated in the murder of Love and there was overwhelming evidence that Halcomb and Cottrell conspired to kill Love. Although Cottrell actually pulled the trigger, there was evidence that he was acting under the command of and in concert with Halcomb. Halcomb was present at the scene of the murder and aided, abetted, and encouraged Cottrell in digging the burial hole. Halcomb provided the murder weapon for Cottrell to shoot Love. After Cottrell shot Love, Halcomb helped him bury Love alive. Upon leaving the scene of the murder, Halcomb helped Cottrell "get rid of the evidence." Halcomb admitted to witnesses that he and Cottrell killed Love.

Moreover, to guarantee that there would be no prejudice to either defendant as a result of the joint trial, the trial court explicitly instructed the jury as follows:

> I will talk with you a little bit further about the fact that these are two individuals charge[d] separately. And you must consider that separately and render your determinations separately with regard to these cases. . . . Now, you must consider each charge separately and you must decide separately whether each individual defendant is guilty or not guilty of the charges alleged in the indictment against that particular individual. It's your duty to give such consideration to each individual defendant on those separate charges alleged in those separate indictments. And you must therefore consider separately the evidence and the law for each individual defendant for each of the charges and write your verdict accordingly. Please do not forget that at any point during the proceeding.

The trial court's cautionary instruction, which is similar to that approved by the South Carolina Supreme Court in Castineira, 341 S.C. at 624, 535 S.E.2d at 452, helped protect Halcomb's rights and ensured that no prejudice resulted from the joint trial with Cottrell.[3]

Because the trial court did not abuse its discretion and Halcomb has not shown that he was prejudiced by the joint trial and that there was a reasonable probability that he could have obtained a more favorable result had he been tried separately, we affirm the trial court on this issue.

B. Exclusion of Evidence

Halcomb asserts the trial court erred in refusing to admit evidence of codefendant Cottrell's letter to Counts in which Cottrell allegedly revealed a personal motive to murder Love. We agree but conclude that the error is harmless.

In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). In particular, the question of whether to admit evidence under the "best evidence rule" is also addressed to the discretion of the trial court. Wayne Smith Constr. Co., Inc. v. Wolman, Duberstein, & Thompson, 294 S.C. 140, 146, 363 S.E.2d 115, 118 (Ct. App. 1987). The preliminary inquiry into whether there has been sufficient evidence to prove loss, destruction or unavailability of an original

[3] In Castineira, the defendant argued on appeal that the trial court erred in denying his motion for severance. The trial court instructed the jury on the jury's responsibility when considering the evidence, "Now, you are to consider each case separately and write a verdict differently in each case. You may find all the defendants not guilty, one of the defendants guilty and the rest not guilty, or some guilty and not guilty. You are to consider each one separately and determine whether or not the State of South Carolina has proven a defendant guilty of this conspiracy beyond a reasonable doubt." Id. The Court found that this jury instruction was sufficient to cure any prejudice that might result from a joint trial.

document so as to justify the admission of secondary evidence is an inquiry, the answer to which is largely within the discretion of the trial court. Windham v. Lloyd, 253 S.C. 568, 573, 172 S.E.2d 117, 119 (1970). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Further, for an error of law to warrant reversal based on exclusion of evidence, the appellant must prove the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the verdict was influenced by the lack of the evidence. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); State v. Gault, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007).

Here, the trial court excluded evidence of the letter finding that it was unreliable and inadmissible under the best evidence rule — Rules 1001 to 1004, SCRE.[4] Rule 1002, SCRE, provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Further, Rule 1004, SCRE, states in relevant part: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—[] All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith."

[4] Contrary to Halcomb's assertion, the trial court did not exclude the evidence because of Bruton v. United States, 391 U.S. 123 (1968) implications. In Bruton, the Supreme Court held that admission of a codefendant's confession that implicated the defendant at a joint trial constituted prejudicial error, even though the trial court gave a clear, concise and understandable instruction that the confession could only be used against the codefendant and must be disregarded with respect to the defendant. In fact, the record in the instant matter indicates that the trial court based its decision to exclude the evidence on the best evidence rule: "[T]he court has determined that that letter or that statement is inadmissible under the best evidence rule which is Rule 1001. Simply finding that it really is not reliable to say that someone said something in a letter which is now lost or destroyed[,] unavailable[,] [and] never seen by counsel."

The trial court erred in excluding evidence of Cottrell's letter to Counts under the best evidence rule.[5] The record does not reveal that the original letter was destroyed through any bad faith of the proponent; thus, there was no basis for excluding Counts' statements about the letter under the best evidence rule.[6]

However, even though the evidence was erroneously excluded, its exclusion affords no basis for reversal because Halcomb has not proved any resulting prejudice, i.e., that there was a reasonable probability that the verdict was influenced by the lack of the evidence. See Fields, 363 S.C. at 26, 609 S.E.2d at 509. As mentioned above, there was overwhelming evidence to indicate that both parties were accomplices in the murder of Love, regardless of what their individual motives might have been, and thus, admission of evidence of the letter would not have changed the outcome of the trial.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

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[5] The trial court did not indicate any other ground for exclusion of the letter apart from the best evidence rule, nor did the defendant object on any other grounds.

[6] Interestingly, in State v. Head, 38 S.C. 258, 258, 16 S.E. 892, 893 (1893), the Supreme Court addressed an evidentiary scenario regarding the admissibility of documentary evidence that is similar to that in the instant matter. While in jail, a prisoner wrote a letter to Nancy Love and gave the letter to another person, Mary Praylor, with directions to deliver the letter to Nancy. Id. The trial court allowed Mary to testify about the contents of the letter and that Mary gave the letter to Nancy, who opened it, and then asked Mary to read it. As soon as Mary read the letter, Nancy put it in the fire where it burned. Id. The Court found that the trial court did not err when it admitted Mary's statements concerning the contents of the letter.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donald Reese Campbell, Respondent,

v.

Wendy L. Jordan a/k/a Wendy Jean Lynch Jordan; Mary Alice Richardson; Elizabeth L. Langley a/k/a Elizabeth Ann Lynch and Harvey R. Campbell, Defendants,

Of whom Wendy L. Jordan a/k/a Wendy Jean Lynch Jordan and Elizabeth L. Langley a/k/a Elizabeth Ann Lynch are the Appellants.

Appeal From Florence County
W. Haigh Porter, Special Referee

Opinion No. 4517
Submitted February 4, 2009 – Filed March 12, 2009

AFFIRMED

David W. Keller and C. Pierce Campbell, of Florence, for Appellants.

John R. Chase, of Florence and Sarah Patrick Spruill, of Columbia, for Respondent.

GEATHERS, J.: Donald Campbell ("Donald") instituted this partition action against his two siblings, Mary Alice Richardson and Harvey Campbell, and his two nieces, Wendy Jordan and Elizabeth Langley ("the nieces"). After ruling that an in kind partition was appropriate, the special referee ordered that the real property be surveyed and subdivided. On appeal, the nieces claim the special referee erred in refusing to consider their emotional attachment to the property awarded to Donald, in refusing to strike certain testimony from the record, and in ordering the nieces' mother, Betty Jean ("Betty Jean"), to remove her mobile home from Donald's property. We affirm.

FACTS

The subject property in this appeal consists of four parcels of land in Darlington and Florence Counties. The title to the property passed from Donald's father, the late Mr. Melvin Campbell Sr., to his widow and their six children[1] upon his death on October 18, 1980. At this time, the children deeded the property to their mother for life, while retaining their respective remainder interests upon her death. Mrs. Campbell later died intestate and her interest passed to her children in equal shares. Through a series of transfers, the property was owned in the following percentages when Donald instituted this partition action: Mary Alice Richardson, 11/36; Harvey Campbell, 11/36; Donald Campbell, 8/36; Wendy Jordan, 3/36; and Elizabeth Langley, 3/36.[2]

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[1] The late Mr. and Mrs. Campbell's children include: Mary Alice Richardson, Betty Jean David, Harvey Campbell, Donald Campbell, the late Melvin Campbell, Jr., and Geraldine Player.

[2] At various times after the late Mrs. Campbell's death, three of the sibling transferred their interests, resulting in the above-stated ownership interests on the date of the hearing. The transfers were as follows: Melvin Jr. transferred his share to his siblings, Mary Alice and Harvey; Geraldine transferred her

Three of the four parcels are unoccupied farmland. The Darlington County parcel consists of thirty-three acres and contains merchantable timber worth approximately $2,000-3,000. One of the Florence County parcels consists of approximately forty-two acres and contains merchantable timber worth approximately $6,500-7,500. The two remaining adjoining Florence County parcels total seventy-five acres and are divided by Lamar Highway.[3] The fifty-acre parcel lying west of Lamar Highway is unoccupied farmland, while the twenty-five acre parcel lying east of Lamar Highway (hereinafter referred to as "the Homeplace") is occupied by the parties or members of the parties' families.

On September 15, 2005, Donald commenced an in rem proceeding to partition the property.[4] After conducting a formal hearing and several conferences between the court and counsel, the special referee issued his order on December 7, 2007. In holding that an in kind partition is preferred at law if the land can be fairly and equitably divided, the special referee acknowledged that the property had been in the family for three decades and that three of the late Mr. Melvin Campbell Sr.'s descendants currently reside on the property. Because equitable and economic considerations warranted

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share to her siblings, Mary Alice, Harvey, and Donald; and Betty Jean transferred her share to her daughters, Wendy and Elizabeth.

[3] The special referee noted the discrepancy between the tax map diagram and the property deed's depiction of the total acreage of the contiguous Florence County parcels and concluded the total acreage consisted of seventy-five acres, rather than ninety-six acres. While the nieces state the special referee did not explain his conclusion, they make only a conclusory statement on appeal, and thus the referee's finding is the law of the case. See Charleston Lumber Co., Inc. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (stating an unchallenged ruling, right or wrong, is the law of the case); see also Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

[4] As governed by S.C. Code Ann. §§ 15-61-10 to -110 (2005 & Supp. 2008) and Rules 17 and 71, SCRCP.

an in kind partition, the special referee allotted each of the parties a portion of the subject property based on the parties' testimony at the hearing, their respective ownership interests, and their improvements to and utilization of the land.

In awarding the majority of the Homeplace to Donald,[5] the special referee found that the improvements made to the Homeplace by Donald and Harvey Campbell's son were more substantial in nature than those of the other parties. Specifically, Donald has affixed to the property a double-wide mobile home, a fenced-in horse corral, and three outbuildings, one of the buildings being a water pump house constructed by Donald and used by Donald's family and Betty Jean. The special referee acknowledged that Betty Jean also lived on the Homeplace in a single-wide mobile home. However, the special referee found that because her residence was not permanently affixed to the Homeplace and she had not resided there as long as Donald, her improvements and contributions to the Homeplace were less substantial than those of Donald. Accordingly, the special referee ordered that the real property be surveyed and subdivided so that each party received a commensurate ownership interest.

ISSUES ON APPEAL

On appeal, the nieces claim the special referee erred in refusing to consider their emotional attachment to the portion of the Homeplace awarded to Donald, in refusing to strike certain testimony from the record, and in ordering Betty Jean to remove her mobile home from the Homeplace. We disagree.

[5] Harvey Campbell's son occupies eight and one-half acres in the northernmost portion of the Homeplace, which the special referee awarded to Harvey Campbell. The nieces are not arguing to overturn this aspect of the order as they set forth no specific argument on why awarding this portion of the Homeplace to Harvey Campbell would be inequitable to them.

LAW/ANALYSIS

I. Partition

The nieces argue the special referee erred in awarding the Homeplace to Donald because the special referee failed to consider their emotional attachment to that portion of the property, which resulted in disparate treatment of the parties. We disagree.

A partition action is an equitable action and, as such, this Court may find facts in accordance with its view of the preponderance of the evidence. Zimmerman v. Marsh, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005). The partition procedure must be fair and equitable to all parties of the action. Pruitt v. Pruitt, 298 S.C. 411, 414, 380 S.E.2d 862, 864 (Ct. App. 1989). This Court has previously stated that partition in kind is favored when it can be fairly made without injury to the parties. Anderson v. Anderson, 299 S.C. 110, 114, 382 S.E.2d 897, 899 (1989). Furthermore, equitable considerations such as the length of ownership and sentimental attachment to property may be considered in a partition action, but the pecuniary interests of all of the parties is the determining factor in deciding whether to require a judicial sale or to allow a partition by allotment. Zimmerman, 365 S.C. at 388, 618 S.E.2d at 901.

The special referee properly partitioned the property in a manner that was fair and equitable to all the parties. The special referee considered the parties' emotional attachment to the land when he specifically recognized the family's long-standing ownership of the property, the parties' respective living situations, and the parties' preference for a partition in kind rather than a judicial sale. Citing to Zimmerman v. Marsh, 365 S.C. 383, 388, 618 S.E.2d 898, 901 (2005), the special referee also stated that partition was justified on economic grounds, as the pecuniary interests of all parties would be best served by dividing the property in this manner.

The nieces argue they are unhappy with the distribution because their mother, Betty Jean, lived a significant portion of her life at the Homeplace.

Because of this history and their emotional attachment to the land, it has a greater inherent value to them. Accordingly, the nieces argue that we must redistribute the property or order a judicial sale to account for the disparity in value. However, no evidence of any current property values is in the record, and the nieces fail to assert that the special referee erred in assigning property values or in assigning ownership interest shares to each party. See Wilson v. McGuire, 320 S.C. 137, 139 n.2, 463 S.E.2d 614, 616 n.2 (Ct. App. 1995) (stating that the allocation of a preselected tract to one heir is not prejudicial to other heirs unless evidence is presented to demonstrate that the preselected tract is more valuable than the other tracts).

Further, the special referee's award of the Homeplace to Donald is supported by the record. Donald has lived on this portion of the family property for his entire life. In contrast, one of the nieces, Elizabeth, testified she had only lived there for three months when she was a baby. As noted in the special referee's order, Donald has made the most significant improvements to the Homeplace as he has permanently affixed to the property a double-wide mobile home with a carport, a barn, a fenced-in horse corral, and three outbuildings. Both the water and the electricity running to Donald's and Betty Jean's home are a result of Donald's efforts, as Donald built the well and connected Betty Jean's home to his pre-existing power and utility lines. Furthermore, we must reiterate that it is the nieces, not Betty Jean, who have a legal interest in the property. While the special referee properly considered Betty Jean's living situation in the overall award, because she is not a party to the action, her interests are not paramount in the final determination.

After considering the equities and the pecuniary interests of the parties, we find the special referee was fair and equitable in the overall partition of the property, including the allotment of the Homeplace to Donald.

II. Admissibility of Evidence

The nieces next assert the special referee erred in failing to strike irrelevant testimony about the circumstances surrounding the transfer of Betty Jean's property to the nieces. We disagree.

The decision to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice. Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001). When improperly admitted evidence is merely cumulative, no prejudice exists, and therefore, the admission is not reversible error. See Creech v. S.C. Wildlife Marine Res. Dept., 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997) (finding challenged evidence was simply one additional, minor piece of evidence, so even though it was irrelevant, its admission did not constitute reversible error). Further, if a party deems testimony to be irrelevant or prejudicial, an objection should be interposed when the testimony is initially offered. State v. Cooper, 212 S.C. 61, 69, 46 S.E.2d 545, 548 (1948). If testimony is received without objection, the motion to strike is then addressed to the sound discretion of the trial court. Id.

The testimony the nieces object to was first elicited when Donald testified. When questioned as to what Betty Jean had done with her ownership interest in the property, Donald responded, "She put her land in her daughters' name so she could draw a check." Neither party objected to this testimony. Later, during cross-examination of Donald's niece, Donald's counsel asked, "Isn't it a fact that the only reason [Betty Jean] put [the property] into your name was to avoid claims of any kind of government agency from whom she was going to be receiving assistance?" The nieces' counsel objected on the grounds of relevance.

The objection to this testimony was not timely raised as Donald gave the same testimony during his direct examination and no one objected at that time. See Cooper, 212 S.C. at 69, 46 S.E.2d at 548 (stating if a party deems testimony to be irrelevant or prejudicial, an objection should be raised when the testimony is initially offered). The nieces' failure to timely object when this testimony was initially offered waives their right to argue error on appeal. See City of Greenville v. Bryant, 257 S.C. 448, 454, 186 S.E.2d 236, 238 (1972) (stating that failure to timely object to introduction of evidence constituted waiver of argument on appeal); Parr v. Gaines, 309 S.C. 477, 481,

424 S.E.2d 515, 518 (Ct. App. 1992) ("Although limited exceptions exist, objections to the admission of evidence must be made when evidence is presented at trial to preserve the error for appeal.").

Even if the nieces had preserved this issue for review, we find the special referee did not err in refusing to strike the testimony from the record. While the nieces argue that the special referee was biased and improperly influenced due to the "highly suggestive" nature of these questions, they have failed to demonstrate that they were prejudiced by this testimony. In response to the nieces' objection, the special referee specifically stated that he could direct the testimony to be struck, but he would have to hear the testimony regardless of its admissibility.[6] Further, the special referee stated twice that this testimony made no difference in his decision as there was no jury to consider the testimony. See Anderson, 299 S.C. at 114, 382 S.E.2d at 899 (stating that a partition action is an equitable matter that is tried by a judge alone). The nieces have failed to specify any portions of the order where the special referee relied on this testimony in reaching its conclusion, and there is no indication from the order's plain language that this testimony influenced his decision.

Additionally, when the nieces' counsel did object, the special referee acknowledged that this testimony was already in the record when he stated that the "cat was already out of the bag." Because this testimony was merely cumulative to Donald's prior testimony, which was not objected to, any error in the admission of this testimony is harmless. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in admission of evidence cumulative to other unobjected-to evidence is harmless). Consequently, the special referee did not abuse his discretion in denying the nieces' motion to strike the testimony as the nieces have failed to demonstrate they were prejudiced by the admission of this testimony.

[6] We note that even if the special referee chose to exclude this testimony, it would have to be introduced on the record before this Court could consider this argument on appeal. See Baber v. Greenville County, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997) (“Absent a proffer, it is impossible for this Court to determine the effect of the excluded testimony.”).

III. Personal Jurisdiction

Last, the nieces contend the special referee erred in asserting personal jurisdiction over their mother, Betty Jean, for purposes of ordering the removal of Betty Jean's mobile home from the Homeplace. We disagree.

South Carolina Code Ann. § 15-61-50 (Supp. 2008) vests a special referee with jurisdiction to hear a partition action. This section states, "The court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares . . . ." § 15-61-50.

A partition action is analogous to a proceeding in rem. Pinckney v. Atkins, 317 S.C. 340, 343 n.4, 454 S.E.2d 339, 341 n.4 (Ct. App. 1995) (citing 59A Am. Jur. 2d Partition § 100 (1987)). It is more precisely described as a proceeding quasi in rem, as the judgment deals with the status, ownership, or liability of the particular property and operates as between the parties to the proceedings. 59A Am. Jur. 2d Partition § 85 (2008). Thus, it is distinguishable from a proceeding strictly in rem, which determines rights in a specific property against the entire world and is equally binding upon everyone. 59A Am. Jur. 2d Partition § 85 (2008). Accordingly, the court must have both in rem jurisdiction and personal jurisdiction in a partition action. See Hisle v. Lexington-Fayette Urban County Gov't, 258 S.W.3d 422, 431 (Ky. Ct. App. 2008) (citing 68 C.J.S. Partition § 67 (2007); 59A Am. Jur. 2d Partition § 108) (finding that although a partition action is in the nature of an in rem proceeding, it also has characteristics of a quasi in rem proceeding because it deals with the title to realty and operates as to the parties in the proceeding, thus requiring both in rem subject matter jurisdiction and personal jurisdiction).

The special referee had jurisdiction to partition the property pursuant to Section 15-61-50 and incidentally to allot certain portions of the property to the respective parties in the action. While the special referee did not have personal jurisdiction over Betty Jean, as she had no interest in the subject

property and therefore was not a party to the action, we do not read the order as an attempt to forcibly remove Betty Jean from her home.

The language in the order to which the nieces object states, "the Defendants Jordan and Langley shall have an additional period of ninety (90) days, **should they wish to avail themselves of it**, to move the mobile home in which their mother resides, together with her storage building, to the property allotted to them or otherwise **as they and she may agree**." (emphasis added). We hold the special referee's order permits the nieces to remove Betty Jean's mobile home within ninety days of the order in whatever manner and to whichever alternate location as Betty Jean and the nieces deem appropriate. The special referee's order is not an attempt to assert personal jurisdiction over Betty Jean, but is rather a grace period for allowing her to remove the mobile home before Donald can institute a separate action to forcibly remove Betty Jean from the Homeplace should he decide to pursue this course of action. Consequently, the special referee did not attempt to assert personal jurisdiction over Betty Jean, and the nieces' argument on this issue is without merit.

CONCLUSION

Based on the foregoing, the special referee's decision is

AFFIRMED.

SHORT and THOMAS, JJ. concur.[7]

[7] We decide this case without oral argument pursuant to Rule 215, SCACR.