The Supreme Court of South Carolina

In the Matter of Kenneth E. Johns, Jr., Respondent.

Appellate Case No. 2016-000740

ORDER

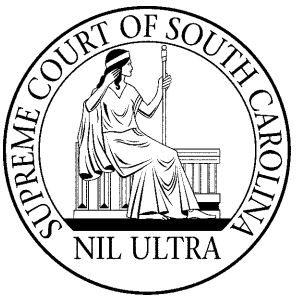
The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). Respondent did not file a return.

The petition is granted and respondent is placed on interim suspension. Respondent is directed to immediately deliver all books, records, bank account records, funds, property, and documents relating to his judicial office to the Associate Probate Judge for Oconee County. Respondent is enjoined from access to any monies, bank accounts, and any other records related to his judicial office. Further, respondent is prohibited from entering the premises of the Oconee County Probate Court unless escorted by a law enforcement officer after authorization from the Associate Probate Judge for Oconee County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records, and he is prohibited from access to any judicial databases or case management systems. This order authorizes the appropriate government or law enforcement official to implement any of the prohibitions as stated in this order.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from having access to or making withdrawals from the accounts.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina
April 12, 2016



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 13, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

27620 - Richard A. Hartzell v. Palmetto Collision, LLC 14

27621 - Stephen George Brock v. Town of Mt. Pleasant 21

27622 - Nathaniel Teamer v. State 28

27623 - State v. Richard B. Beekman 39

Order - In the Matter of Stephen W. Stufko, Jr. 47

UNPUBLISHED OPINIONS

2016-MO-010 - The State v. Ricky Dale Pace

2016-MO-011 - John Garner Kimble v. State

2016-MO-012 - Charles Christopher Williams v. State

2016-MO-013 - Nathaniel Teamer v. State

PETITIONS - UNITED STATES SUPREME COURT

2014-000324 - Cynthia E. Collie v. South Carolina Commission on Lawyer Conduct, et al. Pending

2015-MO-027 - Kamell D. Evans v. The State Pending

2015-MO-028 - Jonathan Kyle Binney v. The State Pending

2015-MO-029 - John Kennedy Hughey v. The State Pending

2015-MO-065 - Edward Dean and Nolan Brown v. Mark Keel Pending

2015-MO-067 - David Gerrard Johnson v. The State Pending

PETITIONS FOR REHEARING

27572 - Stokes-Craven Holding Corporation v. Scott L. Robinson	Pending
27596 - Clarence Kendall Cook v. The State	Pending
27607 - The State v. Donna L. Phillips	Pending
2015-MO-061 - Kennedy Funding v. Pawleys Island North	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

5400-Malia Ann Fredrickson v. Jeffrey Lawrence Schulze 49

UNPUBLISHED OPINIONS

2016-UP-172-State v. Antonio Gordon

2016-UP-173-In the matter of the care and treatment of Larry Edward Hendricks

2016-UP-174-Jerome Curtis Buckson v. State

2016-UP-175-State v. Gerald Bernard Haltiwanger, Jr.

2016-UP-176-State v. Barry Glenn Millwood

2016-UP-177-Mike Russell v. Randolph Gill and Pennsylvania Life Ins. Co.

2016-UP-178-Herman Lee Hughes, Jr. v. State

2016-UP-179-SCDSS v. Tyeisha Miller and Channing Gill, Sr.
(filed April 11, 2016)

PETITIONS FOR REHEARING

5374-David Repko v. Cty. of Georgetown Pending

5378-Stephen Smalls v. State Pending

5381-State v. Justin McBride Pending

5382-State v. Marc A, Palmer Pending

5383-Protection and Advocacy v. SCDDSN (2) Pending

5384-Mae Ruth Thompson v. Pruitt Corporation Pending

5387-Richard Wilson v. Laura B. Willis Pending

5388-Vivian Atkins v. James R. Wilson, Jr.	Pending
5389-Fred Gatewood v. SCDC (2)	Pending
5390-State v. Tyrone King	Pending
5392-State v. Johnnie Allen Devore	Pending
5393-S.C. Ins. Reserve Fund v. East Richland Public Service Dt.	Pending
5395-State v. Gerald Barrett, Jr.	Pending
2015-UP-523-State v. Gary Lane Prewitt	Denied 03/23/16
2015-UP-568-State v. Damian Anderson	Pending
2015-UP-572-KNS Foundation v. City of Myrtle Beach	Pending
2016-UP-012-Whelthy McKune v. State	Denied 04/04/16
2016-UP-015-Onrae Williams v. State	Pending
2016-UP-028-Arthur Washington v. Resort Services	Pending
2016-UP-047-State v. Zinah D. Jennings	Pending
2016-UP-055-State v. Ryan P. Deleston	Pending
2016-UP-059-Betty J. Keitt v. City of Columbia	Pending
2016-UP-067-National Security Fire and Casualty v. Rosemary Jenrette	Pending
2016-UP-069-John Frick v. Keith Fulmer	Pending
2016-UP-070-State v. Deangelo Mitchell (AA Ace Bail)	Pending
2016-UP-071-Bank of America v. Johnson Koola	Pending
2016-UP-073-State v. Mandy L. Smith	Pending
2016-UP-079-Russell Cumbee v. Brandi Fox-Cumbee	Pending

2016-UP-084-Esvin Perez v. Gino's The King of Pizza	Pending
2016-UP-082-Wildflower Nursery v. Joseph Beasley	Pending
2016-UP-088-State v. Dwayne Lee Rudd	Remitted 03/17/16
2016-UP-089-William Breland v. SCDOT	Pending
2016-UP-091-Kyle Pertuis v. Front Roe Restaurants, Inc. (corrected date)	Denied 03/31/16
2016-UP-093-State v. Lywone S. Capers	Pending
2016-UP-097-State v. Ricky E. Passmore	Pending
2016-UP-099-Carrie Steele v. William Steele	Pending
2016-UP-109-Brook Waddle v. SCDHHS	Pending
2016-UP-114-State v. David Judson Penn	Pending
2016-UP-119-State v. Bilal Sincere Haynesworth	Pending
2016-UP-125-Jerome Myers v. Walter Kaufmann	Pending
2016-UP-126-US Bank v. Kim Byrd	Pending
2016-UP-127-James Neff v. Lear's Welding	Pending
2016-UP-129-SCDSS v. Andre Rice	Pending
2016-UP-132-Willis Weary v. State	Pending
2016-UP-134-SCDSS v. Stephanie N. Aiken	Pending
2016-UP-136-The Bristol Condominium v. John T. Lucas, Sr.	Pending
2016-UP-137-Glenda R. Couram v. Christopher Hooker	Pending
2016-UP-138-McGuinn Construction v. Paul Espino	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5253-Sierra Club v. Chem-Nuclear	Pending
5254-State v. Leslie Parvin	Pending
5295-Edward Freiburger v. State	Pending
5301-State v. Andrew T. Looper	Pending
5308-Henton Clemmons v. Lowe's Home Centers	Pending
5312-R. C. Frederick Hanold, III v. Watson's Orchard POA	Pending
5322-State v. Daniel D. Griffin	Pending
5324-State v. Charles A. Cain	Pending
5326-Denise Wright v. PRG	Pending
5328-Matthew McAlhaney v. Richard McElveen	Pending
5329-State v. Stephen Douglas Berry	Pending
5331-State v. Thomas Stewart	Pending
5332-State v. Kareem Harry	Pending
5333-Yancey Roof v. Kenneth A. Steele	Pending
5335-Norman J. Hayes v. State	Pending
5336-Phillip Flexon v. PHC-Jasper, Inc.	Pending
5337-Ruben Ramirez v. State	Pending
5338-Bobby Lee Tucker v. John Doe	Pending
5341-State v. Alphonso Thompson	Pending

5342-John Goodwin v. Landquest	Pending
5344-Stoneledge v. IMK Development (Southern Concrete)	Pending
5345-Jacklyn Donevant v. Town of Surfside Beach	Pending
5346-State v. Lamont A. Samuel	Pending
5347-George Glassmeyer v. City of Columbia	Pending
5348-Gretchen A. Rogers v. Kenneth E. Lee	Pending
5351-State v. Sarah D. Cardwell	Pending
5352-Ken Lucero v. State	Pending
5355-State v. Lamar Sequan Brown	Pending
5360-Claude McAlhany v. Kenneth A. Carter	Pending
5365-Thomas Lyons v. Fidelity National	Pending
5366-David Gooldy v. The Storage Center	Pending
5368-SCDOT v. David Powell	Pending
5369-Boisha Wofford v. City of Spartanburg	Pending
5370-Ricky Rhame v. Charleston County School	Pending
5371-Betty Fisher v. Bessie Huckabee	Pending
5373-Robert S. Jones v. Builders Investment Group	Pending
5375-Mark Kelley v. David Wren	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending
2015-UP-031-Blue Ridge Electric v. Kathleen Gresham	Pending
2015-UP-069-Amie Gitter v. Morris Gitter	Pending

2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-174-Tommy S. Adams v. State	Pending
2015-UP-201-James W. Trexler v. The Associated Press	Pending
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending
2015-UP-215-Ex Parte Tara Dawn Shurling (In re: State v. Harley)	Pending
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending
2015-UP-262-State v. Erick Arroyo	Pending
2015-UP-266-State v. Gary Eugene Lott	Pending
2015-UP-269-Grand Bees Development v. SCDHEC	Pending
2015-UP-273-State v. Bryan M. Holder	Pending
2015-UP-280-State v. Calvin J. Pompey	Pending
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Pending
2015-UP-303-Charleston County Assessor v. LMP Properties	Pending
2015-UP-304-Robert K. Marshall, Jr. v. City of Rock Hill	Pending
2015-UP-307-Allcare Medical v. Ahava Hospice	Pending
2015-UP-311-State v. Marty Baggett	Pending
2015-UP-320-American Community Bank v. Michael R Brown	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Pending
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending

2015-UP-339-LeAndra Lewis v. L. B. Dynasty, Inc.	Pending
2015-UP-344-Robert Duncan McCall v. State	Pending
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending
2015-UP-351-Elite Construction v. Doris Tummillo	Pending
2015-UP-353-Wilmington Savings Fund v. Furmanchik	Pending
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-359-In the matter of the estate of Alice Shaw Baker (Fisher v. Huckabee)	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-362-State v. Martin D. Floyd	Pending
2015-UP-364-Andrew Ballard v. Tim Roberson	Pending
2015-UP-365-State v. Ahmad Jamal Wilkins	Pending
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending
2015-UP-372-State v. Sheldon L. Kelly	Pending
2015-UP-376-Ron Orlosky v. Law Office of Jay Mullinax	Pending
2015-UP-377-Long Grove at Seaside v. Long Grove Property Owners (James, Harwick & Partners)	Pending
2015-UP-378-State v. James Allen Johnson	Pending
2015-UP-381-State v. Stepheno J. Alston	Pending
2015-UP-382-State v. Nathaniel B. Beeks	Pending
2015-UP-388-Joann Wright v. William Enos	Pending
2015-UP-391-Cambridge Lakes v. Johnson Koola	Pending

2015-UP-395-Brandon Hodge v. Sumter County	Pending
2015-UP-402-Fritz Timmons v. Browns AS RV and Campers	Pending
2015-UP-403-Angela Parsons v. Jane Smith	Pending
2015-UP-414-Christopher A. Wellborn v. City of Rock Hill	Pending
2015-UP-417-State v. Raheem Jamar Bonham	Pending
2015-UP-423-North Pleasant, LLC v. SC Coastal Conservation	Pending
2015-UP-428-Harold Threlkeld v. Lyman Warehouse, LLC	Pending
2015-UP-429-State v. Leonard E. Jenkins	Pending
2015-UP-432-Barbara Gaines v. Joyce Ann Campbell	Pending
2015-UP-439-Branch Banking and Trust Co. v. Sarah L. Gray	Pending
2015-UP-446-State v. Tiphani Marie Parkhurst	Pending
2015-UP-455-State v. Michael L. Cardwell	Pending
2015-UP-465-Dushun Staten v. State	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2015-UP-474-Edward Whitner v. State	Pending
2015-UP-476-State v. Jon Roseboro	Pending
2015-UP-477-State v. William D. Bolt	Pending
2015-UP-478-State v. Michael Camp	Pending
2015-UP-485-State v. Alfonzo Alexander	Pending
2015-UP-491-Jacquelin S. Bennett v. T. Heyward Carter, Jr.	Pending
2015-UP-501-State v. Don-Survi Chisolm	Pending

2015-UP-505-Charles Carter v. S.C. Dep't of Corr. (3)	Pending
2015-UP-513-State v. Wayne A. Scott, Jr.	Pending
2015-UP-524-State v. Gary R. Thompson	Pending
2015-UP-536-Vondell Sanders v. State	Pending
2015-UP-540-State v. Michael McCraw	Pending
2015-UP-547-Evalena Catoe v. The City of Columbia	Pending
2015-UP-548-Thaddess Starks v. State	Pending
2015-UP-556-State v. Nathaniel Witherspoon	Pending
2015-UP-557-State v. Andrew A. Clemmons	Pending
2015-UP-564-State v. Tonya Mcalhaney	Pending
2016-UP-011-James Clayton Helms v. State	Pending
2016-UP-013-Ex parte State of South Carolina In re: Cathy J. Swicegood v. Polly A. Thompson	Pending
2016-UP-021-State v. Darius Ranson-Williams	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard A. Hartzell, Employee, Petitioner,

v.

Palmetto Collision, LLC, Employer and South Carolina Worker's Compensation Uninsured Employer's Fund, Respondents.

Appellate Case No. 2013-002611

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Workers' Compensation Commission

Opinion No. 27620
Heard October 8, 2015 – Filed April 13, 2016

REVERSED AND REMANDED

Kerry W. Koon, of Charleston, for Petitioner.

Kirsten Leslie Barr, of Trask & Howell, LLC, of Mount Pleasant, and Lisa C. Glover, of Columbia, both for Respondents.

ACTING JUSTICE TOAL: Richard Hartzell (Petitioner) appeals the court of appeals' decision reversing the South Carolina Workers' Compensation

Commission's (the Commission) determination that he was entitled to medical benefits for a work-related back injury. *See Hartzell v. Palmetto Collision, L.L.C.*, 406 S.C. 233, 750 S.E.2d 97 (Ct. App. 2013). We reverse and remand.

FACTUAL/PROCEDURAL HISTORY

In February 2009, Petitioner, who was fifty years old at the time, worked as an auto body paint technician for Palmetto Collision, LLC (Employer). According to Petitioner, on or around February 25, 2009, he injured his back while moving tires, rims, and heavy frame equipment while cleaning Employer's shop. Petitioner testified that he began experiencing lower back pain sometime in the late afternoon after completing the work, and felt very sore in his lower back the next day.

Petitioner testified that the day after the alleged injury, he told Employer's owner, Mike Stallings, that he was "pretty sore," and that he "must have hurt [himself]." According to Petitioner, Stallings suggested that Petitioner go to the emergency room if he was having problems. Petitioner did not seek any medical treatment at that time. Because business was slow, Petitioner ended his employment with Employer on March 20, 2009. Although Petitioner testified that he and Stallings discussed his back injury during the "last couple of weeks" during which he worked for Employer, he admitted that after ending his employment with Employer, he never further discussed his back injury or requested medical treatment from Employer.

Petitioner filed a workers' compensation claim on May 10, 2010, alleging a partial permanent injury to his back on approximately February 25, 2009, while moving an auto frame machine. Employer denied Petitioner's workers' compensation claim, alleging, *inter alia*, that Petitioner failed to provide notice of his injury as required by section 42-15-20 of the South Carolina Code. *See* S.C. Code Ann. § 42-15-20 (2015).

Commissioner Andrea Roche (the Single Commissioner) held a hearing on July 12, 2011. At the hearing, Stallings testified that Petitioner's Form 50 constituted the first notice he received that Petitioner was alleging a work-related injury. Stallings stated that he had no recollection of the conversation after Petitioner's alleged back injury in which Petitioner claimed that Stallings told him to go to the emergency room if he had injured his back. Stallings did not deny that

the conversation occurred, only that it did not "ring a bell." Stallings also stated that Petitioner never mentioned his back injury after Petitioner stopped working for Employer.

The Single Commissioner issued an order finding that Employer was subject to the Workers' Compensation Act (the Act) and that Petitioner sustained an injury by accident to his back while cleaning Employer's shop. As to the notice issue, the Single Commissioner found that Petitioner "timely reported the injury" to Stallings. The Single Commissioner therefore found that Petitioner was entitled to "medical, surgical, and other authorized treatment[,]" and ordered a medical evaluation of Petitioner to determine: (1) whether he was at maximum medical improvement (MMI); and (2) whether Petitioner required any additional medical treatment, and any benefits under the Act resulting from the evaluation and determination.

Employer appealed, and the Commission affirmed the Single Commissioner's order. Like the Single Commissioner, the Commission found that Petitioner timely reported his injury to Stallings. Stating that Stallings acknowledged in his testimony that he could not testify with certainty that Petitioner did not report the injury to him—but only that it "didn't ring a bell"—the Commission found that Petitioner's testimony was more credible on the issue of notice of the injury.

Employer appealed the Commission's order to the court of appeals, arguing the Commission erred in: (1) determining Employer regularly employed four or more employees, and therefore was subject to the Act; finding Petitioner accidently injured his back, and failing to make any conclusion of law thereon; (3) finding Petitioner timely reported the injury, and failing to make any conclusion of law thereon; and (4) awarding Petitioner medical benefits for the injury. The court of appeals found that Employer regularly employed enough employees such that the Commission's finding of jurisdiction was proper. *Id.* at 245, 750 S.E.2d at 103. On the issue of notice, the court of appeals held that the Commission erred in finding that Petitioner provided proper notice of his injury to Employer. *Hartzell*, 406 S.C. at 246, 750 S.E.2d at 104. The court of appeals concluded that the Commission's determination that Petitioner provided Employer adequate notice was not supported by substantial evidence in the record. *Id.* at 248, 750 S.E.2d at 104. Based on its decision on that issue, the court of appeals reversed the award of

benefits to Petitioner. *Id.* The court of appeals declined to address Employer's remaining arguments. *Id.* at 248, 750 S.E.2d at 105.

This Court granted Petitioner's petition for writ of certiorari to review the court of appeals' opinion pursuant to Rule 242, SCACR.

ISSUES PRESENTED

I. Whether the court of appeals erred in reversing the Commission's finding that Petitioner provided sufficient notice under section 42-15-20 of the South Carolina Code?

II. Whether the Commission erred in finding Petitioner sustained an injury by accident to his back under section 42-1-160 of the South Carolina Code?

III. Whether the Commission erred in awarding Petitioner medical treatment in contravention of section 42-15-60 of the South Carolina Code?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) governs judicial review of decisions by the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). An appellate court's review is limited to the determination of whether or not the Commission's decision is supported by substantial evidence or is controlled by an error of law. *Grant*, 372 S.C. at 201, 641 S.E.2d at 871.

In workers' compensation cases, the Commission is the ultimate fact finder. *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011) (citing *Jordan v. Kelly Co.*, 381 S.C. 483, 674 S.E.2d 166 (2009)). This Court must affirm the Commission's factual findings if they are supported by substantial evidence. *Id.* (citing *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010)). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the

conclusion that the administrative agency reached or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark*, 276 S.C. at 135, 276 S.E.2d at 306). "The substantial evidence test 'need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment;' and a judgment upon which reasonable men might differ will not be set aside." *Holmes*, 395 S.C. at 308–09, 717 S.E.2d at 752 (quoting *Lark*, 276 S.C. at 136, 726 S.E.2d at 307).

LAW/ANALYSIS

I. Notice

Petitioner argues the record contains substantial evidence to support the Commission's finding that he reported his work-related injury to Employer within the requisite time, and therefore, the court of appeals erred in reversing the Commission's order based on this issue. We agree.

Section 42-15-20 of the South Carolina Code provides that an injured employee must provide notice to his employer of a work-related accident "on the occurrence of an accident, or as soon thereafter as practicable," but must do so "within ninety days after the occurrence of the accident." S.C. Code Ann. § 42-15-20 (2015). The notice provisions of section 42-15-20 "should be liberally construed in favor of claimants." *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002) (citing *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951)).

According to Petitioner, the only notice that he provided to Employer—prior to filing the Form 50—was the day after his injury, when he told Stallings that he was "pretty sore" and he "must have hurt [himself]." Nevertheless, the Commission—after hearing the testimony of both parties—found Petitioner more credible than Stallings on the issue of notice, and found that Petitioner complied with the notice requirement of section 42-15-20. While reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual findings on these issues. *See Holmes*, 395 S.C. at 308–09, 717 S.E.2d at 752 (quoting *Lark*, 276 S.C. at 136, 726 S.E.2d at 307). We find the Commission's findings are supported by

substantial evidence. Accordingly, we reverse the court of appeals' decision. [1]

II. *Additional Sustaining Grounds*

Employer presents two additional sustaining grounds. First, Employer argues that the Commission erred in vaguely finding that Petitioner "sustained an injury by accident to his back" because: (1) the Commission provided no conclusion of law on the issue to satisfy section 42-1-160 of the South Carolina Code; and (2) there was not substantial evidence in the record to support the finding. *See* S.C. Code Ann. § 42-1-160 (2015). In addition, Employer argues that the Commission's award of "medical, surgical, hospital, and other authorized treatment" is in direct contravention of section 42-15-60 of the South Carolina Code. *See* S.C. Code Ann. § 42-15-60 (2015).

The court of appeals declined to address these arguments, finding further analysis unnecessary because the notice issue was dispositive. Because we are reversing that holding, Employer is entitled to have the court of appeals rule on the remaining issues. *See State v. Pinckney*, 339 S.C. 346, 350, 529 S.E.2d 526, 528 (2000) ("As the [c]ourt of [a]ppeals reversed Pinckney's convictions, it did not address his remaining issue whether the trial court erred in denying respondent's directed verdict motion on the ground of not guilty by reason of insanity. Accordingly, we remand to the [c]ourt of [a]ppeals for consideration of this issue.").

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[1] Petitioner also argues that the Commission's decision was not immediately appealable under *Bone v. United States Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). To the extent that issue is preserved, *Bone* is inapplicable. *See Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475 n.2, 753 S.E.2d 416, 418 n.2 (2013) ("In 2006, as part of Act 387, which, among other things, mandated that appeals from the Commission go directly to the Court of Appeals, section 1-23-390 (2006), entitled 'Supreme Court review,' was amended to include review of decisions from the Court of Appeals. Section 1-23-390 concludes by providing that appeals from the Court of Appeals shall be pursued 'by taking an appeal in the manner provided by the SCACR as in other civil cases.' Rule 242(a), SCACR, authorizes this Court to issue a writ of certiorari 'to review a *final decision* of the Court of Appeals.'" (internal alteration marks omitted)).

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decision and remand to the court of appeals for consideration of the issues raised by Employer.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stephen George Brock, Petitioner,

v.

Town of Mount Pleasant, Respondent.

Appellate Case No. 2015-000406

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27621
Heard February 10, 2016 – Filed April 13, 2016

AFFIRMED AS MODIFIED

Robert Clyde Childs, III, of The Childs Law Firm, and J. Falkner Wilkes, both of Greenville, for Petitioner.

James J. Hinchey, Jr. and Julia P. Copeland, both of Hinchey, Murray & Pagliarini, LLC, of Charleston, for Respondent.

JUSTICE KITTREDGE: We issued a writ of certiorari to review the court of

appeals' decision in *Brock v. Town of Mount Pleasant*, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014), that the Town of Mount Pleasant (the Town) did not violate the Freedom of Information Act (FOIA)[1] by taking unnoticed action following executive sessions at special meetings. Having carefully reviewed the record and law, we agree with Petitioner Stephen George Brock that the Town technically violated FOIA and that the court of appeals erred in relying on the discussion of regular meetings in *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014), in resolving the underlying challenge concerning special meetings. We accordingly modify the decision of the court of appeals. This technical FOIA violation shall be included in the court of appeals' existing remand to the trial court as an additional matter in Petitioner's request for attorney's fees.

I.

The facts and procedural history are set forth in the court of appeals' opinion. The disputed actions occurred during special meetings for which the Town issued agendas listing an executive session but not indicating Town Council would take action following the executive session. Petitioner, who was a member of the Town's Planning Commission and the president and general manager of a local television station, filed a complaint against the Town alleging numerous violations of FOIA and seeking declaratory and injunctive relief.[2]

The trial court granted Petitioner partial relief, but ruled against him on the issue of "whether a matter added to an agenda for an executive session may be acted on . . . by a public body upon reconvening to open session." The court of appeals ruled against Petitioner on the issue as well, concluding that "the Town did not violate

[1] S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2015).

[2] Petitioner specifically complained about the sufficiency of the notice provided by the agendas for three meetings. The agenda for one meeting listed only an executive session, while another indicated Town Council would go into executive session and then adjourn. The third agenda indicated Town Council would act on only one of the three items listed for discussion during the executive session. Petitioner alleged the agendas were insufficient to give the public notice of actions that were taken following the executive sessions.

. . . FOIA by acting on items added to special meeting[] agendas upon reconvening to open session." *Brock*, 411 S.C. at 124, 767 S.E.2d at 212. We issued a writ of certiorari to review that portion of the court of appeals' opinion. We note here that Petitioner does not seek to set aside any of Town Council's actions, but merely seeks a declaration that the Town violated FOIA.[3]

II.

A.

"The standard of review in a declaratory action is determined by the underlying issues." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012) (citing *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "The interpretation of a statute is a question of law." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing *CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). This Court may interpret statutes, and therefore resolve this case, "without any deference to the court below." *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)).

B.

[3] We also granted Petitioner's petition for a writ of certiorari to review the court of appeals' holding that certain issues raised to the trial court, including the effect of Town Council's subsequent ratification of unnoticed actions, were not preserved for appellate review. *See Brock*, 411 S.C. at 118–19, 767 S.E.2d at 209. We agree with Petitioner that the court of appeals erred, for the issues were properly raised to and ruled upon by the trial court. *See, e.g., Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). However, because Petitioner does not seek to set aside any of Town Council's actions, resolution of this issue on the merits is unnecessary and we decline to address it further. *See, e.g., Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981) (per curiam) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation.").

"The essential purpose of FOIA is to protect the public from secret government activity." *Lambries*, 409 S.C. at 8–9, 760 S.E.2d at 789 (citing *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 535 n.4, 500 S.E.2d 783, 785 n.4 (1998)).

> In declaring FOIA's purpose, the General Assembly has found "that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy."

Id. at 9, 760 S.E.2d at 789 (quoting S.C. Code Ann. § 30-4-15 (2007)). "'Toward this end, [FOIA's] provisions . . . must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.'" *Id.* at 9, 760 S.E.2d at 789 (alterations in original) (quoting S.C. Code Ann. § 30-4-15).

In 2007, when the meetings at issue in this case occurred, agendas were not required for regularly scheduled council meetings. *See* S.C. Code Ann. § 30-4-80(a) (2007) ("Agenda, *if any*, for regularly scheduled meetings . . . . (emphasis added)) (amended 2015); *Lambries*, 409 S.C. at 16, 760 S.E.2d at 793 ("[N]owhere in FOIA is there a statement that an agenda is required for regularly scheduled meetings."). Because no agendas were required for regularly scheduled meetings, we held in *Lambries* that FOIA did not prohibit a public body from amending a posted agenda once a regularly scheduled meeting began. *Lambries*, 409 S.C. at 18, 760 S.E.2d at 794 ("[W]e decline to judicially impose a restriction on the amendment of an agenda for a regularly scheduled meeting, especially when it is clear that no agenda is required at all.").

However, regarding special meetings, FOIA imposed the following requirements:

> All public bodies must post . . . public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of

public bodies.[4]

S.C. Code Ann. § 30-4-80(a), *amended by* Act of June 8, 2015, No. 70, 2015 S.C. Acts 320 (codified at S.C. Code Ann. § 30-4-80 (Supp. 2015)).

FOIA defines a "meeting" as "the convening of a quorum of the constituent membership of a public body . . . to discuss or act upon a matter over which the public body has supervision, control, jurisdiction[,] or advisory power." S.C. Code Ann. § 30-4-20(d) (2007). FOIA does not contain a definition of "special meeting." *See Lambries*, 409 S.C. at 14, 760 S.E.2d at 791. However, in *Lambries*, this Court described special meetings as "meeting[s] called for a special purpose and at which nothing can be done beyond the objects specified for the call." *Id.* at 15, 760 S.E.2d at 792 (citing *Barile v. City Comptroller*, 288 N.Y.S.2d 191, 196 (Sup. Ct. 1968)). It is undisputed the challenged meetings were special meetings.

During an open meeting, public bodies may vote to close the meeting and go into an executive session for certain enumerated purposes. S.C. Code Ann. § 30-4-70(a)–(b) (2007) (allowing executive sessions for the discussion of sensitive topics, including employment matters, negotiations dealing with the purchase of property, and the receipt of legal advice). Importantly, "[n]o action may be taken in executive session except to (a) adjourn or (b) return to public session." *Id.* § 30-4-70(b). Therefore, "[FOIA] does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session." *Herald Publ'g Co. v. Barnwell*, 291 S.C. 4, 11, 351 S.E.2d 878, 883 (Ct. App. 1986).

III.

A.

In relying on this Court's ruling in *Lambries* that FOIA imposed no restrictions on

[4] Although this case is governed by the previous version of the statute, FOIA now requires agendas for regularly scheduled meetings and sets forth a specific procedure for amending agendas during meetings. S.C. Code Ann. § 30-4-80(A) (Supp. 2015).

amending discretionary agendas, the court of appeals failed to distinguish between regular meetings and special meetings. *See Brock*, 411 S.C. at 117, 767 S.E.2d at 208 (quoting *Lambries*, 409 S.C. at 18, 760 S.E.2d at 794). The court of appeals noted that, like regularly scheduled meetings at that time, "FOIA does not mandate an agenda for executive sessions." *Id.* at 120, 767 S.E.2d at 210. Therefore, the court of appeals held that once an agenda was amended to allow discussion of additional items during the executive session, "Town Council could certainly act on the agenda items upon reconvening to public session." *Id.* at 120, 767 S.E.2d at 210. Importantly, the court of appeals concluded that by issuing an agenda for a special meeting listing an executive session, which could thereafter be freely amended, the public not only "had notice Town Council desired to confer . . . in closed session regarding certain matters," but also that Town Council "may take some action upon reconvening to open session." *Id.* at 119–20, 767 S.E.2d at 209–10.

B.

The court of appeals erred in failing to recognize the distinction between regularly scheduled meetings and special meetings. *See Lambries*, 409 S.C. at 16, 760 S.E.2d at 792 (stating that by requiring agendas for regularly scheduled meetings and prohibiting amendments to those agendas, the court of appeals had "treat[ed] a regularly scheduled meeting as a called, special, or rescheduled meeting"). Thus, the court of appeals' holding that Town Council could take *any action* on *any item* that was properly discussed during an executive session is in conflict with *Lambries*, wherein we noted that in special meetings, "nothing can be done beyond the objects specified for the call." *Id.* at 15, 760 S.E.2d at 792 (citing *Barile*, 288 N.Y.S.2d at 196). The court of appeals erred in concluding that an agenda giving notice of discussion during an executive session necessarily implies action following that discussion.

We recognize, and Petitioner does not dispute, that unnoticed items may be added to an executive session discussion at the time of a meeting. *See Brock*, 411 S.C. at 120 & n.11, 767 S.E.2d at 210 & n.11. However, after the executive session concludes and the public body reconvenes in open session, any action taken or decision made must be properly noticed and, in the case of special meetings, such items may not exceed the scope of the purpose for which the meeting was called. In so ruling, we do not suggest that an agenda must specifically state the action to

be taken; rather, it is sufficient for the agenda to reflect that, upon returning to open session, action may be taken on the items discussed during the executive session.

C.

Although we conclude the Town committed technical violations of FOIA, we are not unsympathetic to the Town's position. We, like the trial court and court of appeals, recognize that unforeseen events often occur and Town Council may "not have known what action it would take—to include on an agenda—prior to discussing the relative legal issues and personnel matters during executive session." *Id.* at 119, 767 S.E.2d at 209. Thus, our holding does not require the Town to list with specificity the actions it plans to take following an executive session; it only requires the Town give notice that some action may be taken. This gives Town Council the flexibility to act as may be discovered appropriate during executive sessions while ensuring the public receives notice Town Council may take such action.

IV.

For the reasons discussed above, we modify the court of appeals' opinion by holding that the Town did violate FOIA by taking unnoticed action at special meetings following executive sessions. As this case is already being remanded to the trial court for a redetermination of attorney's fees, *see id.* at 124, 767 S.E.2d at 212, the trial court is instructed to add this ruling to its consideration of Petitioner's request for attorney's fees.

AFFIRMED AS MODIFIED.

PLEICONES, C.J., BEATTY, HEARN, JJ., and Acting Justice Tanya A. Gee, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nathaniel Teamer, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2013-001284

ON WRIT OF CERTIORARI

Appeal from Spartanburg County
Brooks P. Goldsmith, Post-Conviction Relief Judge

Opinion No. 27622
Submitted October 15, 2015 – Filed April 13, 2016

REVERSED

Attorney General Alan Wilson, Senior Assistant Deputy Attorney General Alicia A. Olive and Assistant Deputy Attorney General Suzanne H. White, all of Columbia, for Petitioner.

C. Rauch Wise, of Greenwood, for Respondent.

JUSTICE KITTREDGE: This is a post-conviction relief (PCR) matter. Respondent Nathaniel Teamer was convicted of first-degree burglary, felony driving under the influence (DUI) resulting in great bodily injury, and failure to

stop for a blue light (FSBL) resulting in great bodily injury and sentenced to an aggregate term of thirty years in prison. Following the court of appeals' dismissal of Respondent's direct appeal, Respondent filed a PCR application. The PCR court granted relief on four grounds. We granted the State's petition for a writ of certiorari to review the PCR court's decision. We reverse and reinstate Respondent's convictions and sentences.

I.

The State first argues the PCR court erred in finding Respondent's trial counsel ineffective for failing to move for dismissal of Respondent's DUI charge. Specifically, the State argues the PCR court erred in determining the motion to dismiss likely would have been successful because the PCR court misinterpreted section 56-5-2953 of the South Carolina Code. We agree.

State law generally requires a person charged with DUI to have his conduct at the incident site recorded on video, including his performance of any field sobriety tests. S.C. Code Ann. § 56-5-2953(A) (Supp. 2015).[1] However, subsection (B) of the statute creates exceptions to this general requirement:

> Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to [s]ection 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. *In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens'*

[1] Although the statute has been amended since Respondent's arrest in 2006, the portions relevant to this case remained substantially the same. We therefore cite to the latest version of the statute.

> *arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal*. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. *Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances*; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

Id. § 56-5-2953(B) (emphasis added).

Shortly before Respondent's trial, we held that failure to comply with the video-recording requirement justifies dismissal of a DUI charge, unless noncompliance is excused under subsection (B) above. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of a DUI charge "is an appropriate remedy provided by [section] 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions").

In the present case, Respondent's FSBL and felony DUI charges arose from a chain of events that began in the City of Spartanburg in the early morning hours of February 3, 2006. As Respondent drove out of the parking lot of a convenience store around 1:00 a.m., he pulled out in front of Officer Timothy St. Louis of the City of Spartanburg Department of Public Safety. Officer St. Louis began following Respondent's car because he noticed Respondent was driving with his headlights off and because Respondent threw a beer can out of his vehicle's window. Officer St. Louis activated his recording camera and initiated his blue lights, suspecting the driver may have been intoxicated.[2] However, Respondent did not stop and continued to drive erratically. Officer St. Louis turned off his lights and siren, pursuant to the city's "no chase" policy, and put out a "be on the lookout" (BOLO) alert to county and state officers that included a description of Respondent's car and license plate.

Moments later, Spartanburg County Sheriff's Deputy David Evett spotted a vehicle

[2] This video was introduced at trial.

matching the description from the BOLO traveling with its headlights off. When Deputy Evett pulled close behind Respondent's vehicle to verify the license plate number before initiating a traffic stop (by activating his lights and siren), Respondent took off at a high rate of speed. Deputy Evett activated his lights and siren and pursued Respondent, but at a distance, as Respondent continued to flee at a high rate of speed and without headlights.[3]

Deputy Evett lost sight of Respondent's vehicle, but came in sight of his vehicle just as the vehicle collided head-on with another vehicle.[4] After witnessing sparks from the collision, Deputy Evett radioed for back-up and medical assistance, then exited his patrol car and checked on both drivers. The driver of the other vehicle was seriously injured. Although Respondent was injured, he managed to crawl through the passenger-side window and attempted to flee on foot. Deputy Evett stopped Respondent. Respondent and the driver of the other vehicle were transported to the hospital. Deputy Evett never activated his video camera.

Lance Corporal Dwayne Darity of the South Carolina Highway Patrol responded to the hospital to investigate the accident. Corporal Darity believed Respondent was intoxicated because Respondent was uncooperative and smelled of alcohol. Corporal Darity charged Respondent with felony DUI but did not conduct any field sobriety tests because he suspected Respondent suffered serious injuries in the collision. Blood and urine samples collected from Respondent at the hospital revealed Respondent had marijuana and alcohol in his system at the time of the accident.[5] Marijuana was also found in the vehicle Respondent had been driving. The PCR court found that Respondent's trial counsel was deficient for not moving

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[3] Respondent traveled in excess of seventy miles per hour in areas where the speed limit ranged from thirty-five to forty-five miles per hour.

[4] Respondent's headlights were off at the time of the collision.

[5] Respondent's blood alcohol content was below the legal limit; however, the State contended Respondent was nonetheless driving under the influence because blood tests indicated he had smoked marijuana within 90 minutes of the accident. The State's forensic toxicology expert testified that the amount of marijuana in Respondent's system would impair his ability to drive and that this impairment would be further exacerbated by the presence of any amount of alcohol, even an amount below the legal limit.

to dismiss the DUI charge because, as the PCR court posited, *Suchenski* established that an officer's failure to comply with the video-recoding requirement mandated dismissal of the charge. The PCR court also (erroneously) concluded that Respondent was prejudiced because, although subsection (B) of the statute excuses noncompliance with the recording requirement in certain situations, those exceptions require the arresting officer to submit a sworn affidavit. As no affidavit was submitted in this case, the PCR court concluded that the motion to dismiss would have been granted and, therefore, trial counsel was ineffective.

The PCR court committed an error of law in interpreting subsection (B) to require an affidavit under all exceptions. The follow-up finding that the trial court would have likely granted a motion to dismiss the DUI charge, which was the basis for the PCR court's finding of prejudice, was therefore controlled by an error of law, and we reverse. *See Bryant v. State*, 384 S.C. 525, 528–29, 683 S.E.2d 280, 282 (2009) (citation omitted) (stating statutory interpretation is a question of law, and this Court will reverse a PCR court's decision when it is controlled by an error of law).

We have previously interpreted the exceptions in subsection (B) to not require a sworn affidavit in all circumstances:

> Subsection (B) of section 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Noncompliance is excusable[] (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

Town of Mount Pleasant v. Roberts, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011). Thus, based on this Court's interpretation of the statute in *Roberts*, an affidavit is not needed to qualify for the third and fourth exceptions. As Respondent was arrested for FSBL in connection with a traffic accident, this case

falls within the third exception.

This Court has recently interpreted the third exception, regarding traffic accidents, to excuse the videotaping requirement only up to the point where videotaping becomes practicable. *State v. Henkel*, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015). Here, because Respondent's vehicle's headlights were off, Deputy Evett could not see Respondent's vehicle until it collided with the other vehicle. Once the accident occurred, the urgency of the situation (calling for back-up, assessing injuries, and securing Respondent who was attempting to flee) understandably became Deputy Evett's primary concerns. We further note Respondent was not suspected of DUI until Corporal Darity spoke with Respondent at the hospital.[6]

The failure to initiate videotaping in this case could also be excused under the totality of the circumstances, which is the fourth exception. As this Court recognized in *Henkel*, "Subsection (A) was intended to capture the interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop where there are no other witnesses." *Id.* (citing *Roberts*, 393 S.C. at 347, 713 S.E.2d at 285). This situation, created solely by Respondent's dangerous and evasive driving, does not resemble a typical traffic stop. As Respondent was pursued and arrested in connection with the FSBL charge and was not charged with felony DUI until after he was transported to the hospital, no field sobriety tests were administered or could have been captured on video. The legislative concerns with videotaping one-on-one traffic stops are not implicated under the facts of this case, and under the totality of the circumstances, Deputy Evett's failure to produce a videotape was reasonable and excusable.

Therefore, even if trial counsel was deficient in failing to move to dismiss the felony DUI charge based on the lack of videotape evidence, the prejudice prong required for an ineffective assistance of counsel claim cannot be established. It was purely speculative for the PCR court to conclude that the motion likely would

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[6] Unlike Officer St. Louis, Deputy Evett began following Respondent because Respondent's vehicle matched the BOLO description of the vehicle that failed to stop for a blue light—not because he suspected Respondent of DUI. Deputy Evett testified he did not spend sufficient time with Respondent at the accident scene to suspect Respondent was under the influence of drugs or alcohol. Deputy Evett was dealing with a serious motor vehicle accident and was focused on ensuring those injured received prompt medical attention.

have been granted. Perhaps more importantly, the prejudice finding was grounded in the erroneous finding that all subsection (B) exceptions require an affidavit. Under both the totality of the circumstances and the traffic-accident exception, neither of which require an affidavit, the trial court would not have abused its discretion in denying a motion to dismiss the DUI charge. Thus, we reverse the PCR court's grant of relief to Respondent on this ground.

II.

The State next argues the PCR court erred in finding Respondent's trial counsel ineffective for failing to impeach one of the witnesses to the home invasion with a prior criminal conviction. While we hold there is evidence in the record to support the PCR court's finding that counsel was deficient, we nevertheless find the PCR court erred in finding this failure prejudiced Respondent.

Respondent was convicted of first-degree burglary in connection with his invasion of the home of his long-time neighbors—Mary Gray (Mary); Mary's two children, Erica Gray (Erica) and Donald Martin (Donald); and Mary's nine-year-old granddaughter, Javanica. At trial, Erica testified Respondent broke into the home, held her and her family at gunpoint, and robbed them. Mary, Donald, and Javanica also testified that Respondent broke into the home and robbed the family at gunpoint. Further, Officer Adrian Patton of the Spartanburg Department of Public Safety, who responded to the scene within minutes of the incident, testified the victims immediately identified Respondent as the intruder, even though he was wearing a ski mask, because they knew Respondent well and recognized his voice. At trial, defense counsel cross-examined Erica about her 1997 conviction for distributing crack-cocaine and cross-examined Donald about his 2002 conviction for drug distribution.

At the PCR hearing, Respondent introduced another conviction for Erica, a 1995 conviction for giving false information to police about a shooting and burglary that took place at her home. Trial counsel testified he received a printout of the National Crime Information Center report on Erica before trial, and the report showed an arrest for giving false information; however, trial counsel testified he did not use this information to impeach Erica at trial because the report did not give a disposition for the charge.

The PCR court found trial counsel was deficient for failing to impeach Erica with

her prior conviction for giving false information to police because the conviction was likely admissible under Rule 609(b), SCRE, governing the admission of prior convictions more than ten years old, and the balancing test in *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). The PCR court also found Respondent was prejudiced by this deficiency because Erica was an important witness in establishing Respondent's identity as the intruder and impeachment of Erica with this conviction would have "directly affected" the outcome of the trial.

Although there is evidence to support the PCR court's finding that trial counsel was deficient for failing to impeach Erica with the prior conviction, we find the PCR court erred in finding Respondent was prejudiced because there is not a reasonable probability the impeachment of Erica would have directly affected the outcome of Respondent's trial. *See Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) ("To show prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." (citing *Brown v. State*, 340 S.C. 590, 593, 533 S.E.2d 308, 309–10 (2000))).

Specifically, many witnesses identified Respondent, for he was well known to Erica and the other witnesses. Also, defense counsel used Erica's distribution of crack-cocaine conviction for impeachment purposes. Moreover, Officer Patton testified that when he arrived on the scene, the victims immediately identified Respondent as the burglar. Therefore, there is no evidence to support the PCR court's finding that the additional impeachment of Erica would have undermined the evidence of Respondent's identity as the intruder sufficient to create a reasonable probability that the jury would have found Respondent not guilty of burglary. *See Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (explaining that, to prevail, a PCR applicant "must show that the factfinder would have had a reasonable doubt respecting guilt" had the omitted evidence been introduced at trial and noting that no prejudice results from counsel's failure to bring forward cumulative evidence (citation and internal quotation marks omitted)); *Harris v. State*, 377 S.C. 66, 78, 659 S.E.2d 140, 147 (2008) (finding trial counsel's failure to impeach a witness who identified the accused as the perpetrator of the crime was "inconsequential" and not prejudicial where other evidence of identity was properly admitted at trial); *Huggler v. State*, 360 S.C. 627, 634–36, 602 S.E.2d 753, 757–58 (2004) (finding the PCR applicant was not prejudiced by trial counsel's failure to object to the introduction of the victims'

written statements into evidence or trial counsel's alleged failure to adequately cross-examine witnesses where the State presented overwhelming evidence from four witnesses who testified in detail against the applicant). We therefore reverse the PCR court's granting of relief on this ground.

III.

The State next argues the PCR court erred in finding trial counsel was ineffective for failing to move for a directed verdict on the burglary charge. We agree.

The PCR court concluded trial counsel was deficient in failing to move for a directed verdict because Respondent contended he had permission to enter the victims' home. *See* S.C. Code Ann. § 16-11-311(A) (2015) (defining first-degree burglary as, in part, entering a dwelling without consent). The PCR court also found Respondent was prejudiced because the directed verdict motion likely would have been granted. This was error.

As a matter of law, Respondent would not have been entitled to a directed verdict on the burglary charge. In ruling on a directed verdict motion, the trial court does not view the evidence in the light most favorable to the movant. *See*, *e.g.*, *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) (explaining that when ruling on a motion for a directed verdict, the evidence must be viewed in a light favorable to the nonmoving party, and the trial court is concerned only with the existence or nonexistence of evidence, not its weight); *State v. Prince*, 316 S.C. 57, 64, 447 S.E.2d 177, 181 (1993) ("[I]n ruling on a motion for directed verdict, the trial court must view the evidence in the light most favorable to the State.").

Viewing the evidence in the light most favorable to the State, ample evidence was presented to survive a directed verdict motion. For example, Donald testified that he heard a knock at the door, after which Respondent identified himself by his nickname. Donald stated he cracked the door, at which point Respondent forced open the door and pushed his way into the home while wielding a shotgun. Donald testified Respondent order him to take off his pants and shoes, and then took $500 from him. Properly viewing all the evidence in the light most favorable to the State, as a court must in evaluating a directed verdict motion, had a directed verdict motion been made, it would have been denied. *See Prince*, 316 S.C. at 64, 447 S.E.2d at 181–82 ("The case should be submitted to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused or

from which guilt may be fairly and logically deduced." (citations omitted)). We thus hold that the PCR court erred as a matter of law in finding Respondent's trial counsel was deficient for failing to move for a directed verdict on the burglary charge.

IV.

Finally, the State argues the PCR court erred in finding Respondent's trial counsel ineffective for failing to object to a portion of the trial court's jury instructions because no case law existed at the time of Respondent's trial that would have made the instruction objectionable. Again, we agree.

The trial court's charge to the jury included the following instruction: "Your sole objective of course is to simply reach the truth in the matter, and by doing that you will have fulfilled your obligations as jurors, and that is to simply give both the [S]tate and [Respondent] a fair and impartial trial." Five years after Respondent's trial, this Court criticized a similar instruction: "This court is of the confirmed opinion that whatever verdict you reach will represent truth and justice for all parties that are involved in this case." *State v. Daniels*, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012) (internal quotation marks omitted). This Court ordered

> trial judge[s] to remove any suggestion from [their] general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

Id. at 256, 737 S.E.2d at 475.

The PCR court found trial counsel was ineffective for failing to object to the trial court's instruction, even though *Daniels* had not yet been decided, because if trial counsel had made an objection, the issue would have been preserved for appellate review. The PCR court also found Respondent was prejudiced because the jury

likely "relieved the State of its burden of proof."

We disagree and hold that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. *E.g.*, *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . . ." (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). As trial counsel's performance was not deficient, we reverse the PCR court's grant of relief on this ground.

V.

For the foregoing reasons, the PCR court's grant of relief to Respondent is reversed. Respondent's convictions and sentences are hereby reinstated.

REVERSED.

BEATTY, Acting Chief Justice, HEARN, J. and Acting Justice Jean H. Toal, concur. PLEICONES, C.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Richard Burton Beekman, Petitioner.

Appellate Case No. 2013-002002

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 27623
Heard April 22, 2015 – Filed April 13, 2016

AFFIRMED

Appellate Defender Laura R. Baer and Carmen V. Ganjehsani, of Richardson Plowden & Robinson, P.A., both of Columbia, and Dayne Phillips, of Lexington; all for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Christina C. Bigelow, both of Columbia, for Respondent.

JUSTICE KITTREDGE: Petitioner Richard Burton Beekman was convicted of committing first-degree criminal sexual conduct (CSC) with a minor on his stepson (Stepson) and a lewd act upon a child on his stepdaughter (Stepdaughter). We granted a writ of certiorari to review the court of appeals' decision affirming the trial court's denial of Beekman's motion to sever the charges. We affirm.

I.

In June 2006, Beekman married Mother, who shared joint custody of Stepdaughter and Stepson with her ex-husband. On July 7, 2008, Stepdaughter reported to Mother that Beekman had sexually abused her. Mother took Stepdaughter to the children's grandmother's house for the night, and she and Stepson moved there the next day. At the grandmother's house, Stepson began acting out—scratching his skin, banging his head, hyperventilating, and drawing pictures of Beekman dying. Eventually, a cousin came over to talk to Stepson, and he disclosed to her that he had also been sexually abused by Beekman.

Beekman was subsequently charged with committing CSC on Stepson and a lewd act on Stepdaughter. The State sought to prosecute both indictments in a single trial. Beekman moved to sever the two charges, arguing they did not arise from the same chain of circumstances, would not be proved by the same evidence, and were not of the same general nature. He further argued he would be substantially prejudiced if the cases were tried jointly. The trial court denied the motion, finding that the events arose out of the same chain of circumstances and there was a "great overlap of evidence."

The case proceeded to trial. Stepdaughter testified that on the evening of July 6, 2008,[1] she and Stepson slept on couches in the living room because their rooms were messy. She stayed up watching the Disney Channel awhile, but eventually fell asleep. She awoke later in the night to Beekman touching her "private area" beneath her clothes. The television was still on and the news was playing. Beekman was startled when Stepdaughter woke up, and he asked if she knew where the remote was. She threw it at him, and he left the room. According to Stepdaughter, she told Mother the next night about Beekman touching her, and they immediately moved into her grandmother's house.

[1] Stepdaughter was twelve years old at the time.

Stepson also testified that, on two separate occasions within an eight-month period,[2] Beekman touched Stepson's penis while they were watching the news together. On both occasions, Beekman put his hands under Stepson's clothes and touched Stepson's bare skin. Stepson further stated that Beekman anally penetrated him on one occasion while Stepson was in Beekman's room watching the news.

After disclosing the abuse, Stepson was examined by Dr. Nancy Henderson, the head of Greenville Hospital System's section on child abuse and neglect and a physician board-certified in child abuse pediatrics. Dr. Henderson testified that Stepson informed her he had been touched on his genitals and that "someone had put his private part into [Stepson's] bottom." Although his rectal exam was normal and did not uncover any signs of scars or tearing, Dr. Henderson noted that ninety percent of children have normal exams even when there is a history of penetration.

The jury convicted Beekman of both crimes. He was sentenced to thirty years' imprisonment for CSC and fifteen years' imprisonment for the lewd act, to be served consecutively.

Beekman appealed arguing, in part, that the trial court erred in denying his motion to sever the charges. The court of appeals affirmed. *State v. Beekman*, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013). We granted certiorari to review the court of appeals' opinion.

Beekman argues the court of appeals erred in affirming the trial court's denial of his motion to sever the charges because the crimes did not arise out of a single chain of circumstances and were not provable by the same evidence. Further, Beekman argues that trying the charges together unfairly prejudiced him because it allowed the jury to consider evidence the State would have been prevented from presenting in separate trials and likely created the impression in jurors' minds that Beekman had a propensity to sexually abuse children. Therefore, according to Beekman, this Court should reverse his convictions and remand his case for separate trials. For the reasons discussed below, we disagree.

[2] During this time, Stepson was eight years old.

II.

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996) (citing *State v. Tate*, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct. App. 1985)). "A motion for severance is addressed to the trial court and should not be disturbed unless an abuse of discretion is shown." *Id.* (citing *State v. Anderson*, 318 S.C. 395, 398, 458 S.E.2d 56, 57–58 (Ct. App. 1995)).

III.

First, Beekman asserts the offenses did not arise from a single chain of circumstances. We disagree and, like the court of appeals, reject Beekman's "restrictive reading of the phrase 'a single chain of circumstances.'" *Beekman*, 405 S.C. at 231, 746 S.E.2d at 486. Instead, we agree with the court of appeals that "the two charges against Beekman arose from, in substance, a single course of conduct or connected transactions." *Id.*

In other cases, even though the charges did not arise out of a single, isolated incident, this Court and the court of appeals have allowed joinder when the crimes "involv[ed] connected transactions closely related in kind, place, and character." *State v. Cutro*, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) (footnote and citations omitted); *see, e.g.*, *id.* at 373–75, 618 S.E.2d at 894–95 (finding no abuse of discretion in denying a motion to sever charges involving multiple victims of Shaken Baby Syndrome even though the charges stemmed from separate occurrences); *Tucker*, 324 S.C. at 163–65, 478 S.E.2d at 264–65 (permitting joinder of charges stemming from a multi-day crime spree that included a murder and multiple break-ins); *State v. McGaha*, 404 S.C. 289, 291–99, 744 S.E.2d 602, 603–07 (Ct. App. 2013) (affirming, under facts almost identical to the present case, joinder of CSC with a minor and lewd act upon a child charges arising from the abuse of two sisters who were both abused by an individual in the same manner, in the same place, and during the same time frame); *State v. Jones*, 325 S.C. 310, 314–16, 479 S.E.2d 517, 519–20 (Ct. App. 1996) (finding no abuse of discretion in consolidating child sexual molestation charges, even though the charges concerned two victims, when the offenses "were of the same general nature" and arose from the same "pattern of sexual abuse"); *see also City of Greenville v. Chapman*, 210 S.C. 157, 161–62, 41 S.E.2d 865, 867 (1947) (explaining that courts should avoid

the "inflexible application" of the rule that charges must arise out of the same set of circumstances to warrant joinder and noting that if "it does not appear that any real right of the defendant has been jeopardized, [then] it would be a refinement not demanded by the law or by justice to require in all instances a separate trial").

There can be no dispute that Beekman's molestation of his two stepchildren "involv[ed] connected transactions closely related in kind, place, and character." *Cutro*, 365 S.C. at 374, 618 S.E.2d at 894 (footnote omitted). Specifically, Beekman's victims were siblings and the molestation occurred (1) at the same place—the victims' home; (2) over the same period of time—the eight-month period between November 2007 and July 2008; and (3) with the same modus operandi—Beekman taking advantage of the children's habit of watching television with him. *Cf. Cutro*, 365 S.C. at 374 n.4, 618 S.E.2d at 894 n.4 (finding joinder proper where "the State produced evidence each offense involved the violent shaking of an infant at the [defendant's] home daycare"). Therefore, the same level of interconnectedness of crimes that was sufficient to permit joinder in *Tucker*, *Cutro*, *McGaha*, and *Jones* is present here.

Beekman next argues that the molestation of each child was a distinct crime and that the two charges are not supported by the same evidence. Of course they are distinct crimes, but that in no manner diminishes the glaring similarities in Beekman molesting both of his stepchildren in the same place, over the same time period, and in a similar manner. *Cf. Cutro*, 365 S.C. at 369–75, 618 S.E.2d at 891–95 (affirming the trial court's refusal to sever charges involving multiple victims where the appellant was charged with two counts of homicide by child abuse and one count of assault and battery, each of which involved incidents occurring at different times with different children). Indeed, Beekman acknowledges that testimony from many of the same witnesses would be used to prove both charges.

The fact that the State did not present the exact same testimony to prove the molestation of each stepchild is not dispositive in considering whether joinder of the charges was proper. Beekman advocates for a rule that strictly requires all charges be proved by completely identical evidence, a requirement nowhere to be found in our precedents requiring that the crimes be "proved by the same evidence." *See, e.g.*, *Tucker*, 324 S.C. at 164, 478 S.E.2d at 265 (citing *Tate*, 286 S.C. at 464, 334 S.E.2d at 290) (listing the joinder requirements).

For joinder of related offenses, our appellate courts have recognized that there may be evidence that is relevant to one or more, but not all, of the charges. *Tucker* is such an example. James Neil Tucker committed a murder and robbery; he

subsequently broke into a church and a mobile home while on the run from police. *Id.* at 160–61, 478 S.E.2d at 263. This Court affirmed the denial of Tucker's motion to sever the charges. *Id.* at 163–65, 478 S.E.2d at 264–65. By arguing that the evidence of multiple crimes may not merely overlap but must be wholly identical to warrant consolidation for trial, Beekman ignores the fact that the evidence needed to prove Tucker committed the murder was necessarily different than the evidence needed to prove Tucker broke into the church and mobile home.

IV.

We affirm the court of appeals in finding no abuse of discretion in the joinder of the charges, for the charges arose out of a single course of conduct, were of the same general nature, and were proved by the same evidence. Further, joinder did not prejudice any of Beekman's substantial rights. *See Tucker*, 324 S.C. at 164, 478 S.E.2d at 265 (citing *Tate*, 286 S.C. at 464, 334 S.E.2d at 290). The decision of the court of appeals is affirmed.

AFFIRMED.

HEARN, J. and Acting Justice Jean H. Toal, concur. PLEICONES, C.J., dissenting in a separate opinion in which BEATTY, J., concurs.

CHIEF JUSTICE PLEICONES: I respectfully dissent. I would reverse the Court of Appeals' decision to affirm the denial of Petitioner's motion to sever his charges and remand for further proceedings.

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." *State v. Tucker*, 324 S.C. 155, 164, 478 S.E.2d 260, 265 (1996); *State v. Smith*, 322 S.C. 107, 109, 470 S.E.2d 364, 365 (1996) ("Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced."). In order for charges to be combined in the same indictment and tried together, all four elements must be met. *Tucker*, 324 S.C. at 164, 478 S.E.2d at 265. As explained below, it is my view that the charges did not arise out of a single chain of circumstances and are not provable by the same evidence, and therefore, the Court of Appeals erred in affirming the denial of Petitioner's motion for severance. *State v. Cutro*, 365 S.C. 366, 618 S.E.2d 890 (2005) (Pleicones, J., dissenting).

Petitioner was tried for one charge of criminal sexual conduct - first (CSC) of his stepson and one charge of lewd act on a minor, his stepdaughter. Petitioner moved to sever the charges, but his motion was denied by the trial court. The Court of Appeals affirmed, finding Petitioner "embarked upon a series of actions aimed at the sexual abuse of his two prepubescent stepchildren over the course of an eight month period." The Court of Appeals found the facts that supported trying the charges in the same trial where: each alleged incident of abuse occurred in the family home; both victims are prepubescent siblings[3]; the alleged abuse began in a similar manner by petitioner placing his hand on the unclothed genitalia of the victims; the news playing on the television during both alleged incidents of abuse; and the alleged incidents occurred during an eight month period.

[3] Stepdaughter was twelve years old and stepson was eight years old at the time of the alleged abuse.

As explained in *Tucker*, charges can be joined in the same indictment only when all four elements warranting a combined trial are present. *Id.* In my view, the charges do not arise out of a single chain of circumstances because there is no nexus between the crimes. *Compare State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986) (reversing the consolidation of charges of murder of one victim on June 9th, murder of a second victim in a similar manner on June 10th, and an attempted robbery on June 11th because the crimes did not arise out of a single chain of circumstances); *with Tucker*, 324 S.C. 155, 478 S.E.2d 260 (holding consolidation of murder, kidnapping, armed robbery, possession of a weapon during a crime, burglary, and larceny charges was proper because the crimes arose during a single chain of circumstances when the burglaries were committed to avoid capture for the crimes related to the murder). In my opinion, the trial court and the Court of Appeals applied an exceedingly broad view of the single chain of circumstances factor. While I recognize that similarities exist, such as the alleged abuse occurred in the same home and the victims are siblings, the alleged lewd act on the stepdaughter of touching her genitals while she was sleeping has no nexus to and does not arise out of the same chain of circumstances as the alleged anal penetration of stepson while watching television.

Additionally, the Court of Appeals erred by summarily concluding that each charge is provable by the same evidence without an analysis of the evidence advanced at trial. Although some testimony would be necessary to prove each charge, such as the testimony of the victims' mother, in my view the evidence necessary to prove each charge is different. For example, the State played a forensic interview of stepson and presented testimony of the doctor that examined stepson as evidence of the CSC charge, and this evidence is not relevant to the alleged lewd act on stepdaughter.

Because all four elements required to join charges in the same trial are not present, it is my opinion that the Court of Appeals erred in affirming the denial of Petitioner's motion to sever. Accordingly, I would find the trial judge abused his discretion in denying the motion to sever the charges, reverse the opinion of the Court of Appeals, and remand for further proceedings.

BEATTY, J., concurs.

The Supreme Court of South Carolina

In the Matter of Stephen W. Stufko, Jr., Respondent.

Appellate Case Nos. 2016-000719 & 2016-000720

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on incapacity inactive status pursuant to Rule 28 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules and for the appointment of the Receiver pursuant to Rule 31(c), RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and any other law office account(s) of respondent, shall serve as an injunction to prevent respondent or anyone other than Mr. Lumpkin from taking any action regarding those accounts, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s). This order shall further serve as notice to the bank or other financial institution that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Finally, we hereby direct that Mark Zarra, who is employed in respondent's law office, cooperate with Mr. Lumpkin in fulfilling his duties as Receiver in this matter.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina

April 7, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Malia Ann Fredrickson, Respondent,

v.

Jeffrey Lawrence Schulze, Appellant.

Appellate Case No. 2014-000570

Appeal From Greenville County
W. Marsh Robertson, Family Court Judge

Opinion No. 5400
Heard December 7, 2015 – Filed April 13, 2016

AFFIRMED

Christian Stegmaier, of Collins & Lacy, P.C., of Columbia, for Appellant.

Bruce Wyche Bannister and Luke Anthony Burke, both of Bannister, Wyatt & Stalvey, LLC, of Greenville, for Respondent.

SHORT, J.: Jeffrey Lawrence Schulze (Husband) appeals the family court's divorce decree, arguing the court erred in (1) its identification, valuation, and apportionment of the marital estate and (2) ordering Malia Ann Fredrickson (Wife) and Husband to be responsible for his and her own attorney's fees. We affirm.

FACTS

Husband and Wife were married in 2005. Husband and Wife relocated to Greenville, South Carolina, and Husband began working as an independent insurance agent. Husband also managed properties titled in Wife's name and the couple's limited liability company, JFS, LLC (JFS), named after the parties' son's initials. Husband's highest level of education is a high school General Education Development (GED) diploma with some college classes. Wife is a dentist and a partner in two dental practices. Wife earned eighty-four percent of the parties' income during the marriage. The couple has one son.

Wife filed for divorce on the ground of habitual drunkenness. Prior to trial, Wife amended her complaint to include adultery. Husband countersued for divorce on the ground of one-year's separation.

A trial was held on November 12 and 13, 2013. The family court entered its final order and decree on January 10, 2014. The court granted a divorce, ordered equitable apportionment of the estate, ordered Husband to pay monthly child support to Wife, and denied both parties' requests for attorney's fees. The court also found Husband in contempt of a prior order regarding communication between the two parties during the pendency of the proceedings. Husband filed a motion pursuant to Rules 52 and 59, SCRCP, seeking alteration and/or amendment of the final order. Wife also filed a motion to reconsider. On February 11, 2014, the court issued an order addressing the cross-motions and modifying certain valuations of the marital properties. These modifications increased Husband's share of the marital estate by $5,200 and Wife's share of the marital estate by $5,407. Husband appeals both orders.

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[T]he appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. However, this broad scope of review does not require this [c]ourt to disregard the findings of the family court." *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011) (quoting *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009)). This court will affirm the decision of the family court unless the decision is controlled by an error of law or the appellant

satisfies the burden of showing the preponderance of the evidence supports contrary factual findings. *DiMarco v. DiMarco*, 399 S.C. 295, 299, 731 S.E.2d 617, 619 (Ct. App. 2012).

LAW/ANALYSIS

I. Marital Estate

Husband argues the family court erred in its identification, valuation, and apportionment of the marital estate. We disagree.

Section 20-3-620(B) of the South Carolina Code (2014) provides fifteen factors for the family court to consider in apportioning marital property and affords the family court the discretion to give weight to each of these factors as it finds appropriate:

> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance or other marital action between the parties;
> (2) marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce as such, if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage; provided, that no evidence of personal conduct which would otherwise be relevant and material for purposes of this subsection shall be considered with regard to this subsection if such conduct shall have taken place subsequent to the happening of the earliest of:
>
> (a) entry of a pendente lite order in a divorce or separate maintenance action;
> (b) formal signing of a written property or marital settlement agreement; or
> (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(3) the value of the marital property, whether the property be within or without the State. The contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; provided, that the court shall consider the quality of the contribution as well as its factual existence;
(4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets;
(5) the health, both physical and emotional, of each spouse;
(6) the need of each spouse or either spouse for additional training or education in order to achieve that spouses's income potential;
(7) the nonmarital property of each spouse;
(8) the existence or nonexistence of vested retirement benefits for each or either spouse;
(9) whether separate maintenance or alimony has been awarded;
(10) the desirability of awarding the family home as part of equitable distribution or the right to live therein for reasonable periods to the spouse having custody of any children;
(11) the tax consequences to each or either party as a result of any particular form of equitable apportionment;
(12) the existence and extent of any support obligations, from a prior marriage or for any other reason or reasons, of either party;
(13) liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage;
(14) child custody arrangements and obligations at the time of the entry of the order; and
(15) such other relevant factors as the trial court shall expressly enumerate in its order.

"The division of marital property is in the family court's discretion and will not be disturbed absent an abuse of that discretion." *Doe v. Doe*, 370 S.C. 206, 213, 634 S.E.2d 51, 55 (Ct. App. 2006) (citing *Craig v. Craig*, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005)). "On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might have weighed specific factors differently than the family court." *Id.* at 213-14, 634 S.E.2d at 55 (citing *Greene v. Greene*, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002)). "Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution is fair." *Id.* at 214, 634 S.E.2d at 55.

Marital property is defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held . . . ." S.C. Code Ann. § 20-3-630(A) (2014). Property acquired by either party before the marriage constitutes nonmarital property. S.C. Code Ann. § 20-3-630(A)(2) (2014). Nevertheless,

> [p]roperty that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property.

Wilburn v. Wilburn, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013) (citing *Trimnal v. Trimnal*, 287 S.C. 495, 497-98, 339 S.E.2d 869, 871 (1986)). "As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Id.* at 295, 372 S.E.2d at 110-11. "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." *Id.* at 295, 372 S.E.2d at 111. "The mere use of separate property to support the marriage,

without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id.* at 295-96, 372 S.E.2d at 111. "A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital." *Wilburn*, 403 S.C. at 382, 743 S.E.2d at 740 (citing *Miller v. Miller*, 293 S.C. 69, 71 n.2, 358 S.E.2d 710, 711 n.2 (1987)). "If the party presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." *Id.* at 382, 743 S.E.2d at 740 (citing *Johnson*, 296 S.C. at 294, 372 S.E.2d at 110).

Husband and Wife owned, as individuals or through JFS, several pieces of property in Greenville County. Husband appeals the family court's equitable apportionment of four properties. Specifically, Husband argues the court erred in (1) awarding credit to Wife in the amount of $60,000 in relation to a purported down payment she made at 3 Trails End; (2) determining 39 Druid Street was nonmarital in nature and not apportioning it between the parties; (3) determining Husband was not entitled to any equity in 115 West Park Avenue; and (4) determining Husband was not entitled to any equity in 201 West Park Avenue. Husband also appeals the court's equitable apportionment of personal property, including: (1) pieces of Kolische Art; (2) a Wellington Piano; and (3) Wife's wedding ring. Husband next appeals the court's equitable apportionment of the parties' financial assets, including the Elliott Davis retirement account and the 70/30 split. Finally, Husband appeals the court's order directing him to prepare the Qualified Domestic Relations Order (QDRO).

a. Real Property

1. 3 Trails End

3 Trails End was the marital home and was jointly titled. Wife sought a special equity in the amount of $60,000 because she maintained she used nonmarital assets in the form of a cashed-out insurance policy or her retirement account to make a down payment on the home. Wife asserted an email between her attorney and expert is consistent with her testimony at trial and proved she used $60,000 in non-marital funds for the down payment on the home.[1] Husband testified the parties

[1] The email from Wife's attorney states: "The property is titled jointly to both parties with rights of survivorship. Purchase price was $290,000 and initial mortgage was $232,000 so the down payment/presumed initial special equity

took out a second mortgage to pay the down payment on the house when they purchased it in Spring 2004. Husband also introduced a second mortgage in the names of both Husband and Wife for $58,000, which he asserted was the difference between the purchase price and the first mortgage on the house and twenty percent of the purchase price of the home. Wife asserted the second mortgage was taken to secure a home equity line similar to the home equity lines that encumbered her other properties.

The family court found credible Wife's contention that she made a substantial down payment on the residence from premarital funds and her premarital contribution should be taken into account in determining the percentage of the marital estate to which each party is equitably entitled upon distribution.

Husband asserts the court erred in finding Wife contributed $60,000 in premarital funds as a down payment on 3 Trails End and seeks rescission of the $60,000 consideration given to Wife. While this court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence, we note this broad scope of review does not require this court to disregard the findings of the family court, which saw and heard the witnesses and is in a better position to evaluate credibility and assign comparative weight to the testimony. *See Strickland v. Strickland*, 375 S.C. 76, 82, 650 S.E.2d 465, 469 (2007). We find evidence supports the family court's determination as to Wife's credibility, and affirm the $60,000 consideration given to Wife.

2. 39 Druid Street

Before the couple married, Wife purchased a home at 39 Druid Street. The property was titled in Wife's name; however, Husband asserts the property was marital in nature and should have been apportioned by the court as such. Husband argues the family court erred in finding the property was not subject to equitable apportionment as marital property because (1) the parties used marital funds towards the maintenance, improvement, and increase of equity in the property; (2) the parties claimed the property on their jointly filed tax returns; (3) the court failed to follow transmutation precedent; and (4) alternatively, he is entitled to a special equity in the property.

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interest is $58,000." Then, Wife's expert responds: "Have you seen this email – I think 60,000 is probably a good number. She would have had some closing cost."

Husband asserts the court found the parties regularly transferred marital funds in and out of the JFS bank account for personal and family uses. Thus, Husband asserts the court should have found the JFS account was used to pay for numerous expenses for the Druid Street property as shown by the check ledger for the account. Husband also asserts the parties claimed the Druid Street Property on their joint federal income tax returns from 2005-2011. He maintains that although the property lost money each year, the parties benefited from the losses by decreasing their overall taxable income and increasing their refunds.

Husband additionally asserts the court failed to follow transmutation precedent, and this case is unlike *Smallwood v. Smallwood*, 392 S.C. 574, 580-81, 709 S.E.2d 543, 546 (Ct. App. 2011), because the property had losses every year and required money from marital assets to cover expenses. He argues this case is more like *Pittman v. Pittman*, 407 S.C. 141, 150, 754 S.E.2d 501, 506 (2014), because his role in the rental property business was "pervasive and ubiquitous," which lends support to the transmutation of the Druid Street property into marital property. He asserts this case is also similar to *Edwards v. Edwards*, 384 S.C. 179, 185, 682 S.E.2d 37, 40 (Ct. App. 2009), because he was not paid for his work with all the rental properties and he and Wife built equity in the Druid Street property through the use of marital funds to pay down the debt and improve the property. He further contends this case is like *Jenkins v. Jenkins*, 345 S.C. 88, 99, 545 S.E.2d 531, 537 (Ct. App. 2001), because he worked to maintain and improve the property. Additionally, he cites *Canady v. Canady*, 296 S.C. 521, 524, 374 S.E.2d 502, 504 (Ct. App. 1988), and *Wyatt v. Wyatt*, 293 S.C. 495, 497, 361 S.E.2d 777, 779 (Ct. App. 1987), as support for his argument that the property transmuted into martial property when they jointly discharged the indebtedness for the property.

Alternatively, Husband argues he is entitled to a special equity in the Druid Street property because he managed, maintained, and improved the property. He asserts "[i]t is well-established that a spouse has an equitable interest in appreciation of property to which he contributed during the marriage, even if the property is nonmarital." *Jenkins*, 345 S.C. at 99, 545 S.E.2d at 537. He states he managed the property for nine years and was never paid for his work. He states he also performed or oversaw the performance of maintenance and made improvements to the house without compensation. Husband asserts the Druid Street property was worth $103,000 and encumbered with debt of $124,600 at the beginning of their marriage. He asserts the property is now worth $150,000 with debt of $87,136,

which creates positive equity of $62,864. Therefore, he maintains he possesses an equitable interest in the increase in equity that should be included in the marital estate for inclusion in the equitable apportionment calculation.

Wife argues JFS managed all of the rental property, regardless of how it was titled. As such, she asserts the revenue generated by the Druid Street property was commingled with revenue generated by the other rental properties. Wife does not claim this revenue is non-marital property. She claims Husband had the burden of proving the real property was transmuted into marital property, but he failed to prove where the JFS funds came from, whether from rental income from the Druid Street property, Wife's other non-marital assets, or from the parties' marital assets. Further, she asserts the parties' tax returns show the revenue from the Druid Street property was greater than the actual costs associated with the property. She maintains that although there were cash infusions into the JFS account from the parties' joint account, the money was not used toward the Druid Street expenses.

Wife further argues Husband appears to contend his mismanagement of the parties' rental properties, leading them to lose money, caused the transmutation of the Druid Street property into marital property because it entitled the parties to a larger tax return. She claims allowing the parties' tax deductions to affect the marital or non-marital nature of the property would make it nearly impossible for any spouse owning non-marital property to file joint tax returns.

Wife argues the family court properly followed precedent. She asserts this case is analogous to *Smallwood*. In *Smallwood*, the court recognized the wife's contribution of time and labor to the rental properties, but found the contributions were insufficient to prove transmutation. 392 S.C. at 580, 709 S.E.2d at 546. Wife maintains Husband was not required to manage the lease for the property because it had the same tenant for eight or nine years prior to trial and no substantial improvements were made to the property.

Wife further argues this case is distinguishable from *Pittman*. As in *Pittman*, Husband assisted with the non-marital property; however, unlike in *Pittman*, here the parties did not use marital funds to discharge indebtedness on the Druid Street property. 407 S.C. at 152, 754 S.E.2d at 507. Wife asserts the funds came from the rent generated by the property. Further, Husband's role in maintaining the property was not as "pervasive and ubiquitous" as the wife's role in running the

business in *Pittman* because the property was leased throughout the marriage to the same tenant and no improvements were made to the property.

Wife maintains *Edwards* is also distinguishable from this case because in *Edwards*, the parties used the produce stand in support of the marriage and "demonstrated their intent to treat it as marital property"; thus, it was transmuted into marital property. 384 S.C. at 185, 682 S.E.2d at 40. Whereas here, although the parties did use some of the funds that passed through JFS to support their marriage, they did not use the rental income to the extent the husband and wife did in *Edwards*. Here, the parties' main source of income was Wife's salary from her dental practice. Finally, Wife testified she did not consider the property to be marital property.

In *Canady*, there was evidence the husband considered the non-marital property transmuted because throughout the trial, he referred to their home as the marital residence and admitted the wife probably retained an equitable interest in the property. 296 S.C. at 524, 374 S.E.2d at 504. Also, in *Wyatt*, the husband and wife made substantial improvements to the home and land, and the couple lived in the home for ten of their sixteen years of marriage. 293 S.C. at 497, 361 S.E.2d 779.

Wife asserts Husband's argument that his management and maintenance of JFS transmuted the Druid Street property into marital property does not conform with precedent. She asserts Husband is not entitled to a special equity interest in the property because his management did not increase the value of the property. In *Arnal v. Arnal*, 363 S.C. 268, 294-95, 609 S.E.2d 821, 835 (Ct. App. 2005), the court held the husband did not gain a special equity interest in the property despite the use of his landscaping designs and physical labor because his labor did not create any appreciation in the value of the property. Here, Wife asserted Husband's only contribution was he oversaw maintenance on the property and the property was not maintained adequately. She further states Husband's efforts did not increase the actual value of the property.

Husband argues this case is different from the circumstances in *Fitzwater v. Fitzwater*, 396 S.C. 361, 721 S.E.2d 7 (Ct. App. 2011). In *Fitzwater*, this court affirmed the family court's finding that the husband's nonmarital property was not transmuted. *Id.* at 369, 721 S.E.2d at 11. The parties in *Fitzwater* never used the "property as a marital home, never placed the property in [the wife's] name, and

[the husband] never made any substantial improvements to the property during the marriage." *Id.* at 368, 721 S.E.2d at 11. While the parties paid the mortgage payments from a joint bank account, the wife was never an obligor. *Id.* Also, although the husband in *Fitzwater* mortgaged the property during the marriage, the proceeds were used to pay for improvements to nonmarital property. *Id.* We find the circumstances of this case to be similar to those of *Fitzwater.*

Here, the family court found that "[a]lthough Husband assisted with the managing and maintenance of the property, there is no evidence whatsoever that Wife ever regarded [39 Druid Street] as the common property of the marriage, nor is there probative evidence that the parties used the property exclusively for marital purposes, that they commingled the property with marital property, or that they used marital funds to build equity in the property." Thus, the court determined the property had not been transmuted. After carefully reviewing the record, we agree with the family court's determination that the Druid Street property was not transmuted.

3. 115 West Park Avenue and 201 West Park Avenue

Husband argues he is entitled to at least a 50/50 split of the equity in the 115 West Park Avenue property and the 201 West Park Avenue property; however, he did not raise this issue in his motion seeking alteration and/or amendment of the final order. Therefore, the argument is not preserved for our review. *See Doe*, 370 S.C. at 212, 634 S.E.2d at 54 ("To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court.").

b. Personal Property

Husband argues the family court's order should be revised to reflect that the Kolische Art is a marital asset subject to equitable apportionment because Wife did not prove by a preponderance of evidence the art was owned before the marriage. He also argues the one piece given to him was actually a gift for his son, who should receive it. Wife testified the Kolische pieces should not be included in the marital estate because she owned two of the pieces prior to the marriage and the third piece was a gift from the gallery owner to the parties' son. She asserts Husband did not contradict her testimony.

Husband also argues the family court erred in valuing the Wellington piano at $1,000. He asserts the family court order should be adjusted to reflect that the piano has a market value of $6,500, which was the amount Wife valued it on her Exhibit 8. Wife testified the piano was worth $1,000. She based this on how much she paid for it and her research of its value online.

Finally, Husband argues the family court order should be revised so that Wife receives her wedding ring. Wife contends Husband valued the ring at $12,000, and it is not worth that much to her, so she would prefer the ring be assigned to Husband if it was valued at that price.

After carefully reviewing the record, we agree with the family court's determination of the division of this personal property. *See id.* at 213, 634 S.E.2d at 55 ("The division of marital property is in the family court's discretion and will not be disturbed absent an abuse of that discretion." (citing *Craig*, 365 S.C. at 290, 617 S.E.2d at 361)).

c. Financial Assets

Husband argues the family court order should be adjusted to reflect Wife is to receive the Elliott Davis retirement account at a value of $59,989.74 because she removed $11,000 from the account shortly before the date of filing. Wife testified she removed the funds from the account. Husband's Exhibit 2 also shows three wire transfers from the account in the total amount of $11,000. Husband asserts that by giving Wife the account at the post-transfers value of $49,897, Wife received a contribution of $11,000 towards her attorney's fees and costs, which is in conflict with the finding that each party should be solely responsible for his or her own fees and costs. Wife asserts the divorce action was filed on August 30, 2012; therefore, that is the preferred date of valuation for the marital assets. *See Burch v. Burch*, 395 S.C. 318, 325, 717 S.E.2d 757, 761 (2011) ("In South Carolina, marital property subject to equitable distribution is generally valued at the divorce filing date."). Thus, she requests this court affirm the judgment of the family court in finding the retirement account should be valued as of the date of the filing.

Husband also asserts the family court's 70/30 split should be reversed and the order revised to a 50/50 split. Husband argues the court "hammered" him in dividing the assets and debts, and he has been "saddled with tens of thousands of dollars in

attorney's fees and costs to pay." Husband asserts under the final order, Wife receives a total of $1,064,145 and he receives $185,018.

Husband cites to *Doe*, admitting the parties in this case were not married as long as the couple in *Doe*; however, asserting Husband and Wife had a long term partnership, which included having a child and the acquisition of substantial property they treated as marital. *See Doe*, 370 S.C. at 214, 634 S.E.2d at 55. He asserts that like the wife in *Doe*, he subordinated an established career to support Wife's professional pursuits and operated in an unpaid capacity by managing the real estate titled to Wife or JFS. *See id.* at 215, 634 S.E.2d at 56. Further, he maintains he provided a substantial share of the care for the couple's child. Finally, he asserts his adultery does not rise to the level of the wife in *Doe* because his adultery was after Wife filed for divorce. *See id.* Husband asserts the family court should adopt the same analysis and revise the 70/30 division to the more equitable division of 50/50.

Husband further asserts the family court did not consider all and/or misapprehended certain factors under § 20-3-620. Specifically, he argues the court erred in considering subsections 1, 3, 4, 6, 7, and 11. Under subsection 1, husband asserts a marriage approaching ten years can support a 50/50 division. Under subsection 3, he argues the court incorrectly found Wife was responsible for 92.5% of the parties' total taxable income during the marriage, and "inappropriately treated Husband's committed and compensation-free efforts to the rental properties as an afterthought." As to subsection 4, Husband asserts Wife earns substantially more income than he and has the ability to earn substantially more than he can. Husband argues that at trial Wife claimed her income from employment was lower than it had been during the marriage and what it was when she commenced the action, but she presented no evidence explaining the decrease. Further, Husband argues the court's statement that both parties have a substantial opportunity for future acquisition of capital assets is true for Wife but false and without support for him. Under subsection 6, Husband asserts the order addressed whether a high school degree is sufficient for his current job, which is irrelevant; however, the final order is silent on income potential. As to subsection 11, Husband argues the court did not properly consider the tax consequences. He asserts the division percentage should be adjusted to a 50/50 division to reach an equitable result because the final order leaves him in a severely crippled financial state.

Wife asserts this case is different from *Doe* because in *Doe* the parties were married for thirty-two years and the wife had ceased working to care for the parties' daughter; thus, the court found a 70/30 division was not equitable and a 60/40 division was more appropriate. *See id.* at 216, 634 S.E.2d at 57. Here, Husband and Wife were only married for seven years as of the date of filing. Also, Wife contributed more than eighty-four percent of the parties' income, yet she continued to be the primary caregiver for the parties' son and was responsible for cleaning the house and bathrooms, doing the dishes and laundry, and cooking dinner. Further, she asserts she brought significant non-marital property into the marriage and her wealth decreased during the marriage. Therefore, Wife asserts the 70/30 equitable division of the marital estate was well within the discretion of the family court.

After carefully reviewing the record, we find the family court's determination of the division of the retirement account and the 70/30 split was appropriate and not an abuse of discretion. *See id.* at 213, 634 S.E.2d at 55 ("The division of marital property is in the family court's discretion and will not be disturbed absent an abuse of that discretion." (citing *Craig*, 365 S.C. at 290, 617 S.E.2d at 361)).

d. QDRO

Husband argues the order should be reversed to require Wife to prepare the QDRO at her expense. Husband asserts he does not have access to the Elliott Davis account or the information to prepare a QDRO, whereas Wife has more resources to pay for one. Wife asserts Husband should be responsible for drafting the QDRO because he has the strongest financial incentive to quickly prepare the order and follow through with the qualification process. Also, she claims allowing Husband to draft the QDRO will enable him to include greater protection in the language of the order. We find no error in directing Husband to prepare the QDRO.

II. Attorney's Fees

Husband argues the family court erred in ordering Wife and Husband to be responsible for his and her own attorney's fees. We disagree.

"An award of attorney's fees rests within the sound discretion of the trial judge and should not be disturbed on appeal unless there is an abuse of discretion." *Patel v. Patel*, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004) (citing *Ariail v. Ariail*, 295

S.C. 486, 489, 369 S.E.2d 146, 148 (Ct. App. 1988)). The family court should consider the following factors when determining whether to award attorney's fees: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). To determine the amount of an award of attorneys' fees, the court should consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Husband argues the following sentence from the family court's final order should be stricken: "Wife prevailed on a majority of the transmutation claims made by Husband and achieved a favorable 70%-30% division of the net marital estate." Husband asserts he proved the 115 West Park Avenue was transmuted. He also asserts Wife's premarital down payment at 3 Trails End was transmuted, and he has demonstrated 39 Druid Street was transmuted, or in the alternative, the subject of special equity in his favor. Thus, he argues Wife did not prevail on a majority of the transmutation claims and the 70/30 division was in error.

Husband also argues the following sentence from the family court's final order should be stricken: "Wife spent considerable fees and costs relating to Husband's contemptuous conduct toward her, and in defending his unsuccessful contempt action against her." Husband asserts the fees and costs related to contempt in this action are separate and distinct from the underlying divorce action and should not be factored into the consideration of fees and costs.

Finally, Husband argues he is entitled to attorney's fees because (1) he defeated the fault-based ground of habitual drunkenness; (2) he received by consent an award of custody and visitation that more closely resembled what he sought in his pleadings; (3) he successfully proved transmutation; and (4) the vast majority of the assets were valued at his numbers.

Wife asserts each party earns an above-average income, and Husband is capable of paying his own attorney's fees and costs. She maintains the custody of the parties' minor son was the primary concern in this case, and the court awarded her primary custody and visitation similar to what she originally sought in her complaint.

Further, the court awarded her child support greater than that awarded in the temporary order. Thus, Wife prevailed on the custody issue. She further argues she prevailed on the equitable division of the parties' assets, including the Druid Street property and her non-marital contribution for the down payment on the former marital residence. Wife argues Husband's financial condition has significantly improved during his marriage to Wife. She asserts that prior to marriage, he earned $72,000 annually, owned a vehicle with significant debt, was living with his parents, and did not have any retirement or savings. Whereas, after the divorce, he earns $71,000 annually, owns his own home, has a retirement account worth $70,000, and owns $84,615 in liquid assets and personal property. Finally, she argues Husband's above-average income and improved financial condition will allow him to enjoy a comfortable standard of living after paying his attorney's fees. We find no error in requiring the parties to pay his and her own attorney's fees.

CONCLUSION

Accordingly, the family court's order is

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.