The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(2), SCACR, since April 1, 2011. This list is being published pursuant to Rule 419(d)(2), SCACR. If these lawyers are not reinstated by the Commission by June 1, 2011, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(2), SCACR.

Columbia, South Carolina
May 9, 2011

LAWYERS SUSPENDED FOR NON-COMPLIANCE
WITH MCLE REGULATIONS FOR THE
2010-2011 REPORTING PERIOD
AS OF MAY 5, 2011

J. Reid Anderegg
Post Office Box 73129
North Charleston, SC 29415

Baylor B. Banks
Thompson Law Firm, LLC
3050 Peachtree Road, Suite 355
Atlanta, GA 30355
SUSPENDED BY BAR 2/1/11

Gerald A. Beard
Michelin North America, Inc.
Post Office Box 19001
Greenville, SC 29602
SUSPENDED BY BAR 2/1/11

Margaret H. Benson
DaVita, Inc.
601 Hawaii Street
El Segundo, CA 90245

Teresa D. Bulford
Bulford Law Firm, LLC
107 West 6th North Street, Suite 207
Summerville, SC 29483
INTERIM SUSPENSION 1/20/11

Alton P. Clark
1419 Richland Street
Columbia, SC 29201

Louis M. Cook
Louis M. Cook & Associates
302 43rd North
North Myrtle Beach, SC 29582

Lisa A. Delzotti-Marion
4201 Bayshore Boulevard, Suite 2001
Tampa, FL 33611

Tracy R. Evans
1124 Snyder Lane
Hartsville, SC 29550

J. David Flowers
David Flowers, PA
Post Office Box 8415
Greenville, SC 29604

Frank W. Gibbes
214 Robin Hood Road
Greenville, SC 29607

Donna S. Givens
Post Office Box 12009
Columbia, SC 29211
NINE MONTH SUSPENSION 2/7/11
RETROACTIVE TO 3/04/10

Michelle D. Hodkin
Inclaro, LLC
103 Hickory Street
Charleston, SC 29407

Terrell T. Horne
600 Yuma Court
Sumter, SC 29150

Thomas A. Jones III
Post Office Box 681389
Fort Payne, AL 35968

Laura S. Knobeloch
The Law Office of Laura Spears Knobeloch
808 Johnnie Dodds Boulevard
Mount Pleasant, SC 29464

Kenneth C. Krawcheck
Krawcheck Law Firm, LLC
89 Broad Street
Charleston, SC 29401

David R. Lawson
David R. Lawson, Attorney, LLC
12 Carriage Lane
Charleston, SC 29407

Crystal G. H. Lowery
Law Office of Crystal G. H. Lowery, LLC
Post Office Box 410
Isle of Palms, SC 29451

George K. Macklin
Nationwide Insurance
150 Cartright Street
Charleston, SC 29492

Michael D. Moore
The Moore Law Firm
Post Office Box 100
Ridgeville, SC 29472
SIX MONTH SUSPENSION 3/21/11

Gregory M. Palmer
Palmer & Wood
Federal Square Building
29 Pearl Street, NW, Second Floor
Grand Rapids, MI 49503

Shawn M. Pellow
6 Pequot Square
Mansfield Center, CT 06250
SUSPENDED BY BAR 2/1/11

Heather G. Ruth
33 Selwyn Drive
Greenville, SC 29615

Amanda G. Steinmeyer
Steinmeyer Law Firm
1622 Sunset Boulevard
West Columbia, SC 29169
INTERIM SUSPENSION 12/2/10

Ollie H. Taylor
2609 Atlantic Avenue, Suite 109
Raleigh, NC 27604

Helen Ann S. Thrower
2604 Burney Drive
Columbia, SC 29205

Irby E. Walker, Jr.
2550 Jordanville Road
Galivants Ferry, SC 29544
INTERIM SUSPENSION 9/18/09

Leslie H. Young
Post Office Box 290383
Columbia, SC 29229

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF KENNETH B. MASSEY, PETITIONER

Kenneth B. Massey, who was definitely suspended from the practice of law for a period of two (2) years, has petitioned for reinstatement as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 10, 2011, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

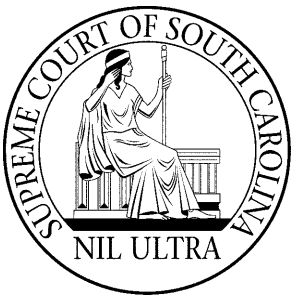
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 5, 2011

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
May 9, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael Hensley Wells, Respondent.

Opinion No. 26969
Heard April 7, 2011 – Filed May 9, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Kevin Mitchell Barth, of Florence, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct ("Commission") investigated allegations of misconduct involving Michael Hensley Wells's ("Respondent's") use of a website, brochures, and telephone book advertisements to promote his law firm's services. The Office of Disciplinary Counsel ("ODC") filed Formal Charges against Respondent. A Hearing Panel of the Commission ("Hearing Panel") issued its Panel Report, finding Respondent had committed misconduct. A majority of the Panel recommended that this Court issue a Public Reprimand.[1] The Panel also recommended that this Court order Respondent to pay costs, pay a fine, and complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program.

[1] One member of the Panel recommended an Admonition.

Neither Respondent nor the ODC has filed a brief taking exception to the Panel Report. We accept the Panel's recommendation. Accordingly, we issue a Public Reprimand and order Respondent to pay the costs of the disciplinary proceedings, pay a fine in the amount of $1,000, and complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program administered by the South Carolina Bar.

I. Factual/Procedural History

Respondent, who was admitted to the South Carolina Bar on April 24, 2001, owns and operates a law firm doing business under the name Coastal Law, L.L.C. This matter arises from the marketing practices used by Respondent's law firm as of January 2009. At that time, Respondent employed two associates, both of whom were admitted to practice in 2007. The law firm's marketing consisted primarily of a website, telephone book advertisements, and a firm brochure distributed at various public locations that included a mall kiosk.

Following a full investigation, the ODC filed Formal Charges against Respondent on February 25, 2010, alleging seven matters of misconduct involving his law firm's advertising practices. In his Answer, Respondent conceded certain allegations, but asserted that he did not intend to violate the Rules of Professional Conduct.

On July 15, 2010, the Panel held a hearing on the Formal Charges. At the hearing, Respondent testified regarding the allegations of misconduct. Although he acknowledged the improper statements in his advertising material, he claimed it was an "honest mistake" and that he had not intended to be deceptive. He further explained that he had failed to oversee the creation of the advertisements. He also emphasized that he had corrected and revised the advertising materials after being apprised of the Rule violations. He maintained that he now reviews all of the firm's advertisements before they are disseminated. In addition, Respondent offered evidence of his good character.

On December 22, 2010, the Hearing Panel issued a report that was filed with the Commission the next day. In its report, the Panel found the following facts[2] regarding the allegations of misconduct:

Allegation A

In his advertising materials, Respondent included false and misleading statements regarding: his experience and his associates' experience; the firm's areas of practice and past case results; the assignment of cases among the attorneys in the firm; the firm's reputation; the firm's office locations; and the foreign language ability of the firm's employees.

In terms of his experience, Respondent included a statement on his website and in his firm brochure that he had "worked in the legal environment for over twenty years." Although Respondent had worked as a clerk for a law firm while in college and law school, he had only actually practiced law for about seven years when these materials were disseminated.

Respondent also overstated the experience of his associates on his website. At the time the website was published, the firm's two associates had been admitted for less than one year, yet the website referred to the firm's "numerous trained and experienced attorneys." The website also included phrases describing the firm's attorneys as "thoroughly familiar with the local court system", "highly skilled", possessing "wide-ranging knowledge", and having a "deep personal knowledge of the courts, judges, and other courthouse personnel."

Regarding the firm's areas of practice and the types of cases handled by the attorneys, Respondent's website included a statement that "our attorneys handle all types of legal matters in state and federal court in South Carolina" when, in fact, that was not the case. The website also stated that the firm

[2] Neither party filed briefs with this Court. Consequently, the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations. See Rule 27(a), RLDE, of Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

represents clients "in every level of the South Carolina state court system", which was not true.

Respondent's website also stated that "[e]ach attorney with Coastal Law Firm focuses his or her practice exclusively on one area of the law [thus] each attorney is deeply familiar with the law and procedural issues related to their clients' cases." However, Respondent listed at least twenty-seven distinct practice areas on his website even though only three attorneys (including himself) were employed with the firm.

Respondent's website further stated that the firm had served clients in constitutional law, civil rights, ethics and professional responsibility, and toxic torts. No lawyer in the firm had actually handled any matters in those areas; however, they were willing to accept such cases.

Additionally, Respondent's website contained a page entitled "Consumer Protection and Products Liability Lawyer." The page claimed that the firm has "a history of winning [products liability] cases" and that it employs "defective products liability lawyers" who "understand how to deal with both corporations and insurance companies and have a history of winning cases for our clients." On another page on the website, Respondent stated that "At Coastal Law, our . . . product recall lawyers understand what is required in filing a medical injuries claim for manufacturer negligence in producing a hazardous drug or product leading to a dangerous product recall. We can aggressively pursue your legal rights against negligent corporations that may have introduced a product that damaged your health." Neither Respondent nor any lawyer in his law firm had ever handled a products liability matter.

In terms of the firm's office locations, some of Respondent's telephone book advertisements stated that the firm had offices in Georgia and Florida. At the time, Respondent had a referral arrangement with firms located in those states and had plans to merge his firm with another South Carolina lawyer, who had offices in Georgia and Florida. Respondent's firm, however, never actually operated offices in those states.

With respect to the foreign language ability of the firm's employees, Respondent's advertising materials included the phrase "We Speak Spanish" written in Spanish. None of the lawyers in the firm spoke Spanish. Only part of the time when these advertisements were published did the firm employ a staff member who spoke Spanish. The inclusion of "We Speak Spanish" in Respondent's advertising, particularly at times when no one in the office spoke Spanish, was misleading as it implied that the firm employed Spanish-speaking attorneys.

As to the firm's reputation, Respondent's website included a number of statements that could not be factually substantiated such as the firm "developed a reputation over the years for outstanding results" and the firm is "recognized as an established, experienced, and reputable local Myrtle Beach law firm." Although Respondent admitted at the hearing that the inclusion of this language was a "mistake" as his law firm had not been identified as a leading law firm or received special recognition, he claimed it was never his "intention to deceive."

Allegation B

In his advertising materials, Respondent improperly compared his law firm's services to other law firms in ways that could not be factually substantiated with statements such as "best attorney available", "most effective legal services", and "best services possible." Respondent acknowledged that it was inappropriate to make these comparisons to other lawyers.

Allegation C

Although Respondent filed his telephone book advertisements with the Commission on Lawyer Conduct in compliance with Rule 7.2(b), he admitted that he did not do so with his website or firm brochure.

Allegation D

Respondent admitted that some of his telephone book advertisements listed only the law firm name and not the name of a lawyer that was responsible for the content of the advertisements.

Allegation E

Respondent admitted in his Answer that his firm brochure characterized the quality of his firm's legal services for criminal defense clients as "tough criminal defense representation." He also admitted that his website characterized his firm's attorneys as: "highly skilled at obtaining bonds for their clients"; "dedicated attorneys who provide excellent legal advice"; "maintaining a high degree of professionalism" in real estate matters; and "intelligent", "competent", and "full service."

Allegation F

Respondent admitted that his telephone book advertising and website included statements regarding contingent fee arrangements, including the following statements: "no fee until you receive money"; "no fees up front to handle your personal injury or wrongful death case"; and "your cost is nothing unless we win." Respondent, however, failed to disclose whether the client would be liable for any expenses in addition to the fee or whether the percentage of the contingency fee would be computed before deducting the expenses.

Allegation G

Respondent's website referred to the firm's "expertise" in personal injury matters and the firm's "expert nursing home litigation advisors." The website and firm brochures also stated that the firm "specializes in several areas of law." Respondent, however, admitted that no one in his firm was a certified specialist in any area of law.

Hearing Panel's Findings of Misconduct

The Hearing Panel found that by his conduct, Respondent was subject to sanctions for violating the following South Carolina Rules of Professional Conduct (RPC) of Rule 407, SCACR: Rule 7.1(a) (communications concerning a lawyer's services that contain "a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading"); Rule 7.1(b) (communications concerning a lawyer's services that are "likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law"); Rule 7.1(c) (communications concerning a lawyer's services that compare "the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated"); Rule 7.2(b) ("A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct"; failure to file advertisements with the Commission on Lawyer Conduct)[3]; Rule 7.2(d) ("Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer responsible for its content."); Rule 7.2(f) ("A lawyer shall not make statements in advertisements or written communications which are merely self-laudatory or which describe or characterize the quality of the lawyer's services; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients."); Rule 7.2(g) ("Every advertisement that contains information about the lawyer's fee shall disclose whether the client will be liable for any expenses in addition to the fee and, if the fee will be a percentage of the recovery, whether the percentage will be computed before deducting the expenses."); and Rule 7.4(b)[4] (use of the words "expert" and

[3] Respondent's advertisements were subject to filing pursuant to Rule 7.2(b), which was amended effective October 1, 2005. As of June 28, 2010, the rule has been amended to eliminate this filing requirement.

[4] Although the Panel Report references Rule 7.4(c), we believe Rule 7.4(b) is the proper rule as Rule 7.4(c) addresses advertisements regarding patent and trademark attorneys.

"specialist" in advertisements is prohibited where a lawyer is not a certified specialist).

Aggravating and Mitigating Circumstances

The Hearing Panel took into consideration the following mitigating circumstances: (1) Respondent's character evidence; (2) the absence of any prior disciplinary history; (3) Respondent's acknowledgement of wrongdoing; and (4) Respondent's remorse and willingness to take remedial action. In aggravation, the Panel took into consideration the seriousness of Respondent's misconduct, in particular the dishonest nature of the conduct, and the fact that these charges represented a pattern of multiple offenses.

Hearing Panel's Recommended Sanction

Two members of the Hearing Panel recommend the sanction of a Public Reprimand. The remaining member of the Hearing Panel recommended the sanction of an Admonition. Additionally, all members of the Hearing Panel recommended that Respondent be ordered to pay the costs of the proceedings, be fined an appropriate amount, and be required to complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program within a period of six months from the date of this Court's order.

II. Discussion

This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. In re Welch, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." In re Hazzard, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008).

"A disciplinary violation must be proven by clear and convincing evidence." In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see also Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity

shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

The parties, by not filing briefs, have accepted the findings of fact, conclusions of law, and recommendations of the Hearing Panel. Thus, this Court must determine whether the recommended sanction is appropriate.

We agree with the Panel's recommended sanction of a Public Reprimand as it is consistent with this Court's decisions regarding similar professional misconduct. See In re Schmidt, 374 S.C. 167, 648 S.E.2d 584 (2007) (holding that Public Reprimand was the appropriate sanction where attorney: published newspaper advertisements that failed to disclose the location, by city or town, where he principally practiced law; used advertisements containing the word "specialist", when in fact he was not a certified specialist; sent solicitation letters that failed to disclose where he principally practiced law, included the words "expert" and "expertise", were not filed with the Commission, and did not disclose a list of persons to whom the letters were sent; and sent a client letter containing statements that were not verified); In re Mitchell, 364 S.C. 606, 614 S.E.2d 634 (2005) (finding Public Reprimand was the appropriate sanction where attorney, who had previously received a letter of caution, continued to use letterhead that contained misleading information regarding his solo practice); In re Pavilack, 327 S.C. 6, 488 S.E.2d 309 (1997) (concluding Public Reprimand was the appropriate sanction where attorney aired two misleading advertisements); cf. In re Anonymous Member of the South Carolina Bar, 386 S.C. 133, 687 S.E.2d 41 (2009) (issuing a letter of caution with a finding of minor misconduct where attorney's use of the words "expert" and "specialist" on his firm's website violated Rule 7.4(b) of the Rules of Professional Conduct); In re Creson, 338 S.C. 157, 526 S.E.2d 231 (2000) (finding a Public Reprimand was warranted for attorney who failed to remove from his South Carolina letterhead a misleading statement indicating that he was admitted to practice in Georgia but had been suspended from the practice of law in that state).

Here, Respondent was clearly cooperative and remorseful as evidenced by his testimony before the Hearing Panel and this Court. Respondent also has no prior disciplinary history and has revised his advertising materials in accordance with the suggestions made by the ODC. Moreover, according to

Respondent, the advertising materials were corrected almost immediately after he received the ethics complaint in January 2009.

In terms of the website, Respondent testified that the website was "actually up" for only three to four months as it became operational at the end of 2008 and was taken down shortly after he received the ethics complaint in January 2009. Respondent also testified that he "pulled all the brochures and business cards" from the mall kiosk that had been set up for the firm's advertisements.

Finally, Respondent stated that he now uses a "checklist" compiled by the ODC to help attorneys with their advertisements. He further explained that he has "scaled" back on the statements in his advertisements as to the firm's areas of practice and the potential case results.

In addition to the above-outlined sanction, we also order Respondent to pay a fine of $1,000 and the costs of the disciplinary proceedings.[5] See In re Thompson, 343 S.C. 1, 13, 539 S.E.2d 396, 402 (2000) ("The assessment of costs is in the discretion of the Court."); Rule 27(e)(3), RLDE, of Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct."); Rule 7(b)(6), RLDE, of Rule 413, SCACR (stating sanctions for misconduct may include the "assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services"); Rule 7(b)(7), RLDE, of Rule 413, SCACR (providing that sanctions for misconduct may include assessment of a fine).

Moreover, given the extent of Respondent's improper advertisements, we order Respondent to complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program.

[5] The Commission claims it has incurred $1,005.24 in these proceedings.

III. Conclusion

Based on the foregoing, we conclude that Respondent has committed misconduct in the respects identified by the Hearing Panel. We further find the Hearing Panel's recommended sanctions are warranted under the circumstances. Accordingly, we issue a Public Reprimand and further order Respondent to pay the costs of the disciplinary proceedings, pay a fine in the amount of $1,000, and complete the Ethics School and the Advertising School of the Legal Ethics and Practice Program administered by the South Carolina Bar within six months of the date of this order.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Essie Simmons, Appellant,

v.

Rubin Simmons, Respondent.

Appeal from Charleston County
Jan Bromell Holmes, Family Court Judge

Opinion No. 26970
Heard February 2, 2011 – Filed May 9, 2011

REVERSED AND REMANDED

Paul E. Tinkler and Joshua P. Stokes, both of Charleston, for Appellant.

Eduardo Kelvin Curry, of North Charleston, for Respondent.

JUSTICE KITTREDGE: We are presented with a 1990 family court-approved settlement agreement that has been determined to be void in part. This appeal presents the question of whether the family court may revisit, in whole or in part, the now partially voided agreement. The family court ruled in 2008 that it lacked subject matter jurisdiction to reconsider the 1990 court-approved agreement. We reverse and remand for reconsideration of the court-approved agreement.

I.

Appellant Essie Simmons (Essie) and Rubin Simmons (Rubin) divorced in 1990. They entered into a settlement agreement, which was approved by the family court. A central part of the parties' agreement required Rubin to give Essie one-third of his Social Security benefits if he began receiving them at age 62 or one-half of those benefits if he began receiving them at age 65. The Social Security benefits were to "be construed only as a property settlement, and shall not in any way be considered or construed as alimony."[1]

Rubin attained the age of 62 in 1994 and 65 in 1997, but he failed to pay Essie any portion of his Social Security benefits. In December of 2003, Essie filed a petition for a rule to show cause, seeking to compel compliance with the agreement. Rubin responded by filing a Rule 60(b)(4), SCRCP,[2]

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[1] The agreement further provided that "[t]he parties acknowledge that the agreement set forth . . . represents a compromise . . . ." Both parties stipulated that the agreement was "fair and reasonable, both to himself or herself as well as the other party," that "the subject agreement [was] an equitable resolution to all of the issues before them," and that "the agreement [was] fair and equitable under all of the circumstances."

[2] "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void."

motion, asserting that the family court lacked subject matter jurisdiction to order division of his Social Security benefits. The family court dismissed Rubin's subject matter jurisdiction challenge, and Rubin appealed. The court of appeals reversed. Simmons v. Simmons, 370 S.C. 109, 634 S.E.2d 1 (Ct. App. 2006). The court found that the Social Security Act, specifically 42 U.S.C. § 407(a) (2010), preempted and expressly precluded the parties' agreement to divide Rubin's Social Security benefits. As a result, the court voided that portion the agreement.

At the time of the 1990 agreement, both parties believed Social Security benefits could be equitably divided as property. Essentially, the parties proceeded under a mutual mistake regarding the ability to equitably apportion Social Security benefits.

Because the parties' agreement had been voided in part, Essie sought to reopen the matter in its entirety, including equitable division and alimony. The family court granted Rubin's motion to dismiss, holding that it lacked subject matter jurisdiction to revisit the parties' agreement, even that part declared void by the court of appeals. Essie sought reconsideration, relying in part on Rule 60(b)(5), SCRCP, which provides for relief from judgment when "the judgment has been … discharged … or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Essie's motion to reconsider was denied, and this appeal followed.

II.

In appeals from the family court, this Court reviews factual and legal issues de novo. Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992) (noting the authority to review factual findings and legal conclusions without deference to the family court); Inabinet v. Inabinet, 236 S.C. 52, 55, 113 S.E.2d 66, 67 (1960) ("Our duty in equity cases [is] to review challenged findings of fact as well as matters of law . . . .").

III.

The court of appeals' interpretation of section 407(a)—Congress precluded Social Security benefits from being assigned as part of an equitable division of marital property—is the law of the case. We find, however, that the family court committed an error of law by determining that it did not have subject matter jurisdiction. It appears the family court's primary focus of concern was the passage of time, not its lack of authority to equitably apportion a marital estate upon dissolution. See S.C. Code Ann. § 63-3-530 (2010) (stating the family court has jurisdiction over "divorce . . . and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage . . . .").

Under these circumstances, we hold the family court has jurisdiction to reconsider a voided agreement, at least to the extent of the part declared void. The question becomes whether the family court on remand should be confined to a fresh look at the matter of equitable division of the marital estate, or whether all issues, including alimony, should likewise be considered. Because it is readily apparent that the parties' desire to equitably divide Rubin's Social Security benefits was a significant feature of the overall agreement, we expand the scope of the remand to include Essie's alimony claim.

The agreement represented a "compromise." The parties agreed that Essie would receive $5,000 lump sum alimony, $20,000 in immediate property distribution, and ultimately one-third to one-half of Rubin's Social Security benefits. In exchange, Essie gave up her rights in the marital home, Rubin's pension from the International Longshoreman's Association, and an alimony arrearage. As is customary in divorce settlements, it would be difficult to fairly view the various aspects of this agreement in isolation. In other words, the parties' intended agreement concerning alimony is inextricably connected to the agreed upon division of marital property, and

vice versa. In this context, and in view of Rule 60(b)(5), SCRCP, basic principles of equity suggest that all issues should be revisited by the family court.

We recognize the practical difficulties confronting the family court on remand in attempting to fashion an equitable result more than twenty years after the divorce. But that challenge pales in comparison to Rubin's suggestion that we simply end this matter with the remnant of the agreement remaining valid. We direct the family court to consider the issues raised in Essie's complaint. To the extent the agreement has been executed, proper credits must be given to Essie and Rubin, respectively.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kenneth Harry Justus, Appellant.

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26971
Heard March 3, 2011 – Filed May 9, 2011

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Senior Appellate Defender Joseph L. Savitz, III, both of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

JUSTICE KITTREDGE: This is a direct appeal in a death penalty case. Appellant raises one issue, asserting the trial court abused its discretion in disqualifying one of his two appointed counsel two years prior to his guilty plea to murder. We find no abuse of discretion and affirm.

I.

On the evening of July 26, 2005, Appellant Kenneth Harry Justus murdered Justin Bregenzer.[1] At the time, Appellant was serving two consecutive life sentences at Lieber Correctional Institute, a maximum security prison, for murdering two convenience store workers in separate armed robberies in Oconee County.[2] Bregenzer had been stabbed eleven times and died from a stab wound to the heart.[3] Appellant was arrested and indicted for Bregenzer's murder, and the State sought the death penalty.[4]

The trial court originally appointed Maite Murphy as second-chair defense counsel in October 2005.[5] Shortly thereafter, in November 2005, and

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[1] Bregenzer's name is also spelled Breganzer in the record on appeal.

[2] Appellant murdered Randal Eades and Kitty Smith in separate armed robberies in 1997 and 1998, respectively. He was convicted of both murders and accompanying armed robbery charges and sentenced to two consecutive life sentences and two thirty-year sentences for armed robbery. He pled guilty to all charges.

[3] Bregenzer was serving time under the Youthful Offender Act for car breaking and grand larceny and had been moved to Lieber for walking away from litter detail. He was scheduled to be released two months after his murder took place.

[4] A trail of blood and several bloody footprints—which matched Appellant's boots—led from Bregenzer's cell to Appellant's cell. Investigators found Bregenzer's blood on Appellant's clothing and his thumbprint, in Bregenzer's blood, on Bregenzer's sink. They also found the shank used to stab Bregenzer in the bottom of his toilet and the matching wooden handle in the sewer system.

[5] Appellant's original first-chair counsel, Marva Hardee-Thomas, was excused without

in response to our then recent decision in State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005), the solicitor filed a motion entitled "Motion to Have the Court Determine Whether Defense Counsel has an Actual Conflict of Interest." The solicitor's concern stemmed from Murphy's representation of the solicitor's lead investigator, Tim Stevenson, in his divorce action. Stevenson was purported to be a potential witness in the prosecution against Appellant.

The trial court conducted an evidentiary hearing on the matter in February 2006. At the hearing, Stevenson testified that he had hired Murphy to represent him in his divorce in June 2005, only a few months prior to Murphy's appointment as Appellant's lawyer. He testified that he hired her for the entire divorce and that he still considered her his lawyer. Further, he testified that she had not withdrawn as his lawyer or notified him that she no longer represented him. Murphy, on the other hand, testified that she had agreed to represent Stevenson only to complete his separation agreement, which had been completed. She acknowledged that she had not sent a formal notice of withdrawal. There was no written agreement between Murphy and Stevenson. Both sides presented expert testimony on the conflict of interest issue.

Ultimately, the trial court removed Murphy from the case, noting that it could "not risk the possibility of Mr. Stevenson being called in this case and needing [sic] to be cross examined," and appointed new second-chair counsel.

More than two and one-half years later, on December 11, 2008, Appellant pled guilty to murder. During the sentencing phase, the trial court sentenced Appellant to death for Bregenzer's murder, citing Appellant's prior murder convictions as the aggravating circumstance. See S.C. Code Ann. § 16-3-20(C)(a)(2) (2003) ("The murder was committed by a person with a prior conviction for murder.").

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objection for personal health reasons and replaced by a former solicitor, Walter Bailey.

II.

A.

Appellant raises one issue on appeal: did the trial court abuse its discretion by disqualifying Appellant's originally appointed second-chair counsel? We hold that it did not.

An accused has the right to the assistance of counsel. U.S. Const. amend. VI; Gideon v. Wainwright, 372 U.S. 335 (1963). "[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) (quoting State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001)).

We acknowledge that it is a close question whether Murphy's representation of Stevenson was ongoing or had concluded. Moreover, it is fairly debatable whether Stevenson's potential testimony presented an actual conflict of interest. However, given the conflicting evidence before the trial court, and giving deference to its findings of fact, we find no abuse of discretion in the disqualification of Murphy.

We recognize the State's motion came on the heels of our decision in State v. Gregory.[6] Gregory presents a far more compelling case for relieving counsel than the case before us today. At Gregory's insistence, defense counsel moved to be relieved after informing Gregory of counsel's representation of an assistant solicitor in a divorce action. Gregory believed his counsel and the solicitor's office were "in cahoots." Finding no prejudice to counsel's continued representation of Gregory, the trial court denied the motion to relieve counsel. We reversed, finding "Gregory's attorney had an actual conflict because he placed himself in a 'situation inherently conducive to divided loyalties' by simultaneously representing Gregory and the assistant

[6] Gregory was filed in April 2005, only months before Appellant was indicted.

solicitor who was handling his criminal case." Id. at 154, 612 S.E.2d at 451. Notwithstanding the distinguishing features in Gregory, we cannot say the decision to relieve Murphy amounted to an abuse of discretion.[7]

B.

We note Appellant was ultimately represented by attorneys with substantial death penalty experience, Walter Bailey and Norbert Cummings. Appellant had long expressed a desire to plead guilty and to receive the death penalty. The trial court conducted an extensive guilty plea *voir dire*,[8] including numerous questions which revealed Appellant's complete satisfaction with Bailey and Cummings.[9]

III.

Proportionality Review

We review the proportionality of Appellant's sentence in accordance with South Carolina law. S.C. Code Ann. § 16-3-25 (2003). The aggravating

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[7] In light of the fundamental nature of the Sixth Amendment right to counsel and the prosecutor's duty to seek justice, the State must exercise caution in this area. It is the threat of an actual conflict that justifies the State's effort to deprive an accused of his counsel; hypothetical or speculative conflicts are insufficient. Different considerations are at play when an accused seeks to relieve his or her counsel, as Gregory illustrates.

[8] Prior to Appellant's guilty plea, the trial court held a State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), hearing to determine whether Appellant was competent to plead guilty and to assist his attorneys in his defense. The trial court found that Appellant was competent, and there is no suggestion to the contrary.

[9] Prior to the guilty plea hearing, Appellant had instructed his attorneys not to present any mitigating evidence. Nonetheless, Bailey and Cummings investigated possible mitigating circumstances and prepared to introduce evidence in that regard. They even sought ethical advice on the potential presentation of mitigating evidence notwithstanding Appellant's instructions. In the sentencing phase, Appellant wrote a note to the trial court, which stated, "[I] ask that you punish me to the fullest extent of the law, this being the death sentence. I truly believe this punishment is the only just punishment for the crime I've committed."

circumstance in this case is a prior conviction for murder, for which section 16-3-20(C)(a)(2) permits the imposition of the death penalty. We find the record establishes that the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions in which a defendant was sentenced to death when he had a prior conviction for murder demonstrates that Appellant's death sentence is neither excessive nor disproportionate. See State v. Motts, Op. No. 26947 (S.C. Sup. Ct. filed March 21, 2011) (Shearouse Adv. Sh. No. 10 at 45); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Iraj Mazloom, Respondent,

v.

Manoochehr Mazloom, Albolfazl Mazloom and AMA, LLC, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 26972
Heard April 19, 2011 – Filed May 9, 2011

AFFIRMED

Deborah Harrison Sheffield, Law Office of Deborah Harrison Sheffield, of Columbia, and Paul L. Reeves, of Reeves Law Firm, of Columbia, for Petitioners.

Tobias G. Ward, Jr. and J. Derrick Jackson, of Todd Holloway & Ward, of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the decision of the court of appeals in *Mazloom v. Mazloom*, 382 S.C. 307, 675 S.E.2d 746 (Ct. App. 2009). The writ was granted to determine if there is sufficient evidence to support a breach of fiduciary duty by Petitioners and, if so, to determine if this conduct warranted the imposition of punitive damages.

As to the sufficiency of the evidence to support a breach of fiduciary duty, we find that this portion of the question is not preserved for review because it was not raised in the petition for rehearing to the court of appeals. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari . . . ." (emphasis added)); *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in petition for rehearing); *Holly Hill Lumber Co. v. McCoy*, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case).

As to the remaining issue, we find no error on the part of the court of appeals in affirming the award of punitive damages. *See Jordan v. Holt*, 362 S.C. 201, 206, 608 S.E.2d 129, 131 (2005) (finding that ignoring member's request for financial information regarding LLC, using LLC money to satisfy personal obligations, engaging in self-dealing, and selling LLC property and keeping proceeds without knowledge or consent justified an award of punitive damages); *see also Davenport v. Woodside Cotton Mills Co.*, 225 S.C. 52, 59, 80 S.E.2d 740, 743 (1954) (stating that "[i]n view of the unappealed verdict and judgment for actual damages it must be taken as determined" that the appellant engaged in the conduct complained of when reviewing award of punitive damages).

Accordingly, the decision of the court of appeals is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roberta Hardy Lewis, Petitioner,

v.

Joseph Terrell Lewis, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Williamsburg County
R. Wright Turbeville, Family Court Judge
George M. McFaddin, Jr., Family Court Judge

Opinion No. 26973
Heard April 20, 2010 – Filed May 9, 2011

REVERSED

Donald Bruce Clark, of Charleston, for Petitioner.

Kevin M. Barth, of Ballenger, Barth and Hoefer, of Florence, and Marian D. Nettles, of Nettles Turbeville & Reddeck, of Lake City, for Respondent.

JUSTICE KITTREDGE: In this divorce action, the Court granted a writ of certiorari to review two issues in the court of appeals' decision. *Lewis v. Lewis*, 2008-UP-645 (Ct. App. 2008). The issues are: (1) the court of appeals' reversal of the family court's determination of the value of the marital home, and (2) the court of appeals' reversal and modification of the family court's award of expert witness fees to Petitioner. We reverse the court of appeals' decision and reinstate the family court's order.[1]

I.

Standard of Review

"In appeals from the family court, the 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 Court to disregard the findings of the family court." *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009) (citations omitted). More recently, we held that "[a]n appellate court should approach an equitable division award with a presumption that the family court acted within its broad discretion. The family court's award should be reversed only when the appellant demonstrates an abuse of discretion." *Dawkins v. Dawkins*, 386 S.C. 169, 172-73, 687 S.E.2d 52, 54 (2010).

We take this opportunity to give historical context to the appellate court standard of review of family court factual findings.

A.

The myriad of modern cases setting forth an abuse of discretion as the standard of review in appeals from the family court may be traced to two common features found in our earlier jurisprudence concerning appeals in

[1] The balance of the court of appeals' decision stands.

equity cases. The primary one is the familiar mantra that the appellate court is not required to disregard the findings of the trial judge who was in a superior position to make credibility determinations. The second concept is the tenet that *de novo* standard of review does not relieve an appellant from demonstrating error in the trial court's findings of fact. *See Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965) (citing *Forester v. Forester*, 226 S.C. 311, 85 S.E.2d 187 (1954)) ("It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence."); *Inabinet v. Inabinet*, 236 S.C. 52, 55-56, 113 S.E.2d 66, 67 (1960) (citing *Twitty v. Harrison*, 230 S.C. 174, 94 S.E.2d 879 (1956)) ("Our duty in equity cases to review challenged findings of fact as well as matters of law does not require that we disregard the findings below or that we ignore the fact that the trial judge, who saw and heard the witnesses, was in better position than we are to evaluate their credibility; nor does it relieve appellant of the burden of convincing this court that the trial judge erred in his findings of fact."); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951) ("We have jurisdiction in appeals in equity to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of verdict by jury."); *Wise v. Wise*, 60 S.C. 426, 449, 38 S.E. 794, 802-03 (1901) (McIver, C.J., dissenting and quoting *Finley v. Cartwright*, 55 S.C. 198, 33 S.E. 359 (1899)) ("Whatever differences of opinion may once have existed as to the rule which should govern where an appellant . . . asks this court to reverse the findings of fact by the circuit judge in an equity case, it must now, since the decision in *Finley v. Cartwright* . . . be regarded as settled 'that this court may reverse a finding of fact by the circuit court when the appellant satisfies this court that the preponderance of the evidence is against the finding of the circuit court.'").

The family court is a court of equity. Article V, § 5 of the South Carolina Constitution provides in relevant part that our appellate jurisdiction in cases of equity requires that we "review the findings of fact as well as the

law." This constitutional provision was adopted as article V, § 4 of the Constitution of 1895.[2] Shortly thereafter, we interpreted this provision and held that "it may now be regarded as settled that this court may reverse a finding of fact by the circuit court [in a case of equity] when appellant satisfies this court that the preponderance of the evidence is against the finding of the circuit court." *Finley*, 55 S.C. at 202, 33 S.E. at 360-61. This language served as the forerunner to the often-quoted language that an appellate court may take its own view of the preponderance of the evidence, as included in the landmark standard of review case, *Townes Associates, Ltd. v. City of Greenville*: "In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (citing *Crowder*, 246 S.C. 299, 143 S.E.2d 580). Our standard of review, therefore, is *de novo*. Our modern day usage of the term "abuse of discretion" does not comport with our constitutionally authorized standard of review.[3]

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[2] A similar constitutional provision was adopted as article IV, § 4 of the South Carolina Constitution of 1868.

[3] As noted, article V, § 5 of the South Carolina Constitution sets forth appellate court jurisdiction in equity cases. The Legislature, shortly after adoption of the 1895 Constitution, codified this principle as Act No. 3, § 15 of the 1896 South Carolina Statutes at Large; this was the precursor to South Carolina Code section 14-3-320. In 1983, the Legislature enacted Act No. 89, 1983 S.C. Acts 160, which amended this statute to restrict the review of the findings of fact of the family court "to a determination of whether or not there is substantial evidence to sustain such facts." S.C. Code Ann. § 14-3-320 (1976 & Supp. 2009). This language was declared unconstitutional in *Rutherford v. Rutherford*, 307 S.C. 199, 414 S.E.2d 157 (1992). In answering the question of "what is the proper standard of appellate review in domestic actions from the family courts," *Rutherford* held that "[i]n appeals from all equity actions including those from the Family Court, the appellate court has authority to find facts in accordance with its own view of the preponderance of evidence." *Id.* at 201, 204, 414 S.E.2d at 158, 160.

B.

The South Carolina family court was created in 1977 as part of the adoption of our unified judicial system.[4] "All single county and multi-county family courts, juvenile courts, domestic relations courts, juvenile and domestic relations courts, shall be abolished on July 1, 1977, and the jurisdiction of such courts devolved upon the statewide family court system as established by this title." S.C. Code Ann. § 14-2-10 (Supp. 2009); *see also* S.C. Const. art. V, § 1 ("The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.").

Initially, the family courts operated with little statutory guidance and scarce case law. For example, approaches to alimony awards, the division of marital property, and the effect of marital misconduct on dissolution issues found incomplete guidance in the case law. Family court findings in the early years often reflected the court's attempt not only to find facts, but also to discern the law. As a result, appellate court decisions became the primary source of domestic relations law.

Because of the frequent interrelationship of fact and law, there were instances where we exercised our broad equitable standard of review and made findings of fact. When we reversed a family court's finding based on

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[4] The statewide system of family courts was established through enactment of Act No. 690, 1976 S.C. Acts 1859. Prior to 1977, some counties had county family court judges, yet much of the domestic relations docket was handled by the circuit court judges. The circuit court judges generally handled their domestic relations cases on Saturday mornings in an assembly line fashion, trying to do what was equitable without the benefit of uniform and developed legal criteria. Modern day complexities of domestic relations law were unheard of then.

de novo review, we often said the family court "abused its discretion." *See Shaluly v. Shaluly*, 284 S.C. 71, 74, 325 S.E.2d 66, 67 (1985) (where the family court failed to make findings, this Court made its own findings and observed, "we have studied the record and listened to the arguments of counsel and reached the decision that the judge abused his discretion in failing to allocate the wife a more abundant portion of the property she helped to accumulate"); *Lide v. Lide*, 277 S.C. 155, 158, 283 S.E.2d 832, 834 (1981) (weighing the evidence and concluding, "the trial judge abused his discretion in denying alimony to the wife").

Nevertheless, this Court and the court of appeals generally sustained (and continue to sustain) family court findings of fact, notwithstanding our constitutional imprimatur for *de novo* review. The tendency to affirm family court findings of fact may be traced to the two features noted above—the superior position of the trial judge to determine credibility and the appellant's burden to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court. *See Wilson v. Wilson*, 285 S.C. 481, 483, 330 S.E.2d 303, 304 (1985) (citing *McAlister v. Patterson*, 278 S.C. 481, 299 S.E.2d 322 (1982)) ("Although our scope of review allows us to find the facts in accordance with our view of the preponderance of the evidence, we give broad discretion to the family court judge who has observed the witnesses and is in a better position to judge their demeanor and veracity."); *Perry v. Perry*, 301 S.C. 147, 149, 390 S.E.2d 480, 481 (Ct. App. 1990) (citing *Ray v. Ray*, 296 S.C. 350, 372 S.E.2d 910 (Ct. App. 1988)) ("The Court of Appeals has jurisdiction in a divorce case to find facts based on its own view of the preponderance of the evidence; however, it is not required to disregard the findings of the trial judge who saw and heard the witnesses and

was in a better position to evaluate their testimony."); *Sealy v. Sealy*, 295 S.C. 281, 283, 368 S.E.2d 85, 87 (Ct. App. 1988) (finding the appellate court had "ample evidence to support the trial judge's finding").[5] Stated differently, *de*

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[5] Adhering to the factual findings of the family court because of its superior position to judge the witnesses' demeanor and veracity is not unique to the family court. We have often cited to that principle in a host of equitable matters where we have the authority to take our own view of the evidence. *See, e.g.*, *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001) (regarding a quiet title action: "In an appeal from an action in equity, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses. Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." (citations omitted)); *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (citing *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008)) (regarding a mortgage foreclosure action: "In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence."); *Clardy v. Bodolosky*, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting *Greer v. Spartanburg Technical Coll.*, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999)) (regarding an action for specific performance: "'In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence. This broad scope of review does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses.'"); *Straight v. Goss*, 383 S.C. 180, 192, 678 S.E.2d 443, 449 (Ct. App. 2009) (regarding a shareholder derivative action: "[T]his court may find facts in accordance with our own view of the preponderance of the evidence. However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." (citations omitted)); *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004) (regarding an action for partition: "In an appeal from an

novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court. The presence of *de novo* review and a willingness, after review, to defer to the fact finder should not be viewed as contradictory positions.

C.

The tendency to sustain family court findings continued as the General Assembly began to pass legislation to provide guidelines to family court judges in the exercise of their enormous responsibility and discretion.[6] With

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equitable action, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the trial judge was in a better position to assess the credibility of the witnesses." (citations omitted)).

[6] These statutes are found in the South Carolina Code, Title 20 (1976 & Supp. 2009) and Title 63 (2010). *See, e.g.*, S.C. Code Ann. § 20-3-130 (alimony; enacted by Act No. 137, 1949 S.C. Acts 216; amended in 1990 to specify factors for determining an alimony award); § 20-3-620 (equitable apportionment of marital property; enacted by Act No. 522, 1986 S.C. Acts 3264); § 63-3-530 (family court jurisdiction; enacted by Act No. 690, 1976 S.C. Acts 1859); § 63-3-550 (standing to institute a proceeding regarding a neglected or delinquent child; enacted by Act No. 71, 1981 S.C. Acts 121); § 63-3-620 (penalties for violating a family court order; enacted by Act No. 71, 1981 S.C. Acts 121); § 63-5-30 (rights and duties of parents regarding their minor children; enacted by Act No. 398, 1982 S.C. Acts 2391); § 63-7-10 (child protection services; enacted by Act No. 1068, 1972 S.C. Acts 2231); § 63-7-620 (emergency protective custody; enacted by Act No. 71, 1981 S.C. Acts 121); § 63-7-2510 (termination of parental rights; enacted by Act No. 1540, 1972 S.C. Acts 2817); §§ 63-15-300 to 63-15-322 (Uniform Child Custody Jurisdiction and Enforcement Act; enacted by Act No. 60, 2007 S.C. Acts 250); § 63-17-310 (enforcement of child support orders; enacted by Act No. 198, 1987 S.C. Acts 2208).

the benefit of increasing legislative standards in many areas, family court disputes evolved to be more and more fact-driven as appellate courts were called on less to declare the law. As the family court system has matured, while retaining our constitutional authority to make our own findings of fact, appellate court decisions have continued to reflect a preference to sustain a family court's factual findings.

The highly fact-intensive nature of family court matters lends itself to a respect for the factual findings of our able and experienced family court judges who are in a superior position to assess the demeanor and credibility of witnesses. Indeed, life-altering credibility determinations often lie at the heart of family court factual findings. However, neither our respect for the family court bench nor the special need for finality in family court litigation may serve as a license to lessen our standard of review in family court appeals.

"An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." *Eason*, 384 S.C. at 479, 682 S.E.2d at 807. *De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings. We must acknowledge that the term "abuse of discretion" is a misnomer in light of the authorized *de novo* review in article V, § 5 of the South Carolina Constitution.

We are nevertheless persuaded that the inartful use of an abuse of discretion deferential standard of review merely represents the appellate courts' effort to incorporate the two sound principles underlying the proper review of an equity case. As discussed above, those two principles are the superior position of the trial judge to determine credibility and the imposition of a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court. Those

principles are consistent with our historic approach to *de novo* review. This is the appropriate frame of reference for construing the abuse of discretion language in family court cases.[7]

D.

This approach to reviewing family court factual findings for an abuse of discretion may be seen in the primary issues before us today, equitable division and property valuation. Typical of our pronouncements is: "Family court judges have wide discretion in determining how marital property is to be distributed. They may use any reasonable means to divide the property equitably, and their judgment will not be disturbed absent an abuse of discretion." *Murphy v. Murphy,* 319 S.C. 324, 329, 461 S.E.2d 39, 41-42 (1995). Although statutory factors provide guidance, there is no formulaic approach for determining an equitable apportionment of marital property. Similarly, as for a family court's finding of a marital asset's value, "[d]etermination of fair market value is a question of fact." *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 215, 321 S.E.2d 179, 182 (Ct. App. 1984). Consequently, we have recognized the presence of discretion in the family court in valuing marital property and in effecting a division of marital property that is equitable under the circumstances. This acknowledgement of discretion should not be construed as an abandonment of our authority to make our own findings of fact.

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[7] We reiterate that appellate deference to factual findings in an equitable action is not mandatory. We do not, however, perceive any conflict between our *authority* to make findings of fact and our tendency to sustain family court factual findings when the appellant fails to satisfy the appellate court that the preponderance of the evidence is against the finding of the family court. This juxtaposition of the constitutionally authorized *de novo* review and our tendency, after review, to uphold family court findings is seen in the expression that the appellate court is not required to disregard the findings of the trial judge who was in a superior position to make credibility determinations.

In sum, while retaining the authority to make our own findings of fact,[8] we recognize the superior position of the family court judge in making credibility determinations. Moreover, consistent with our constitutional authority for *de novo* review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact. Consequently, the family court's factual findings will be affirmed unless "appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." *Finley,* 55 S.C. at 202, 33 S.E. at 360-61.

II.

Value of Marital Residence

Petitioner retained an expert real estate appraiser to render an opinion on the value of the parties' former marital residence, a plantation home in Williamsburg County. Without objection, the appraiser assigned a value of $800,000. The appraiser provided detailed evidence supporting his methodology and selection of comparable properties. Petitioner additionally introduced the appraiser's comprehensive report into evidence without objection. Respondent offered only cursory valuation evidence and focused almost exclusively on disputing the appraiser's value.[9] Petitioner contends

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[8] *McCrosson v. Tanenbaum* is an example of the appellate court exercising its authority to make its own findings of fact and reversing the family court. 375 S.C. 225, 652 S.E.2d 73 (Ct. App. 2007), *aff'd in part and vacated in part,* 383 S.C. 150, 679 S.E.2d 172 (2009). This Court affirmed the court of appeals' reversal of the family court, but noted that "although the standard of review in such cases is broad, an appellate court should be reluctant to substitute its own judgment for that of the family court." *McCrosson*, 383 S.C. at 151, 679 S.E.2d at 172, n. 1.

[9] Respondent's brief conceded the appraiser's qualification: "Husband does not contend that Mr. Hartnett is not an expert. Clearly, Mr. Hartnett has excellent credentials and has been qualified as an expert on many occasions." On his financial declaration, Respondent listed the value of the marital residence at $400,000, but he testified at trial to a value of $350,000.

the family court acted within its discretion when it accepted the appraiser's value of $800,000. We agree.

The court of appeals adopted Respondent's challenge to the appraiser's sales comparison approach, expressed "sympathy" for Respondent's "concerns," and found "the family court's finding about the worth of the marital home is not supported by the record."[10] We have reviewed the record, under our *de novo* review, and find evidence to support the $800,000 value. Beyond a superficial presentation for a substantially lower value, Respondent elected to approach the valuation issue by challenging the appraiser's valuation. Under the facts presented, we reject Respondent's contention that the appraiser's valuation is not entitled to weight. Respondent has failed to demonstrate error in the family court's valuation. We, therefore, decline to alter the factual finding of the family court.[11]

"The family court has broad discretion in valuing the marital property. A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." *Pirri v. Pirri*, 369 S.C. 258, 264, 631 S.E.2d 279, 283 (Ct. App. 2006) (citation omitted). "We have stated before, and we reiterate here, that a party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to

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[10] We respectfully disagree with the dissent's characterization that the court of appeals reversed "because it found the family court committed an error of law." The court of appeals treated the issue as one of fact.

[11] There is another consideration at play here. The court of appeals understood that Respondent's cursory evidence precluded it from definitively finding a value for the home that was below the appraiser's recommendation. The court of appeals admitted it was "sympathetic to Husband's concerns." The court of appeals' remand instructions invited the family court to "accept additional evidence . . . or order supplemental information on its own motion." Given Respondent's incomplete presentation at trial, it would be fundamentally unfair to Petitioner to give Respondent a second bite at the apple.

support the family court's findings." *Honea v. Honea*, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987) (citing *Cox v. Cox*, 290 S.C. 246, 349 S.E.2d 92 (Ct. App. 1986)); s*ee also Hough*, 312 S.C. 344, 440 S.E.2d 387; *Hudson v. Hudson*, 294 S.C. 166, 363 S.E.2d 387 (Ct. App. 1987). Because Respondent has failed to establish error in the family court's valuation, we reverse the court of appeals.

III.

Expert Witness Fees

The family court ordered Respondent to pay Petitioner $23,066.25 for expert witness fees. The court of appeals accepted Respondent's "alternative that these fees be prorated in the same percentages as the equitable division award itself." *Lewis*, 2008-UP-645 at 7. The family court awarded fifty-five percent of the marital property to Respondent and forty-five percent to Petitioner. Petitioner contends the family court acted within its discretion in ordering Respondent to pay expert witness fees of $23,066.25.

"The decision of whether to award expert witness fees, like the decision to award attorney fees, rests within the sound discretion of the family court." *Brunner v. Brunner*, 296 S.C. 60, 62, 370 S.E.2d 614, 616 (Ct. App. 1988). The family court found the various experts credible and accepted their valuations. Moreover, the court noted that the experts' valuations were material to the relief Petitioner sought and obtained. We further note the large disparity in the parties' incomes—Respondent makes $24,000 per month, while Petitioner makes $436 per month. We concur in the family court's allocation of expert witness fees. The contrary decision of the court of appeals is reversed.

REVERSED.

BEATTY and HEARN, JJ., concur. TOAL, C.J., concurring in a separate opinion in which KITTREDGE, J., concurs. PLEICONES, J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I concur with the majority's excellently researched opinion. I write separately to note my disagreement with the dissent's contention that the standard of *de novo* appellate review of facts in an equity case changes when this Court reviews a case pursuant to a grant of a writ of certiorari, rather than on appeal. The dissent would hold that, when we review equitable actions pursuant to a writ of certiorari, we may only correct errors of law or findings of fact that are wholly unsupported by the evidence.[12]

Since this Court's decision in *Finley v. Cartwright*, 55 S.C. 198, 35 S.E. 359 (1899), our scope of review in equitable actions, including domestic relations actions, has been well-settled and consistently applied. *Rutherford v. Rutherford*, 307 S.C. 199, 203, 414 S.E.2d 157, 160 (1992) ("This interpretation [of the Court's scope of review in equitable actions] has been consistently applied to all equity cases, including domestic actions, since *Finley*."); *Finley*, 55 S.C. 198, 35 S.E. at 360–61 (in equitable matters, when "reviewing questions of fact under the constitution of 1895, it may now be regarded as settled that this court may reverse a finding of fact by the circuit

[12] The dissent provides support for this position by citing two non-equitable cases: *Hollman v. Wolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (where the Court issued a writ of certiorari to the trial court to review a discovery order based on exceptional circumstances and stated "[o]n certiorari, this Court will review only errors of law and will not review factual findings unless wholly unsupported by the evidence") and *Turner v. State*, 384 S.C 451, 453, 682 S.E.2d 792, 793 (2009) (where the Court granted a writ of certiorari to the PCR court to review that court's denial of relief to petitioner and stated "on certiorari, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record," and the Court will reverse when "[the PCR court] is controlled by an error of law" (internal citations omitted)). In my view, despite the Court's inclusion of the phrase "*on certiorari*," these opinions do nothing to advance the dissent's position that *because* this Court issues a writ of certiorari in an equity case, it follows that the Court *must* limit its scope of review to the correction of errors of law and the correction of factual errors only if the facts are unsupported by the evidence.

court when the appellant satisfies this court that the preponderance of the evidence is against the finding of the circuit court."); *see also, e.g.*, *Fisher v. Tucker*, 388 S.C. 388, 391, 697 S.E.2d 548, 550 (2010) ("[T]he appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence."); *Patel v. Patel*, 359 S.C. 515, 522–23, 599 S.E.2d 114, 118 (2004) ("Where a family court order is appealed, we have jurisdiction to find facts based on our own view of the preponderance of the evidence."); *Clinkscales v. Clinkscales*, 275 S.C. 308, 310, 270 S.E.2d 715, 716 (1980) ("This Court has jurisdiction, on an appeal from an order of the Family Court, to find facts in accordance with its own view of the preponderance or greater weight of the evidence, and may reverse factual finding by lower court when appellant satisfies the Court that the finding is against the preponderance of the evidence."); *Simonds v. Simonds*, 232 S.C. 185, 205, 101 S.E.2d 494, 504 (1957) ("This Court has the authority in appeals in equity to find the facts in accord with our own view of the preponderance or greater weight of the evidence, and we may reverse a finding of fact by the Circuit Court when an appellant satisfies this Court that the preponderance of the evidence is against the finding of the Circuit Court."); *Wise v. Wise*, 60 S.C. 426, 38 S.E. 794, 802–03 (1901) (McIver, C.J., dissenting and quoting *Finley*, 55 S.C. 198, 35 S.E. 359) ("Whatever differences of opinion may once have existed as to the rule which should govern where an appellant, as in this case, asks this court to reverse the findings of fact by the circuit judge, in an equity case, it must now, since the decision in *Finley v. Cartwright*, be regarded as settled 'that this court may reverse a finding of fact by the circuit court when the appellant satisfies this court that the preponderance of the evidence is against the finding of the circuit court.'" (internal citations omitted)); *Sylvester-Bleckley Co. v. Goodwin*, 51 S.C. 362, 29 S.E. 3, 4 (1898) ("In a case in equity this court will reverse a finding of fact by the circuit court when the appellant satisfies this court that the preponderance of the evidence is against the finding of the circuit court.").

Likewise, in numerous equitable matters before this Court pursuant to a grant of a writ of certiorari, the Court has applied a *de novo* standard of review. *See, e.g.*, *Ables v. Gladden*, 378 S.C. 558, 564, 664 S.E.2d 442, 445

(2008) (on writ of certiorari in domestic relations cases, this Court may find facts in accordance with its own view of the preponderance of the evidence); *Goldman v. RBC, Inc.*, 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006) (because an action to quiet title is equitable in nature, the Court could find facts in accordance with its own view of the preponderance of the evidence); *Wooten v. Wooten*, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005) (stating on writ of certiorari in a domestic relations case, "an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence"); *Williams v. Wilson*, 349 S.C. 336, 339–40, 563 S.E.2d 320, 322 (2002) (because the main purpose of the underlying action for declaratory relief was to enjoin a party from taking an action in the future, the action for declaratory judgment was said to be equitable in nature, and therefore, the Court could take its "own view of the preponderance of the evidence"); *Taylor v. Lindsey*, 332 S.C. 1, 3 n.2, 498 S.E.2d 862, 863 n.2 (1998) (on writ of certiorari, an action to enforce a restrictive covenant by injunction was equitable, so the Court was entitled to "find facts in accordance with its own view of the evidence."); *Rutherford*, 307 S.C. at 204, 414 S.E.2d at 160 ("In appeals from all equity actions including those from the Family Court, the appellate court has authority to find facts in accordance with its own view of the preponderance of the evidence.").

While I appreciate the dissent's effort to distinguish the various means by which this Court may exercise appellate review, our cases do not require the Court to apply a particular standard of review in equity actions because we choose to grant a writ of certiorari. In the very case cited by the dissent in support of this proposition, *City of Columbia v. S.C. Public Service Commission*, 242 S.C. 528, 131 S.E.2d 705 (1963), the Court explained the attributes of the common law writ of certiorari:

> At common law the writ of certiorari is used for two purposes: (1) As an appellate proceeding for the re-examination of some action of an inferior tribunal. (2) As an auxiliary process to enable the Court to obtain further information with respect to some matter already before it for adjudication.

> While certiorari has been said to be original in nature, it has also been said to be appellate. It may be said, indeed, to have characteristics of both. For example, to the extent that it involves the review of the proceedings of an inferior court, certiorari is an appellate proceeding, but to the extent that the subject matter of the proceeding brought before the appellate court will not be reinvestigated, tried, or determined on the merits as on appeal or writ of error, it is an original proceeding.

242 S.C. at 534, 131 S.E.2d at 708 (citations omitted). When reviewing the decision of an inferior tribunal "on certiorari" or "on appeal," the writ is said to be appellate in nature. *Id.* ("An appeal is a review by a superior court of some proceeding held in an inferior tribunal. The method of review may be called appeal or certiorari and be classified as an appellate proceeding . . . ."); *Rowe v. City of W. Columbia*, 334 S.C. 400, 404, 513 S.E.2d 379, 381 (Ct. App. 1999) ("[W]hen a court is reviewing some proceeding held in a lower tribunal, the proceeding is an appellate proceeding, regardless of the title given the proceedings by the reviewing court."). In my view, our standard of review in a particular case depends on the nature of the underlying action and has little to do with the semantics concerning the method by which the case reaches the Court.

As noted above, in an appeal from the family court before this Court pursuant to a grant of a writ of certiorari, where the action is equitable in nature, this Court may find facts in accordance with its own view of the preponderance of the evidence. To hold otherwise would convert all equitable matters before this Court on a writ of certiorari into matters of law, which result is not only contrary to longstanding precedent, but is also in derogation of our state constitution.[13] *See* S.C. Const. art. V, § 5 (providing that in equity appeals, the Court "shall review the findings of fact as well as

[13] I also note the dissent's reasoning would lead to the absurd result wherein the court of appeals had the capability to exercise greater discretion than this Court simply because the case reached that court "on appeal" rather than "on certiorari."

the law, except in cases were the facts are settled by a jury and the verdict not set aside"); *RV Resort & Yacht Club Owners Ass'n, Inc. v. Billybob's Marina, Inc.*, 386 S.C. 313, 321, 688 S.E.2d 555, 559 (2010) (distinguishing our scope of review in actions at law, in which we will not disturb the trial court's factual findings unless unsupported by the evidence, and in actions in equity, in which we may find facts in accordance with our own view by a preponderance of the evidence); *Rutherford*, 307 S.C. at 204, 414 S.E.2d at 160 (holding unconstitutional the passage of a statute purporting to limit the constitutionally mandated standard of review in appeals from family court to a determination of whether there was substantial evidence to support the findings of the family court); *Forester v. Forester*, 226 S.C. 311, 315, 85 S.E.2d 187, 188-89 (1954) (rejecting the argument that "the power and jurisdiction of this court over [an] equity case are practically the same as if we were reviewing a case at law and that the judgment of the lower court is similar in that aspect to the verdict of a jury" and finding "'[the Court] ha[s] jurisdiction in appeals in equity to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of verdict by jury'" (quoting *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 524, 528 (1951)). Based on the foregoing, I am unable to find any merit in the dissent's rationale.

KITTREDGE, J., concurs

JUSTICE PLEICONES: I respectfully dissent. As I find that the Court of Appeals committed no error of law, I would dismiss the writ of certiorari as improvidently granted.

I appreciate the history, set out in the majority, of this Court's review of cases originating in the family courts in South Carolina. The majority focuses its review on the family court and cites the standard for the review of family court findings on appeal. However, as noted by the majority, this case is before this Court by virtue of our issuance of a *writ of certiorari* to review two issues in the *Court of Appeals* decision: (1) the Court of Appeals reversal of the family court's determination of the value of the martial home, and (2) the Court of Appeals reversal and modification of the family court's award of expert witness fees to Petitioner. As explained below, our review on certiorari is confined to an examination of the decision of the Court of Appeals for errors of law or for findings which are wholly unsupported by the evidence. See Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009); Turner v. State, 384 S.C. 451, 453, 682 S.E.2d 792, 793 (2009).

In my view, this case requires us to directly address, for the first time,[14] the consequences of Rule 242, SCACR, which provides that appellate review by the Supreme Court of decisions of the Court of Appeals is by certiorari. My research convinces me that the first question when determining an appellate tribunal's scope of review is a determination of the method of review, i.e. by appeal or by certiorari. That certiorari and appeal are different methods is recognized by the Constitution[15] as well as by statute.[16] If the

[14] The Chief Justice maintains that this question is well-settled. Although I agree that myriad decisions on certiorari cite the appeal standard, I am unaware of any case which explicitly addresses the issue I raise today. Cf. Wallace v. Interamerican Trust Co., 246 S.C. 563, 144 S.E.2d 813 (1965) (fact that Court has previously entertained appeals from interlocutory orders does not foreclose a finding, when issue is raised, that the order is not directly appealable).

[15] S.C. Const. art. V, § 5; see also Ex parte Childs, 12 S.C. 111 (1879) (Court had four types of appellate jurisdiction under art. IV, § 4 of 1865 Constitution).

method of review is by certiorari, then case law dictates that review is limited to review of errors of law including findings wholly unsupported by the evidence. E.g. City of Columbia v. S.C. Pub. Serv. C'n, 242 S.C. 528, 131 S.E.2d 705 (1963); Carolina, C. & O. Ry of South Carolina v. Worley, 102 S.C. 302, 86 S.E. 820 (1915). On the other hand, when the Court's review is by appeal, then the scope of review is governed by the nature of the action, i.e. whether it is at law or in equity. S.C. Const. art. V, §5; § 14-3-320; § 14-3-330.

The General Assembly provided that there would be no appeal from a decision of the Court of Appeals, and that review of those decisions by this Court, if any, would be by discretionary review. S.C. Code Ann. § 14-8-210 (Supp. 2009). As is our prerogative when the legislature provides for our discretionary review, we chose to require that a party seeking review of the lower tribunal's decision do so through a petition for a writ of certiorari. See Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985) (under pre-1999 version of S.C. Code Ann. § 17-27-100, Court could constitutionally require post-conviction relief appellate review to be by certiorari). I do not seek to alchemize equity into law, but rather to logically apply our constitution, our statutory law, and our established precedent to the novel question of what our scope of review is on certiorari to the Court of Appeals.

The Court of Appeals decision reversing the family court's order with regard to valuation of the marital estate should only be overturned if based on an error of law or if wholly unsupported by the evidence. By my reading, the Court of Appeals reversed and remanded the case because it found the family court committed an error of *law* by automatically accepting the expert's opinion. The Court of Appeals held: "In this case . . . Husband has expressed valid concerns that the family court automatically accepted the opinion of Wife's appraiser merely because the appraiser was deemed to be an expert

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[16] Compare S.C. Code Ann. § 14-3-310 (1976) (authority to issue writ of certiorari) with S.C. Code Ann. § 14-3-320 (Supp. 2009) (jurisdiction in appeals from equity) *declared unconstitutional in part*, Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1997) and § 14-3-330 (jurisdiction in appeals at law).

and never considered whether that opinion was actually supported by the evidence on which it was purportedly based. Cf. Sauers v. Poulin Bros. Homes, Inc., 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997) (stating the fact that expert testimony was not directly refuted does not automatically entitle the party offering such testimony to a directed verdict)." With regard to valuation of the marital home, the family court held as follows:

> It is well settled law that an owner familiar with his or her property may give his or her opinion of value of the property. However, where an owner is not an expert in the field of real estate appraisals, or one who even "dabbles" in the real estate sales area, I find it would be an abuse of discretion to reject the expert appraisals while adopting the owner's values. I am mindful of Husband's arguments and positions related to the values debate, and I do indeed appreciate the position he takes. However, I do not find that I can or should ignore the values offered by experts in their fields, especially when Husband did not counter those experts' opinions with his experts' values. Husband did offer numerous properties in the area to bolster his argument that the home and tracts are valued too high but I am not a real estate appraiser, and am certainly not versed in the methods of comparing different and similar properties. And just as I cannot "average" values I cannot lower values without credible reasons to do so. As to the experts Wife used at trial, I find them to be experienced, educated in their fields, convincing in their methodology, and credible. I therefore adopt the values each gave to certain pieces and parcels of personal and real property.

In my view, this excerpt from the family court order provides ample support for the ruling of the Court of Appeals. Despite finding the family court's order affected by an error of law, the Court of Appeals exercised its obligation to conduct a *de novo* review of the record to determine if the family court's ruling nonetheless reached a valuation otherwise supported by the evidence. Finding flaws in the evidence presented by Wife's expert, the

Court of Appeals declined to assign its own value to the property and instead chose to remand the matter to the family court which, it noted, may accept additional evidence. I can find no error of law in the Court of Appeals assessment of the evidence or in its decision to defer to the family court by remanding the case for further proceedings.

In reversing the Court of Appeals, the majority finds evidence to support the family court's valuation and therefore "decline[s] to alter the factual finding of the family court." As explained above, in my view, the majority's analysis fails to address the issue before this Court, namely whether the Court of Appeals erred in reversing the family court.

Finally, I note that, in support of its decision, the majority also cites cases for the proposition that "a party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the family court's findings." In my opinion, such cases are inapplicable to the instant case. As the family court discussed in the portion of the order cited above, Respondent disputed the valuation by Wife's expert, offered comparable properties, and stated his own opinion as to what the home was worth. See Seaboard Coast Line R.R. v. Harrelson, 262 S.C. 43, 46, 202 S.E.2d 4, 5 (1974) (landowner may testify as to the value of his land).

In my view, the Court of Appeals committed no error of law in reversing and remanding the family court's order. I would therefore dismiss the writ of certiorari as improvidently granted.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Gregory Kirk Duncan, Respondent.

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

Opinion No. 26974
Heard January 18, 2011 – Filed May 9, 2011

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General S. Creighton Waters, of Columbia, and Solicitor Robert Mills Ariail, of Greenville, for Appellant.

Chief Appellate Defender Robert M. Dudek and Senior Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE PLEICONES: The State appeals the circuit court's grant of respondent's pre-trial motion to dismiss on the ground that respondent was entitled to immunity under the Protection of Persons and Property Act[1] (the Act). We affirm.

FACTS

Respondent was indicted for murder after he shot and killed Christopher Spicer (the victim) at respondent's home. Prior to trial, respondent moved to dismiss the indictment, arguing he was entitled to immunity under the Act. At a hearing on respondent's motion, the State introduced numerous pieces of evidence, including witness statements and testimony, photographs and video of the crime scene, 911 tapes, and the victim's autopsy report.

According to the statement and testimony of respondent's girlfriend, Jean Templeton, she, the victim, and the victim's girlfriend, Amanda Grubbs, were guests in respondent's house on the night of the shooting. At some point, Grubbs handed the victim a picture of respondent's daughter in a cheerleading outfit and the victim began making inappropriate comments about the picture. Respondent asked the victim and Grubbs to leave.

According to Templeton, the victim left but returned a few minutes later. The victim was opening the screened porch door when respondent exited the front door of the house onto the porch with the gun. At one point, the victim began advancing across the porch and Templeton was "between [the victim] and [respondent]" and was "trying to get [the victim] off the steps and leave." The victim continued to force his way onto the porch. Templeton claimed respondent pointed the gun at the victim and fired. The victim died as a result of the gunshot wound to the face.

[1] S.C. Code Ann. §§ 16-11-410 to 450 (Supp. 2010).

After considering the evidence, the circuit court dismissed the indictment finding respondent was immune, under the Act, from prosecution.

ISSUES

I. Did the circuit court err in making a pre-trial determination of immunity?

II. Did the circuit court err in finding respondent was entitled to immunity under the Act?

ANALYSIS

I. Pre-trial determination of immunity

The State argues the circuit court erred in making a pre-trial determination of immunity.[2] We disagree.

The Act provides, "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle . . . ." S.C. Code Ann. § 16-11-420(A) (Supp. 2010). The Act also states, "the General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B) (Supp. 2010).

[2] We find an order granting or denying a motion to dismiss under the Act is immediately appealable, as it is in the nature of an injunction. See S.C. Code Ann. § 14-3-330(4) (Supp. 2010) ("The Supreme Court . . . shall review upon appeal . . . an interlocutory order or decree . . . granting, continuing, modifying, or refusing an injunction . . . .").

The Act further provides:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle . . . ; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> . . . .
>
> (D) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime as defined in Section 16-1-60.

S. C. Code Ann. § 16-11-440 (Supp. 2010).

The immunity provision at issue provides:

> (A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and *is immune from criminal prosecution* and civil action for the use of deadly

> force, unless the person against whom deadly force was used is a law enforcement officer . . . .

S. C. Code Ann. § 16-11-450 (Supp. 2010) (emphasis supplied).

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Id. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

Black's Law Dictionary defines "immune" as "having immunity" or being "exempt from a duty or liability." Black's Law Dictionary (9th ed. 2009). "Prosecution" is defined as "a criminal proceeding in which an accused person is tried." Id.

The trial court found the plain meaning of the immunity provision was to shield a person from a "full blown criminal trial." Accordingly, the trial court found the only way this statutorily granted right could be meaningfully enforced was for the defendant to be able to raise immunity in a pre-trial motion.

Whether immunity under the Act should be determined prior to trial is an issue of first impression in this state. Further, the Act does not explicitly provide a procedure for determining immunity. In deciding this matter, we find guidance from several other states that have addressed similar statutory immunity provisions.

In Fair v. State, the Supreme Court of Georgia held the trial court erred in refusing to rule on the defendants' immunity[3] prior to trial. Fair v. State,

[3] The defendants argued they were immune from prosecution under OCGA § 16-3-24.2, which provides in relevant part that "[a] person who uses threat or

284 Ga. 165, 166, 664 S.E.2d 227, 230 (Ga. 2008). Particularly, the Fair court found that by the plain meaning of "immune from prosecution," the statute must be construed to bar criminal proceedings against persons who used force under the circumstances set forth in the statute, and that this determination must be made before the trial commences. Id.

In the recent decision of Dennis v. State, 51 So.3d 456 (Fla. 2010), the Supreme Court of Florida approved the reasoning of Peterson v. Florida, 983 So.2d 27 (Fla.1st D.C.A. 2008), where the First District Court of Appeal found that by enacting a statute[4] similar to the Act at issue here, the legislature intended to establish a true immunity and not merely an affirmative defense. The Dennis court therefore found the plain language of the statute grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial. Dennis, 51 So.3d at 462. The Dennis court concluded that, where a defendant files a motion to dismiss on the basis of Florida's "Stand Your Ground" statute, the trial court should conduct a pre-trial evidentiary hearing to decide the factual question of the applicability of the statutory immunity. Id.

Likewise, we find that, by using the words "immune from criminal prosecution," the legislature intended to create a true immunity, and not simply an affirmative defense. We also look to the language of the statute that provides, "the General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers *without fear of prosecution* or civil action for acting in defense of themselves and others." We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial. Accordingly, we find the trial court properly made a pre-trial determination of respondent's immunity.

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force in accordance with Code Section . . . 16-3-23 or . . . 16-3-24 shall be immune from criminal prosecution . . . ."

[4] See F.S.A. § 776.032 (Supp. 2010).

II. Respondent's immunity under the Act

The State argues the circuit court erred in finding respondent was entitled to immunity under the Act. We disagree.

The circuit court found that, applying any standard of proof, respondent would be entitled to immunity under the Act.

The proper standard of proof in determining immunity under the Act is also a novel issue in this state. Other states have addressed this matter. In Dennis, the Florida Supreme Court rejected the State's argument that the pre-trial hearing on immunity should test merely whether the State has probable cause to believe the defendant's use of force was not legally justified. Dennis, 51 So.3d at 463. Specifically, the Dennis court found the grant of immunity from "criminal prosecution" under the statute "must be interpreted in a manner that provides the defendant with more protection from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by rule." Id. Accordingly, the court found the procedure set out in Peterson, supra, best effectuated the intent of the legislature. The Peterson court held that when a defendant raises the question of statutory immunity pre-trial, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. Peterson, 983 So.2d at 29.

Likewise, we hold that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence. Turning to the facts of this case, we find there is evidence to support the circuit court's finding that respondent was entitled to immunity. Templeton's testimony and statements showed that, at the time the victim was shot, she was between the victim and respondent, trying to remove the victim from the dwelling. The victim, however, continued to force his way onto the porch. We find respondent showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering respondent's home in accordance with § 16-11-440. Accordingly, the circuit court properly found respondent was entitled to immunity under the Act.

We further find the circuit court's order of dismissal was proper because it found respondent was entitled to immunity under the Act under any standard of proof. In other words, had the circuit court held respondent to a stricter standard of proof, such as clear and convincing evidence or even proof beyond a reasonable doubt, the circuit court would have nonetheless found respondent was entitled to immunity.

CONCLUSION

We conclude a pre-trial determination of immunity under the Act using a preponderance of the evidence standard is proper and that respondent was entitled to immunity under the Act. Accordingly, the findings of the circuit court are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lucas Bailey, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26975
Submitted March 16, 2011 – Filed May 9, 2011

REVERSED AND REMANDED

Tara Shurling, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General Mary S. Williams, of Columbia, for Respondent.

JUSTICE BEATTY: After his conviction for homicide by child abuse[1] was affirmed on direct appeal, Lucas Bailey filed an application for

[1] S.C. Code Ann. § 16-3-85 (2003).

post-conviction relief (PCR). We granted a petition for a writ of certiorari to review the denial of PCR. Bailey contends the judge erred in denying PCR as trial counsel was ineffective in failing to object to supplemental jury instructions that allowed the jury to convict him for an act that was not alleged in the indictment. We reverse and remand for a new trial.

I. Factual/Procedural Background

This case arises from the tragic death of sixteen-month-old Charles Devon Allen ("Victim"). At the time of his death, Victim lived with his mother, Amy Hughes, her boyfriend, Bailey, and Victim's two sisters, who were then five and six years old, respectively.[2]

Around 6:00 p.m. on Thursday, April 26, 2001, Bailey called 9-1-1 and reported that Victim was not breathing. When Aiken County emergency personnel arrived, they found Victim lying face down on the bed. The coroner pronounced Victim dead as his body was "cool to the touch" and *rigor mortis* had begun to set in. Based on the history presented by Bailey and Hughes, investigators initially believed that Victim might have died from an accidental overdose of cold medications. However, upon examining Victim's body, the coroner noticed three "circular marks" or "discolorations" on the child's abdomen.

The next day, Dr. Joel Sexton, a forensic pathologist, performed an autopsy. Dr. Sexton noted visible bruises on Victim's abdomen. Upon further examination, he discovered "extensive internal injuries in the abdominal region and in the head region." Injuries to the intestines and the mesentery arteries and veins indicated multiple blows had torn the areas by compression against the spine. As to Victim's head, Dr. Sexton noted that "there were numerous small round contusions . . . in the front, on the top of the head, on the right side of the head and in the back," which resulted in swelling of the brain. According to Dr. Sexton, the contusions were consistent with a fist or a knuckle-sized object hitting the head. He believed

[2] Bailey was not the biological father of Victim or Hughes's other children; however, Hughes was pregnant with Bailey's child at the time of Victim's death.

the head injuries contributed to Victim's death and were consistent with some of the symptoms exhibited by Victim prior to his death. He explained that a head injury leads to swelling of the brain, which in turn causes vomiting, lethargy, a "limp" body, and eyes that "roll back" into the head.

Ultimately, Dr. Sexton opined the abdominal injuries were the primary cause of Victim's death. He believed that at least one of the abdominal injuries had occurred hours before death. He concluded that the later abdominal injuries could have caused Victim's death within minutes due to the loss of blood. The cause of death was "listed as blood loss which we refer to as exsanguination due to laceration of these mesentery arteries and veins . . . due to blunt force injury to the abdomen due to a beating." Although Dr. Sexton could not definitively pinpoint Victim's time of death, he opined that it occurred sometime after 2:30 p.m. on Thursday, April 26, 2001. Dr. Sexton believed Victim's injuries were inflicted by an adult as a child would not have had the "force" to cause these injuries. Finally, he did not believe the cold medications given to Victim prior to his death caused or contributed to the death.

Law enforcement interviewed Hughes and Bailey. Subsequently, an Aiken County grand jury indicted Bailey for homicide by child abuse.

At trial, Hughes testified for the State. Hughes testified that she had worked on the Monday and Tuesday preceding Victim's death. According to Hughes, Victim was cared for by Bailey on Monday and then went to daycare on Tuesday. Because Victim had a cold on Wednesday, Hughes stayed home from her job to care for him. Hughes recalled that she and Victim went to sleep in the same bed around 8:00 p.m. Around 12:00 or 12:30 a.m., Bailey took Victim into the kitchen to feed him. Hughes, who had remained in bed, heard a "loud noise" coming from the kitchen followed by Victim crying out. Although Hughes did not get up to check on Victim, she asked Bailey what had happened, to which Bailey responded, "Nothing." When Bailey returned to bed around 12:50 a.m., he told Hughes that he had put Victim in the bed with his sisters.

Hughes stated that her oldest daughter came in the next morning and reported that Victim had thrown up. According to Hughes, Bailey got up and

when he returned he told Hughes that Victim was fine and that he had cleaned him up and placed him in his crib. When Hughes checked on Victim later on Thursday morning, she observed that Victim was unusually quiet and did not stand up in his crib. After taking her daughter to school, Hughes returned and gave Victim some medicine for his cold, but Victim was unable to keep it down. Hughes stayed home from work to care for Victim and called a friend to bring additional cold medication. Hughes stated that Victim was unable to keep this medication down and that he was weak and "wasn't moving." She then took Victim into the bedroom where she laid down with him and Bailey. When Hughes's mother arrived around noon, Hughes left Victim with Bailey. While she was talking with her mother, Hughes heard a "loud sound" from her bedroom. Hughes then asked her daughter to get Victim, but her daughter reported that Bailey told her "no."

Approximately twenty or thirty minutes later, Hughes's daughter took Victim out of the bedroom and brought him to Hughes. Hughes described Victim as "droopy," unable to sit up on his own, and that his eyes rolled back into his head. Around 2:00 p.m., Hughes's friend returned with a different cold medication that Victim was able to tolerate. Hughes testified that Victim fell asleep and Bailey then put him to bed. After she laid down with Victim for approximately thirty minutes to an hour, she got up and checked that Victim was breathing normally.

Around 5:00 p.m., Hughes left the home to drive Bailey's mother to the store. When Hughes returned home around 6:00 or 6:30 p.m., she found emergency personnel at her home. At that time, she was informed that Victim was dead. Hughes ultimately claimed that Bailey had struck Victim, resulting in his death.

During his testimony, Bailey adamantly denied hitting Victim or causing his death. Although Bailey recounted essentially the same timeline as Hughes, he claimed that he and Hughes discussed taking Victim for medical treatment but decided to see if Victim felt better after taking medication on Thursday. He further testified that he checked on Victim after Hughes left on Thursday afternoon and discovered that Victim was not breathing.

In his jury charge, the judge instructed the jurors on the offense of homicide by child abuse by reading the applicable statutory language.[3]

Approximately one hour into deliberations, the jury sent a note to the judge with several questions concerning evidentiary issues. Additionally, the jury asked "the difference between the indictment and the last statement on

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[3] Specifically, the judge read the following provisions of section 16-3-85:

> (A) A person is guilty of homicide by child abuse if the person:
>
> > (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life;
>
> . . . .
>
> (B) For purposes of this section, the following definitions apply:
>
> > (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
> >
> > (2) "harm" to a child's health or welfare occurs when a person:
> >
> > > (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;
> > > (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or
> > > (c) abandons the child resulting in the child's death.

S.C. Code Ann. § 16-3-85(A)(1), (B) (2003).

the indictment form"[4] and "whether the neglect has to directly contribute to the death." In response to the notes, counsel believed that recharging the statute on the offense of homicide by child abuse would be appropriate.

When the jury returned to the courtroom, the foreman referenced the last sentence of the indictment and explained that the jury "wanted to get an understanding of the meaning of the indictment." After the judge read the last sentence of the indictment, the foreman responded:

> Well, the definition was the question we [were] asking for. Also, our verdict to . . . to say this person did that last statement . . . you're talking two different . . .

Before the foreman finished his statement, the judge explained the purpose of the indictment was to "state the charges with enough specificity so that the defendant knows what he has to defend against." The judge then re-read the applicable provisions of the homicide by child abuse statute and gave the jury a printed copy of the statute.

Approximately thirty minutes later, the jury sent out another note, stating:

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[4] The text of the indictment provided:

> That LUCAS LORENZO BAILEY did in Aiken County on or about April 26, 2001, commit the crime of Homicide By Child Abuse in violation of South Carolina Code Ann. Section 16-3-85, in that the defendant did cause the death of Charles D. Allen, a child two (2) years of age, while committing child abuse or neglect as defined by South Carolina Code Section 20-7-490, and the death of said child occurred under circumstances manifesting an extreme indifference to human life, in that Lucas Lorenzo Bailey was responsible for the welfare of said child and the defendant did inflict physical harm to the child, to wit: **The defendant inflicted upon said child physical injuries to his abdomen resulting in exsanguination and consequently the death of the child**.

> Does the State have to prove beyond a reasonable doubt: that the defendant caused the death of the child and does the neglect or abuse have to have caused the death?

Counsel and the judge debated the meaning of the jury's question. When the jury returned to the courtroom, the judge explained that "in this case, the only allegations are that [the defendant] caused the death of the child by neglect and abuse," and that under the statute several acts qualified as "neglect and abuse," but the State was required to prove only one of them.

In response, the foreman stated:

> We see . . . as a jury, total jury, we see the neglect in the parents, but we fail to see evidence that Lorenzo struck the child. There was no evidence to us that Lorenzo struck this child. There was neglect, yes, on both parties, but we fail to see that - - - and that's written in that document that we didn't see any evidence. We didn't see any evidence . . . And the definition of your homicide has a combination of both. I know [its] a part of that definition, but we fail to see any evidence that he did that.

The judge then instructed the jury to refer to the language of the homicide by child abuse statute.

Out of the presence of the jury, defense counsel indicated her concern over the "emphasis on the neglect to the possible exclusion of the rest of the statute;" however, she believed the jury understood the judge's explanation.

When the jury returned to the courtroom, the judge issued supplemental instructions that stated in part:

> [I]f you are distinguishing some acts that you would call abuse and some that you would call neglect, that's up to you as long as you kind of go by the statute here. The statute doesn't really . . . It says it can be abuse or neglect, and it doesn't say which acts might be which, but it says that abuse or neglect is an act or omission which causes harm.

> So if there is an act or omission which causes harm then that is abuse or neglect, by definition under this statute. Any act which causes, any act or omission, or failure to act, which causes harm to the child's health, that would be by this statute abuse or neglect, without getting into the difference of which is which, it doesn't matter.

The judge further explained that:

> So you have to find that [the defendant] either did something or failed to do something . . . that caused the death of the child. Either his doing something which is an act, or failing to do something which is an omission. And that that conduct on his part, either the act or the omission, caused the death of this child.

Moments later, a juror approached the bench and, in an off-the-record discussion, expressed her concern to the judge over the definition of the word "caused."[5] The judge then gave an instruction on proximate cause. In part, the judge stated: "You must find that the State has convinced you beyond a reasonable doubt that either an act or failure to act on the part of this defendant is a proximate cause of the death of this child."

Nine minutes later, the jury returned with a guilty verdict. The judge denied counsel's motion for a new trial and sentenced Bailey to twenty-five years' imprisonment.

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[5] We take this opportunity to caution the bench against engaging in off-the-record discussions with members of the jury. Here, the record does not reveal whether the attorneys were present during the exchange that culminated in the jury charge regarding proximate cause. Thus, we are troubled that the decision regarding the jury instruction may have been made without the judge conferring with the attorneys. Because this was not an issue raised for our consideration on appeal, we do not address any arguments challenging the procedure employed by the judge. However, we emphasize that we do not condone a judge's off-the-record discussion with a juror.

Bailey appealed his conviction and sentence to the Court of Appeals, alleging the trial judge erred in declining to direct a verdict of acquittal. The court affirmed Bailey's conviction and sentence, concluding that "substantial circumstantial evidence" supported a finding that Bailey abused Victim. State v. Bailey, Op. No. 2003-UP-744 (S.C. Ct. App. filed Dec. 17, 2003).

Subsequently, Bailey filed a timely PCR application. After a hearing, the PCR judge denied Bailey's application. As to trial counsel's performance, the PCR judge found, in part, that counsel was not ineffective for failing to object to certain jury instructions. In so ruling, the PCR judge concluded that counsel's decision constituted trial strategy and that even if counsel's performance was deficient, Bailey had not proven prejudice.

II. Discussion

A.

Bailey contends the judge erred in denying his PCR application as his trial counsel was ineffective in failing to object to the trial judge's supplemental jury instructions. In support of this contention, Bailey claims the instructions allowed the jury to convict him for "an act alternative to the one specified with particularity in the indictment." Because "the infliction of physical injuries was the specific act alleged in the indictment," Bailey asserts the jury was limited to a determination of whether he committed this act. Based on the foreman's statement that the jury found no evidence that Bailey struck the child, Bailey claims the jury found "a material variance between the act alleged in the indictment and the State's proof." Specifically, Bailey avers the jury convicted him of an unindicted crime as the jury found evidence of neglect rather than the specifically-alleged acts of abuse. Given that the judge's erroneous instructions precipitated this result, Bailey asserts his trial counsel was ineffective in failing to object to these supplemental instructions.

B.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI;

Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

C.

As a threshold matter, the State claims Bailey's issue is not preserved for appellate review given it was not raised to and ruled upon by the PCR judge. We disagree.

In his PCR application, Bailey characterized the trial judge's instructions as erroneous and confusing because the jury was misled regarding the homicide by child abuse statute and the indictment. Additionally, Bailey argued that trial counsel was ineffective in failing to object to certain instructions.

During the PCR hearing, Bailey testified that his trial counsel failed to object to the improper jury instructions. In explaining this claim, Bailey referenced the trial judge's supplemental instructions and the judge's discussions with the jury regarding its questions. Trial counsel admitted that she did not object to these instructions and contended her decision constituted trial strategy. Finally, in his written order, the PCR judge addressed Bailey's

allegation of "ineffective assistance of counsel for failing to object to jury charges."

Based on the foregoing, we find Bailey's argument was properly preserved for this Court's review. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

D.

Having found that Bailey's issue is properly before this Court, we turn to the merits.

"In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.'" State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (quoting State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). "A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it is not an element of the offense." Id. (citation omitted); see 41 Am. Jur. 2d Indictments & Informations § 252 (2005) (stating that one of the two ways an indictment can be improperly modified is through "a variance, whereby the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment").

"[W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged." Thomason v. State, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994) (citations omitted). "A conviction under the latter circumstance violates principles of due process . . . because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged." Id. (citations omitted); see 41 Am. Jur. 2d Indictments & Informations § 256 (2005) ("A material variance that violates a defendant's

substantial right to be tried only on charges presented in an indictment constitutes fatal error and warrants a reversal on an appeal of a judgment of conviction of the offense not charged in the indictment.").

In a case involving similar facts to the instant case, the Texas Court of Appeals found error in the trial judge's jury instructions that permitted the jury to convict the defendant of an act not alleged in the indictment. Castillo v. State, 7 S.W.3d 253 (Tex. Ct. App. 1999). In Castillo, the defendant was charged with the felony offense of intentionally and knowingly causing serious bodily injury to a child and convicted of the lesser-included offense of reckless injury to a child pursuant to section 22.04(a)(1) of the Texas Penal Code. Id.; Tex. Penal Code Ann. § 22.04(a)(1) (1994) ("A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes a child . . . serious bodily injury."). The one-count indictment charging Castillo with this offense provided that Castillo:

> [d]id then and there intentionally and knowingly cause serious bodily injury to Triston Castillo, a child 14 years or younger by then and there striking the child with a deadly weapon, to wit: the defendant's hands or by striking the child's head against a deadly weapon, to wit: a wall or a floor.

Id. at 255. In prefacing its analysis, the Texas Court of Appeals noted that "[b]y including a more specific description, the State undertook the burden of proving the specific allegations to obtain a conviction." Id.

At trial, the child's mother testified that the morning the child was taken to the hospital, she was taking a shower when she heard the child "crying out loudly" while in Castillo's care. When she went to check on the child, she observed that he was "in a daze," "seizing," and "limp." Id. at 255. Although Castillo admitted to shaking the child because he was having difficulty breathing, he expressly denied that the child hit or struck a wall. Id. at 257.

On appeal, Castillo raised several issues, including an argument that the trial judge egregiously erred by adding, through a lesser-included offense charge, a theory of prosecution ("shaking") that was not supported by the

indictment. Id. at 254. The Texas Court of Appeals agreed with Castillo's argument, finding the trial court erred in "enlarging" the indictment by adding "shaking" as an additional manner and means of committing the charged offense. Id. at 260. In so ruling, the court recognized that a defendant may only be tried and convicted of the crimes alleged in the indictment and the State is bound by the theory alleged in the indictment. Id. at 258-59.[6]

In light of its holding, the court declined to reach Castillo's claim of ineffective assistance of counsel. The court, however, noted the claim would "loom large on the scene, given the failure to move for an instructed verdict and to object to the charge which enlarged the indictment." Id. at 262.

We agree with the reasoning in Castillo and apply its analysis to the facts of the instant case. We conclude that the trial judge's instructions improperly "enlarged" the indictment by instructing the jury that it could convict Bailey of a crime not alleged in the indictment.

Here, the indictment charging Bailey with homicide by child abuse specifically alleged that Bailey "inflicted upon [Victim] physical injuries to his abdomen resulting in exsanguination and consequently the death of the child." By its express terms, the indictment alleged that Bailey's "act" resulted in Victim's death. Significantly, it did not allege that Victim's death was the result of an "omission" on the part of Bailey.

Thus, the indictment apprised Bailey that he had to defend only against the allegation that he inflicted the physical injuries resulting in Victim's death. See Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) ("The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the

[6] Notably, the court stated in its conclusion that its decision did not prevent "the State from seeking a new indictment charging injury to a child and alleging a different manner and means of committing the offense such as 'shaking,' and trying appellant on the new indictment." Id. at 262.

defendant is convicted."); State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document.").

A careful review of the jury's questions and the ensuing discussion with the judge reveals that the jury focused on the terms of the indictment and recognized the alternative elements in the homicide by child abuse statute, i.e., an "act" versus an "omission." The foreman of the jury then stated the jury found "no evidence" that Bailey struck the Victim.[7] Based on this statement and the reference to the last line of the indictment, it is evident the jury was inquiring as to whether a finding of "neglect" on the part of Bailey was sufficient for a conviction under the statute.

The judge's supplemental instructions, which were confusing and contradictory, resulted in the erroneous directive that the jury could find Bailey guilty of homicide by child abuse if it found an act of "abuse or neglect." Such an instruction was in direct contravention of the specific act alleged in the indictment and, thus, constituted a material variance or a "constructive amendment" to the indictment.

We find that trial counsel not only failed to object to these jury instructions, but also acquiesced in the judge's erroneous interpretation. Thus, counsel's failure to object did not constitute a valid trial strategy. Cf. Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997) (finding trial counsel's failure to challenge first-degree burglary indictment did not constitute valid trial strategy where counsel did not recognize the distinction between a "barn" and a "dwelling" for the purposes of first-degree burglary).

[7] By his statement, the foreman was conveying the jury's deliberations as to whether there was "direct evidence" that Bailey struck Victim. Thus, we believe it would have been prudent and more appropriate for the trial judge to instruct the jury on "circumstantial evidence" in order to resolve the jury's confusion.

Having found that trial counsel's performance was deficient, the question becomes whether Bailey was prejudiced by counsel's errors.[8] Because the supplemental instructions created a material variance between the State's evidence and the allegations in the indictment, we conclude that Bailey was prejudiced by trial counsel's failure to object as this deficiency undermined confidence in the outcome of his trial. Accordingly, we hold trial counsel rendered ineffective assistance. See McKnight v. State, 378 S.C. 33, 48-49, 661 S.E.2d 354, 361-62 (2008) (finding trial counsel rendered ineffective assistance when she failed to object to the supplemental jury charge on the measure of criminal intent required for a conviction under the Homicide by Child Abuse statute; reasoning that the supplemental charge: (1) did not clarify the particular mental state and served to "further confuse the jury;" (2) "attained a special significance in the minds of the jurors;" and (3) was "prejudicial in fact" as the jury returned a guilty verdict five minutes after the supplemental charge).

III. Conclusion

In conclusion, we find Bailey's issue was preserved for appellate review as it was raised to and ruled upon by the PCR judge. In terms of the merits, we hold trial counsel was deficient in failing to object to the supplemental jury instructions as the judge perpetuated the jury's confusion that they could convict Bailey of homicide by child abuse based on an unindicted allegation of neglect. We find that a confluence of the lone specific allegation of physical abuse in the indictment and the jury's expressed confusion about the necessity of evidence of physical abuse by Bailey with the insufficient jury instructions created a structural due process defect that deprived Bailey of a fair trial. We conclude that Bailey was prejudiced by counsel's deficient performance. Accordingly, we reverse the order of the PCR judge and remand for a new trial.

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[8] We reject any contention that the Court of Appeals' opinion affirming Bailey's conviction negates a finding of prejudice as the court only considered the evidence in the context of a directed verdict motion. Although we agree there was sufficient evidence to submit the case to the jury, the issue in this case requires a consideration of the evidence after the submission of the case to the jury.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Crystal Pines Homeowners Association, Inc., Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc., and Crystal Pines Yacht Club, LLC, Appellants.

Appeal From Lexington County
James Spence, Master-In-Equity

Opinion No. 4832
Heard December 9, 2010 – File May 4, 2011

AFFIRMED IN PART AND REVERSED IN PART

John D. Hudson and Shaun Blake, both of Columbia, for Appellants.

Harry Clayton Walker, Jr., of Columbia, for Respondent.

KONDUROS, J: Don E. Phillips appeals the master-in-equity's finding that Phillips, as successor in interest to Crystal Lake Land Developers, Inc. (CLLD), is responsible for maintaining roads in the Crystal Pines subdivision (Crystal Pines). Phillips and the Crystal Pines Yacht Club, LLC (the Yacht Club) appeal the master's ruling that residents of Crystal Pines had either acquired or were granted an easement for use of a boat ramp in the subdivision. We affirm in part and reverse in part.

FACTS

Phillips was the sole shareholder and officer in CLLD. In 1979, CLLD began developing Crystal Pines. In 1981, CLLD deeded the roads in Crystal Pines to the Crystal Lake Road Company (the Road Company). All homeowners in Crystal Pines were members of the Road Company. The deed contained the following provision:

> The undersigned [CLLD] by execution of this instrument hereby agrees at its own personal cost and expense to open the unopened portion as may be necessary for development, of Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described on Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved. The said roads shall be kept free of all obstructions so as to be open for the passage of fire, police, and other emergency vehicle personnel and equipment at all times and by the owners of portion of the real property described in Exhibit "B" hereto and their agents, guests, invitees and employees; . . . .

From 1981 through 1986, the Road Company operated as an unincorporated association and simple homeowner's association. In 1987, the Road Company changed its name to the Crystal Pines Homeowners Association (HOA), although it was not technically incorporated until 1997. Beginning in 1996, CLLD drafted a proposed deed granting title to the road to the HOA instead of the Road Company. The deed contained an attachment that placed road maintenance obligations on the HOA. In 1997, CLLD conveyed its remaining interest in Crystal Pines to Phillips with Phillips paying CLLD $392,679 and assuming CLLD's mortgage debt. CLLD was then dissolved.

Phillips unsuccessfully tried to have the second deed and attachment executed. In 1998, Phillips filed an amendment to the restrictions governing certain sections of Crystal Pines. The amendment stated the HOA was responsible for road maintenance in Crystal Pines. Phillips repaired the roads in Crystal Pines in the early 1990s, but further maintenance is now required. Phillips has refused to perform any additional work.

Additionally, in 1980, CLLD constructed a boat ramp in Crystal Pines. George Bugenske, a Crystal Pines resident, testified homeowners regularly used the boat ramp. Phillips also testified Crystal Pines residents regularly used the boat ramp, but with his permission. In 2004, Phillips installed a locked gate prohibiting access to the boat ramp and later conveyed title to his son. His son then transferred title to the Yacht Club, which has maintained the locked access.

The HOA filed suit against Phillips, CLLD, and the Yacht Club alleging CLLD and Phillips, as CLLD's successor, were responsible for maintaining the roads in Crystal Pines and claiming an easement to use the boat ramp. The master found in favor of the HOA on both claims, and this appeal followed.

LAW/ANALYSIS

I. Construction of the 1981 Deed

Phillips maintains the master erred in determining the deed placed maintenance responsibilities for all the roads in Crystal Pines on CLLD.[1] We agree.

A reviewing court determines, as a matter of law, whether the language in a deed is ambiguous. Santoro v. Schulthess, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009). A reviewing court considers questions of law de novo. Id. "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one, i.e., when it is obscure in meaning through indefiniteness of expression, or containing words having a double meaning." 30 S.C. Jur. Contracts § 32 Ambiguity (1999) (footnote omitted).

If the reviewing court determines a deed is ambiguous, it must interpret the deed. "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts

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[1] The HOA contends Phillips's argument regarding construction of the deed is unpreserved because it was not raised to and ruled upon by the master. We disagree. At the beginning of trial, when discussing the exhibits to be submitted, counsel for Phillips stated both sides "have the same documents, and we agree our interpretation is correct, or I should say that I agree, that the Homeowners' Association is responsible for the roads and not Mr. Phillips." Witnesses for both sides were asked to look at the deed and determine who bore road maintenance responsibilities under the document. Phillips testified regarding his belief the deed did not place road maintenance obligations on CLLD. The master clearly ruled against Phillips's construction of the deed when it stated in the order that "CLLD contracted with [the Road Company] to maintain the [r]oads according to the terms of the [d]eed." Because this issue was raised to and ruled upon by the master, it is adequately preserved for our review.

in accordance with the court's view of the preponderance of the evidence." Slear v. Hanna, 329 S.C. 407, 410-11, 496 S.E.2d 633, 635 (1998).

> In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.

K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (internal quotation marks and citations omitted). "The intention of the grantor must be found within the four corners of the deed. When intention is not expressed accurately in the deed evidence aliunde may be admitted to supply or explain it. The instrument is not thereby varied or contradicted but is explained or corrected." Id. (citations omitted).

We find the deed is ambiguous with respect to road maintenance obligations. Paragraph 11 of the deed indicates the CLLD will, at its own expense, pay to open and pave roads as necessary for further development of Crystal Pines. The deed then states the CLLD will be responsible for maintaining "said roads." Whether "said roads" include all roads that CLLD was conveying to the Road Company or just the roads it would open in further development of the subdivision is unclear. Furthermore, the deed contains no specific designation of responsibility for maintaining the roads being conveyed by the deed.

Because the language of the deed is ambiguous, we must examine it to determine the intent of the parties. Viewing the deed as a whole, its purpose was to convey ownership of the roads in Crystal Pines to the Road Company. Paragraph 10 states the Road Company "shall receive title to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane and shall hold and deal with the same and such other assets as it may receive from time to time . . . ." Additionally, under Paragraph 13, if the Road Company incurred costs for any item of maintenance or repair

occasioned by the misconduct of a property owner, the responsibility for that maintenance or repair is shifted from the Road Company to the property owner.[2] The Road Company also had the right to dedicate the roadways to a government entity for perpetual maintenance under Paragraph 22. Placing ownership and essentially all control of the roads with the Road Company and leaving the responsibility for maintenance with CLLD would be inconsistent.

Because the deed is ambiguous, we may also consider extrinsic evidence to ascertain the intent of the parties. The general rule, as evidenced by Lexington County Development Guidelines, was for homeowners to take over maintenance of private roads once the final plat of a development was approved. According to Phillips's testimony at trial, the deed states CLLD would repair and maintain the roads being conveyed if they were damaged during the process of constructing the new portions of road. He testified:

> Q. Is it your position that paragraph 11 doesn't obligate the developer to maintain and repair the roads mentioned here?
>
> A. If you read the whole sentence, it says that if you cause damage, you will repair it; if you don't read the whole sentence, you can take portions of it and

[2] Paragraph 13 of the deed states:

> Notwithstanding anything to the contrary in this instrument contained, if [the Road Company] shall incur any cost or expense for or on account of any item of maintenance, repair or other matter directly or indirectly occasioned or made necessary by any wrongful or negligent act or omission of any owner . . . such cost or expense shall not be borne by [the Road Company] but by such owner and if paid out the [Road Company] shall be paid or reimbursed to the [Road Company] by such owner forthwith . . . .

> put together an entirely different notion, and that is what you have done. . . .
>
> Q. I'm going to borrow Mr. Lapine's pen and ask you, on Exhibit #1, paragraph 11, to circle the words that you contend limit the developer's obligation to repair damage it causes.
>
> A. It would be the whole paragraph.
>
> Q. Then circle the whole paragraph. So you can't point to specific words in the paragraph that limit the developer's liability to repairing damages it causes?
>
> A. You would have to assume that a road was opened, an unpaved portion was opened, and that there was damage done.

The fact that the only mention of maintaining the roads immediately follows the clause concerning the opening of new roads is consistent with Phillips's explanation of CLLD's intent in Paragraph 11.

The HOA argues Phillips's efforts beginning in 1996 to execute a corrected deed with Exhibit B attached evidenced his understanding that CLLD had the obligation to maintain the roads pursuant to the original deed. We disagree. Phillips testified that his purpose in drafting the corrected deed was to ensure the conveyance of the roads to the HOA as an incorporated entity was proper. The inclusion of Exhibit B and Phillips's amendments to the restrictions governing certain sections of Crystal Pines likely reflects his desire to clear up any ambiguity in the original deed. Additionally, the master found that Phillips made some road repairs in the late 1990s. The record contains no testimony regarding this particular point, but the master's order indicates the repairs were made when Phillips "extended the Roads to open new areas of Crystal Pines." That action is consistent with Phillips's construction of the deed. Other than that instance, the testimony indicates

Phillips consistently disclaimed personal responsibility for repairing or maintaining the roads in Crystal Pines.

Because we have a broad standard of review in this case and considerable evidence supports Phillips's construction of the deed, we find the CLLD and Phillips are not responsible for repairing or maintaining the roads in Crystal Pines, except to the extent of damage that occurs during any further development of the subdivision. Therefore, we reverse the master's finding CLLD is responsible for all road maintenance in Crystal Pines. Accordingly, we need not determine two additional issues raised by Phillips regarding the amount of damages awarded to Crystal Pines or whether Phillips was successor to CLLD. See Whiteside v. Cherokee Cnty. Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (declining to address remaining issues when determination of prior issue is dispositive).

II. The Boat Ramp

Phillips argues the master erred in determining the HOA was entitled to an easement for use of the community's boat ramp. We disagree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear, 329 S.C. at 410, 496 S.E.2d at 635. To establish a prescriptive easement, a party must demonstrate (1) continued and uninterrupted use or enjoyment of the right for a period of 20 years, (2) proof of the identity of the thing enjoyed, and (3) adverse use or use under a claim of right. Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App. 2005).

According to the testimony in the record from Phillips and Bugenske, the ramp was constructed in 1980 and homeowners used it until 2004, when the Yacht Club restricted access.[3] Phillips claims the homeowners used the

[3] Phillips argues the Road Company and the HOA are not the same entity for purposes of establishing the twenty-year prescriptive period. However, even if the entities are not the same, a claimant is permitted to tack the time period

boat ramp with his permission. However, some evidence demonstrates the use was under a claim of right, not just with permission. According to Bugenske, homeowners were told when they purchased their lots they had access to the boat ramp and they used the ramp frequently throughout the years with no indication they sought Phillips's permission to do so. Marketing brochures for the subdivision indicated deep-water access was available to residents.

Detrimental to HOA's case is that Bugenske's testimony only affects the period of time after he purchased his home in 1994, short of the required twenty years. The only evidence in the record from the 1984 to 1994 period is from Phillips himself. Phillips acknowledged homeowners used the ramp, but he claims they did so with his permission. However, in a letter to the HOA in 2002, Phillips indicates the original 1981 deed transferring ownership of the roads also included the transfer of ownership of the boat ramp. The letter states: "Although not specifically mentioned in the deed, the entrance gates and Parcel A including the boat ramp are included in property turned over with the roads." Furthermore, a plat filed in 1986 indicates the location of the boat ramp is in an area designated "community common area."[4] Phillips's testimony regarding actual use, coupled with the letter and plat, is at least some evidence the residents were using the boat ramp based on a claim of right during the 1984 to 1994 period. Therefore, we find the master did not err in finding a prescriptive easement in favor of the HOA.

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of a prior owner to his own to establish the required prescriptive period. See Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("A party may 'tack' the period of use of prior owners in order to establish the 20-year requirement.").

[4] Although the year 1986 cannot be used to establish the beginning of the twenty-year prescriptive period, the plat is some evidence demonstrating residents would have understood their use to be a matter of right. The plat and the contents of the letter also discredit Phillips's testimony that residents only used the boat ramp with his permission.

Because we affirm the master's finding the HOA established a prescriptive easement to use the boat ramp, we need not address Phillips's remaining argument regarding an easement by implication in favor of Section IV of Crystal Pines. See Whiteside, 311 S.C. at 340, 428 S.E.2d at 889 (declining to address remaining issues when determination of prior issue was dispositive).

Based on the foregoing, the judgment of the master is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and LOCKEMY, JJ., concur.